THE

CODE OF CIVIL PROCEDURE

(ACT V of 1908)

VOL. II.

SARKAR

THE CODE OF CIVIL PROCEDURE

BEING

ACT V of 1908

WITH A CRITICAL COMMENTARY, COPIOUS EXPLANATORY NOTES, AND A COMPLETE COLLECTION OF RULINGS OF ALL THE INDIAN HIGH COURTS AND OTHER SUPERIOR COURTS AND THE PRIVY COUNCIL, ETC., ETC.

BY

MAHIM CHANDRA SARKAR, RAI BAHADUR,

Late of the Bengal Civil Service (Judl.), Author of the Law of Evidence in British India, Specific Relief Act, Provincial Insolvency Act, Land Acquisition Act, Practice and Procedure in Civil Cases and Examination of Witnesses, etc., etc.

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P. C. SARKAR,

PLEADER.



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THE FIRST SCHEDULE.

ORDER I.

PARTIES TO SUITS.

Who may be joined as plaintiffs

1. All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether, jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise. [S. 26.]

COMMENTARY.

Scope and Object.—This rule corresponds to s. 26 of the old Code with some important alterations. It has been borrowed from English Or. XVI, rule 1. Its language is wider than that of the old section. By the substitution of the words "*in respect of or arising out of the same act or transaction or series of acts or transactions*," for the words "*in respect of the same cause of action*," the scope of the present rule has been made wider. Section 26 expressly provided that in the case of joinder of the plaintiffs, the relief must be "in respect of the same cause of action." The words "*where, if such persons brought separate suits, any common question of law or fact would arise*" have been added in order to further enlarge the scope of the present rule. The judgment of WALLIS, J., in *Aiyathurai Ravuthan* v. *Santhu M. Meera*, 31 M. 252: 18 M. L. J. 238, clearly explains the meaning of the expressions "in respect of the same cause of action" in s. 26 and "in respect of the same matter" in s. 28 of the C. P. Code of 1882. The expression "*any right to relief*" used in this rule is wider than the expression "right to any relief" which occurred in the old section. According to the present rule the cause of action need not be one and idential. Now, several persons having separate causes of action can join in one suit, provided (1) the right to relief alleged arises out of the same act or transaction *and* (2) a common question of law or fact arises.

The words "*cause of action*" which occurred in the old section have been omitted, because those words gave rise to diversity of judicial opinions owing to different interpretations placed upon these words by the several High Courts. In *Sundar Jha* v. *Bansman Jha*, 33 C. 307: 10 C. W. N. 508 (following 22 C. 833), it was held that the qualification implied in the words "in respect of the same cause of action" in s. 26 of the Code of 1882, would be satisfied if the facts which constituted the infringement of the right of the several plaintiffs were the same. In 18 A. 131, 219 and 432, the above expression has been differently interpreted. The Legislature, it seems, in framing this rule has adopted the Calcutta view. The Allahabad cases are no longer good law. The expression "*act or transaction*" is more

comprehensive than the expression "*cause of action.*" For instance, in a suit brought by a presumptive reversioner for a declaration that an alleged adoption is invalid, the contingent reversioners may be joined under this rule as plaintiffs in the presumptive reversioner's suit; because, the right to relief on the part of the reversioners exists severally in order of succession and arises out of one and the same transaction impugned as invalid and not binding against them as a body; and the dispute involves a common question of law, *viz.*, the validity or invalidity of the act challenged as done without authority. See *Venkatanarayana* v. *Subbammal*, 38 M. 406 P. C.: 28 M. L. J. 535: 21 C. L. J. 515: 19 C. W. N. 641: 17 Bom. L. R. 468: 17 M. L. T. 435: 29 I. C. 298. The above Privy Council case clearly explains the meaning of the rule.

Objection to misjoinder c
nity (Or. I, r. 13); Parties n
may be amended (Or. VI, r
read with cl. (a) *of rule* 4 *of this Order*

Joinder of Plaintiffs in One Suit when Right to Relief Arises out of the Same Act or Transaction.—This rule deals only with joinder of parties and not joinder of causes of action, which is dealt with by Or. II, r. 3. This rule allows a number of plaintiffs, with the same right to relief, to join in one suit instead of bringing separate suits. It is not necessary that all the plaintiffs must have the same cause of action.—*Baiju Lal* v. *Bulak Lal*, 24 C. 385. *See* also *Ram Sewak* v. *Nakched*, 4 A. 261; *Ebrahimbai* v. *Fulbai*, 26 B. 577 (582), and *Lakshmakka* v. *Negi Reddi*, 28 M. 500 (26 M. 647 *folld.*).

Where certain persons were alleged to have committed a wrongful act by evicting the plaintiffs from certain land in which the first plaintiff claimed to be entitled to the *Melvaram*, and the other plaintiffs to the *Kudivaram*.—*Held*, that the suit brought by the plaintiffs jointly was not bad for misjoinder; *Muthuvijaya Raghunadha* v. *Chokalingam*, 19 M. 335.

Where persons are jointly interested in the subject-matter of a suit and their interests are identical, and where they do not advance antagonistic claims, of plaintiffs.—*Fakirapa* v. *Rudrapa*, 16 B. *mappa*, 28 B. 94 and in *Harimani Dasse* hich the meaning of the expression "cause of action" in s. 26 of the old Code, has been explained. *See* also, *Pinapati* v. *Pinapati*, 20 M. 647, and *Sundar Jha* v. *Bansman Jha*, 33 C. 367: 10 C. W. N. 508 (22 C. 833 *folld.*; 18 A. 131 and 219 *not folld.*).

The C. P. Code does not give sanction to the joinder as plaintiffs, of rival claimants, each of whom denies the right to the relief of the other. It is essential that each co-plaintiff should be in harmony with the other; *Ambadas* v. *Pandu*, 57 I. C. C. 784.

All persons who have a common cause of action are entitled to be joined as plaintiffs in one suit.—*Kalidas Jivram* v. *Goparjaram*, 15 B. 309.

Where the plaintiffs are landlords in respect of a portion of the house and tenants in respect of the rest, they could sue in their double capacity for damages for a nuisance caused by a third person to the house.—*Bai Bhichaji* v. *Perojshaw*, 17 Bom. L. R. 1040.

Where three persons, differently related to a deceased person, claimed maintenance from his estate and brought a single suit for maintenance. *Held*, that the suit was maintainable as the relief claimed by the three plaintiffs arose out of the same transaction and common questions of fact and law were involved in the suit; *Nil Madhab* v. *Jotindra Nath*, 17 C. W. N. 341.

The plaintiff No. 1 had absolutely nothing to do with the claim of the plaintiff No. 2 so far as the possession and partition of the plaintiff No. 2's share was concerned. Similarly, the plaintiff No. 2 had no concern with the relief claimed by the plaintiff No. 1. If the two plaintiffs had brought the suits separately there would not be any question of law or fact which would be common to the suits. The rights to the reliefs claimed by the two plaintiffs did not arise out of the same act or transaction. *Held*, that the joinder of the two plaintiffs and the causes of action alleged by them was not authorized by any law or principle; *Ramjas Agarwalla* v. *Linton Molesworth & Co., Ltd.*, 73 I. C. 71: A. I. R. 1923 Pat. 411.

The Old Section and the New Rule.—The corresponding section 26 of the Code of 1882 ran as follows:—" All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally or in the alternative, *in respect of the same cause of action.*" The decisions under the old section upon the interpretation of the words " cause of action," were not uniform, and different Courts took different views. In some cases " cause of action " was taken to mean right and its infringement, and in others the right only. In the light of the present rule therefore many such cases are no longer law, for there would be no misjoinder of plaintiffs in them now. The following are some of them.—*Mahima* v. *Atul*, 24 C. 540, suit by husband (*putnidar*) and wife who had a subordinate *miras* interest to recover money paid by each to save the putnis from being sold; *Aldrige* v. *Barrow*, 34 C. 662, suit by six members of the Calcutta Police for libel against the " Calcutta Police "; *Nusserwanji* v. *Gordon*, 6 B. 266, suit by two plaintiffs as shareholders and by all the plaintiffs as contracting parties for an injunction to restrain the breach of contract between the plaintiffs and the company; *Ramanuja* v. *Devanayaka*, 8 M. 361, by six persons asking for a declaration that the proceedings of the Temple Committee removing them from office was illegal; *Varajlal* v. *Ramdat*, 26 B. 209, joint suit by father and son for damage for assault by defendants at an interview; *Rajjokoer* v. *Debi Dial*, 18 A. 482, joint suit by several creditors to avoid a deed of gift by debtor in favour of his daughter with intent to defeat and defraud; *Ali Serang* v. *Beadon*, 11 C. 524, suit by thirteen men for damages for detention after expiry of term of imprisonment inflicted in one trial. For other such cases see, *Rahim Baksh* v. *Amiran*, 18 A. 219; *Salima* v. *Muhammad*, 18 A. 131; *Baijnath* v. *Chowaro*, 26 A. 218; *Beharilal* v. *Koduram*, 15 A. 380.

In all the above cases, it was held that the plaintiffs having distinct causes of action, they could not join in one suit and that the proper course for them was to bring separate suits. Under the present rule, the plaintiffs may in such cases all join in one suit. The present rule enables several persons to join as plaintiffs in one suit, though their causes of action may be *separate and distinct*, provided that (1) the right to relief, alleged to exist in them, arises out of the *same act or transaction or series of* or

transactions and (2) the case is of such a character that, if such persons brought separate suits, any *common question of law or fact would arise.* The two conditions are not alternative, and both these conditions must exist in order to enable two or more persons to join as plaintiffs in one suit; *Stroud* v. *Lawson*, 2 Q. B. (1898), 44, 52, 54.

Or. I, r. 1 and Or. I, R. 3.—The effect of the change of language in Or. I, rr. 1 and 3 of the new C. P. Code is to permit different causes of action to be joined even in respect of several plaintiffs or defendants provided they satisfy the conditions of Or. I, r. 1 and Or. I, r. 3, as the case may be; *Allu Ramalingier* v. *Subramania Pillai*, 17 L. W. 25: 32 M. L. T. 46: 69 I. C. 402.

Plaintiffs having Different Interests.—Under the corresponding s. 26 of the old Code, it was held by the High Courts of Calcutta and Madras that where the plaintiffs were entitled to different interests in a property, they could all join in one suit to recover possession of the property from a third party if the ground on which they claimed relief was common to all of them; *Sundar Jha* v. *Bansman*, 33 C. 367; *Muthuvijaya* v. *Chockalingam*, 19 M. 335. On the other hand, it was held by the High Court of Allahabad that they could not; *Salima Bibi* v. *Sheik Muhammad*, 18 A. 131; *Rahim Bakhsh* v. *Amiran Bibi*, 18 A. 219. This conflict of decisions has been removed by the present rule which enacts that such persons may be joined in one suit as plaintiffs. If any one of the persons who should join as plaintiffs in a suit refuses to join, he may be joined as a defendant. He should, however, be first asked to join as plaintiff and on his refusal, he may be made a defendant. But if he is joined as a defendant without being first asked to join as plaintiff, the suit should not be dismissed for that reason; *Bulli Mal* v. *Jhabba*, 7 Lah. L. J. 280: A. I. R. 1925: Lah. 504; *Pyari* v. *Kedar Nath*, 26 C. 409.

May be Joined as Plaintiffs.—This rule simply *enables* several persons with the same right to relief, to join in one suit, instead of bringing separate suits. It does not say that all such persons must be joined as plaintiffs in one single suit. This view was taken under s. 26 of the old Code in *Baiju Lāl* v. *Bulak Lal*, 24 C. 385 (388). *See* also, *Gobind* v. *Chandar*, 9 A. 491. The following will clearly explain the meaning of the rule.

A Hindu died leaving a widow and three reversioners The widow alienated the properties left by her deceased husband without legal necessity. After the death of the widow, all three reversioners can bring one joint suit under [illegible] because they have [illegible] nsaction, (unautho[illegible] would arise in the c[illegible] Hindu Law, (2) whether there is legal necessity for the alienation. It is not necessary that both common question of law and fact should arise, it is sufficient if one of them arises because the word used is " or." The reversioners may also bring three separate suits if they like; the section does not compel them to bring one joint suit.

Persons who are jointly entitled to the same relief in respect of a transaction must all join as plaintiffs in one suit. Thus when two or more persons are joint owners of a property, they must all join as plaintiffs in a

suit to recover possession of the property; *Kattusheri* v. *Vallotil*, 3 M. 234. Similarly, all the members of a joint family must as a rule join as plaintiffs in a suit for recovery of possession of joint family property; *Collector of Monghyr* v. *Hurdai Narain*, 5 C. 425. All the executors who proved the will must join as plaintiffs in a suit to recover the estate of a deceased person; *Mohanavelu* v. *Annamalai*, 44 M L. J. 219: A. I. R. 1923 Mad. 387. In a suit to recover trust property, all the trustees must join as plaintiffs; *Shanmuga* v. *Subbaya*, 42 M. L. J. 133: 70 I C. 645: A. I. R. 1922 Mad. 317.

" Severally."—Where each of the plaintiffs has a right to sue the defendant for wrong done to him individually, they may join as plaintiffs in one suit, or may bring separate suits; the section does not compel them to bring one joint suit; See, *Baiju Lal* v *Bulak Lal*, 24 C. 385.

" In the alternative."—Under this rule, the contingent reversioners may be joined as plaintiffs in the presumptive reversioner's suit to set aside an alleged invalid adoption. The object of the suit is to remove a common apprehended injury to the interests of all the reversioners, presumptive and contingent alike; see, *Venkatanarayana* v. *Subbamal*, 38 M. 406 P. C.

The principle as to alternative relief is that a plaintiff has no right to allege two inconsistent states of facts and ask relief in the alternative but that it is quite open to him to state the facts of the case, the documents and deeds and ask the conclusion of the Court on those facts and documents and say the Court may come to one conclusion or another; *Nripenda Nath* v. *Birendra Nath*, 21 C. W. N. 939.

The first plaintiff was the widow and the second plaintiff was the adopted son of a deceased creditor. As the *factum* and the validity of the adoption was disputed by the reversioners, both the plaintiffs brought a joint suit to recover the amount due to the deceased, agreeing that either of them should take it. *Held*, that as there was no contest as between the plaintiffs, the suit was not bad for misjoinder of plaintiffs; *Pinapati* v. *Pinapati*, 26 M. 647 F. B; *Lakshmakka* v. *Nagi Reddi*, 28 M. 500; *Rukman Devi* v. *Shib Devi*, 34 I. C. 641; *Velappa v. Chidambara*, 43 M. L. J. 277; A. I. R. 1922 Mad. 174: 70 I. C. 684.

SUITS IN SPECIAL CASES.

A suit is maintainable by one of several joint landlords for recovery of the balance of rent due from a tenant and in the alternative for recovery of a sum which may have been collected by his co-sharers in excess of their legitimate share. The ground for this alternative claim should be specifically set forth in the plaint; *Uzir* v. *Haricharan*, 37 I. C. 671.

Where in a suit by two sets of plaintiffs claiming that either of them is entitled to the property and that by agreement they have arranged to divide the property in the event of success of either party, *held*, that the provisions of Or. I, r. 1, contemplate claims by different plaintiffs in the alternative provided there is common question of law or of fact which would arise if such plaintiffs brought separate suits and that the suit should not have been dismissed on the ground that the plaint contained contradictory allegations and inconsitent claims; *Musst. Rukmani Devi* v. *Musst. Shib Devi*, 10 P. R. 1916: 69 P. L. R. 1917: 32 I. C. 526. *See* also *Velappa Nadar* v. *Chidambara Nadar*, 43 M. L. J. 277: (1922) M. W. N. 316.

(a) Suits for Damages for Slander, Defamation, Assault and Nuisance.—A suit for defamation can only be brought by the person actually defamed, and, if the person is not *sui juris*, then by his guardian or next friend; a relative cannot maintain the suit.—*Daya* v. *Paran Sukh*, 11 A. 104; followed in *Brahmanna* v. *Ram Krishnama*, 18 M. 250.

A brother cannot sue for a slander on his sister unless the slander upon the sister necessarily involves a slander upon the brother as well —*Girwar Singh v. Sirwan Singh*, 2 C. L. J 396: 9 C. W. N. 847 32 C 1060.

A husband can maintain a suit for damages for defamation of his wife. *Sukan Teli* v. *Bipal Teli*, 34 C. 48. 4 C L. J. 388. *See*, however, *Shoobhagee Koeri* v. *Bokholi Ram*, 4 C. L. J 390.

When two persons have been dammified by the same tortious act, and have therefore a joint cause of action, one is entitled to enforce his claim for damages, so far as he has been injuriously affected by the tort, although the claim of the other is barred by limitation —*Harihar Pershad* v. *Bholi Pershad*, 6 C. L. J. 383 (25 C 285 *referred to.*)

Where the plaintiffs, landlords in respect of a portion of the house are tenants in respect of the rest, they could sue in their double capacity for damages for a nuisance caused by a third person to the house; *Bai Bhicaji* v. *Perojshaw*, 40 B. 401. 17 Bom. L. R. 1040.

(b) Suits by Executors, Agents and Managers.—All suits should be brought by the person or persons in whom the legal right of suit is vested, and not by the agents in their own names —*Lala Manohur* v *Kishen Dyal*, 3 N. W 175; *Ladlee Pershad* v. *Gunga Pershad*, 4 N. W 59; *Fyazooddeen* v. *Pudmee*, 4 N. W 68, *Nubeen* v. *Stephenson*, 15 W. R 534. But where an agent enters into a contract as such, if he has an interest in the contract, he may sue in his own name; *Subrahmania* v. *Narayanan*, 24 M. 130.

Where several executors have been appointed under a will and have entered on the duties as such, it is not open to some of them to sue on behalf of the estate without impleading the others If a defendant is sued by one only of two persons who have a cause of action against him, he has a right to have the action dismissed unless the other is joined (6 C 815 *referred to*); *Mohanavelu Mudaliar* v. *Annamalai Mudaliar*, 17 L. W 241 44 M. L. J. 249.

A *gomasta* has no right to bring a suit in his own name. He can only sue in the name of his employer, like any other.—*Koonjo Behary* v. *Poorno Chunder*, 9 C. 450: 12 C. L. R. 55.

An action to recover the price of goods supplied to a member of a non-proprietary club cannot be brought in the name of the Secretary of the club.—*Michael* v. *Briggs*, 14 M. 372.

A Court in which a suit is brought on behalf of one person through the agency of another, is entitled to enquire as to the agent's authority, and on failure to prove the authority the suit must fail.—*Ram Narain* v. *Raghunath*, 19 C. 678 (P. C.).

(c) Suit for Property Dedicated to an Idol.—The possession and management of property dedicated to an idol belongs to a *shebait*, and

this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the *shebait* and not in the idol.—*Maharaja Jagadindra Nath* v. *Rani Hemanto Kumari*, 8 C. W. N. 809: 32 C. 129, P. C., followed in 10 C. W. N. 42: 2 C. L. J. 337.

The manager is the proper person to be plaintiff in a suit relating to temple property.—*Thakur Raghunathji* v. *Shah Lal Chand*, 19 A. 330. But see, *Jodhi* v. *Basdeo*, 33 A. 735.

(d) Suit to Set Aside Alienation of Properties belonging to a Religious Endowment.—In a suit for setting aside an alienation of properties belonging to a religious endowment, a person to whom plaintiff had conveyed a portion of the properties at a time when he had neither title nor cause of action to sue need not be joined as co-plaintiff in the action. Nor is a transferee *pendente lite*, a necessary party to the suit; *Mahant Ramrup* v. *Lal Chand*, 1 Pat. 475: 3 Pat. L. T. 352.

(e) Suit to Enforce Due Performance of Religious or Charitable Trusts.—Any person interested in the proper observance of a religious endowment may sue in his own name to have the trust property administered, and s. 92 is no bar to such a private suit.—*Thakersy Devraj* v. *Hurbhum Narsey*, 8 B. 432. *See* also *Panchcowrie Mull* v. *Chumroolall*, 3 C. 563: 2 C. L. R. 121: *Kali Churn* v. *Golabi*, 2 C. L. R. 121; *Rupnarain* v. *Junki Bye*, 3 C. L. R. 112.

The *Samudayi* of a temple is not competent to bring a suit on its behalf. The proper parties to sue are the *uralers* (trustees.—*Ramavarar* v. *Krishnen*, 3 M. 270; *Kunjunneri Nambiar* v. *Nilakunden*, 2 M. 167: *Patinharpat Krishnan* v. *Chekur Manakkal*, 4 M. 141.

In a suit to recover property belonging to an endowment all the trustees of the endowment should be made parties either as plaintiffs, or as defendants.—*Bechu Lal* v. *Oliullah*, 11 C. 338; *Rajendronath* v. *Mahomed Lal*, 8 C. 42; *Parmeswaran* v. *Shangaran*, 14 M. 489 and *Kakilasari Dasi* v. *Mohunt Rudranand*, 5 C. L. J. 527.

Where a road has been dedicated for the use of the public, the owner of the soil, over which the road runs, is entitled to institute a suit for damages and injunction against the destroyer of any work of improvement done to the road.—*Maharaj Bahadur Singh* v. *Paresh Nath Singh*, 31 C. 893.

The representatives of a testator are entitled to sue for the enforcement of the due performance of trusts created by him for religious and charitable purposes, and in which they are not personally interested.—*Brojo Mohan* v. v. *Hurro Lall*, 6 C. L. R. 58. 5 C. 700.

(f) Suit by One Member of a Joint Hindu Family—Proper Parties.—To a suit by one member of a Mitakshara joint Hindu family, for a specific share of the joint family property, all the members of the family are necessary parties —*Nathuni Mahton* v. *Manraj Mahton*, 2 C. 149.

The manager of a joint Hindu family is not entitled to bring a suit to establish a right belonging to the family, without making the other members parties to the suit either as co-plaintiffs or defendants.—*Hari Gopal* v.

(a) Suits for Damages for Slander, Defamation, Assault and Nuisance.—A suit for defamation can only be brought by the person actually defamed, and, if the person is not *sui juris*, then by his guardian or next friend; a relative cannot maintain the suit.—*Daya* v. *Paran Sukh*, 11 A. 104; followed in *Brahmanna* v. *Ram Krishnama*, 18 M. 250.

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(e) Suit to Enforce Due Performance of Religious or Charitable Trusts.—Any person interested in the proper observance of a religious endowment may sue in his own name to have the trust property administered, and s. 92 is no bar to such a private suit.—*Thakersy Devraj* v. *Hurbhum Narsey*, 8 B. 432. *See* also *Panchcowrie Mull* v. *Chumroolall*, 3 C. 563: 2 C. L. R. 121: *Kali Churn* v. *Golabi*, 2 C. L. R. 121; *Rupnarain* v. *Junki Bye*, 3 C. L. R. 112.

The *Samudayi* of a temple is not competent to bring a suit on its behalf. The proper parties to sue are the *uralers* (trustees.—*Ramavarar* v. *Krishnen*, 3 M. 270; *Kunjunneri Nambiar* v. *Nilakunden*, 2 M. 167: *Patinharipat Krishnan* v. *Chekur Manakkal*, 4 M. 141.

In a suit to recover property belonging to an endowment all the trustees of the endowment should be made parties either as plaintiffs, or as defendants —*Bechu Lal* v. *Oliullah*, 11 C. 338; *Rajendronath* v. *Mahomed Lal*, 8 C. 42; *Parmeswaran* v. *Shangaran*, 14 M. 489 and *Kakilasari Dasi* v. *Mohunt Rudranand*, 5 C. L. J. 527.

Where a road has been dedicated for the use of the public, the owner of the soil, over which the road runs, is entitled to institute a suit for damages and injunction against the destroyer of any work of improvement done to the road.—*Maharaj Bahadur Singh* v. *Paresh Nath Singh*, 31 C. 893.

The representatives of a testator are entitled to sue for the enforcement of the due performance of trusts created by him for religious and charitable purposes, and in which they are not personally interested.—*Brojo Mohan* v. v. *Hurro Lall*, 6 C. L. R. 58: 5 C. 700.

(f) Suit by One Member of a Joint Hindu Family—Proper Parties.—To a suit by one member of a Mitakshara joint Hindu family, for a specific share of the joint family property, all the members of the family are necessary parties.—*Nathuni Mahton* v. *Manraj Mahton*, 2 C. 149

The manager of a joint Hindu family is not entitled to bring a suit to establish a right belonging to the family, without making the other members parties to the suit either as co-plaintiffs or defendants.—*Hari Gopal* v.

Gokaldas, 12 B. 158. *See* also, *Alagappa Chetti* v. *Villian Chetti*, 18 M
33. Followed in *Angamuthu Pillai* v. *Kalandavelu Pillai*, 23 M. 19
See also *Shamruthi Singh* v. *Krishan Prasad*, 29 A 311: 4 A. L. J. 19
But see, *Arunachala Pillai* v. *Vithialinga Mudaliar*, 6 M. 27.

The *karta* alone of a joint Hindu family cannot maintain a suit f
rent without joining the other members either as plaintiffs or as defendan
except when the tenant has dealt with such *karta* as sole landlord.—*M
Tapurab Hossein* v. *Gopi Narain*, 7 C. L. J. 251 (3 M. 234 *followed*).

A member of a joint Hindu family has a right to sue alone upon co
tract made in his individual capacity, if there is nothing in the face of th
contract to show that it was entered into on behalf of the family.—*Jagabh
Lallubhai* v. *Rastamji Nasarwanji*, 9 B. 311. *See* also, *Hari Vasudev*
Mahadeo Dad Gavda, 20 B. 435; *Bungsee Singh* v. *Soodist Lall*, 7
739; 10 C. L R. 263; *Adaikkalam* v. *Marimuthu*, 22 M. 326; *Dayabh*
v. *Gopalji*, 18 B. 141 and *Gopal* v. *Badri*, 27 A. 361.

A plaintiff representing his father and uncle, who were alive, cannot s
to recover possession under s. 9 of Act 1 of 1877—*Nritto Lall* v. *Rajend
Narain*, 22 C. 562.

(g) Suit by a Member of a Malabar Tarwad.—A *Karnavan* of
Malabar *tarwad* can alone sue for the tarwad property.—*Byatamma*
Avulla, 15 M. 19. *See* also, *Subramanyan* v. *Gopala*, 10 M. 223.

A suit by one of two urulans to recover property demised on Kanor
in which the other urulan is impleaded as defendant is maintainable.-
Mariyil Raman, v. *Narayanan*, 26 M. 461 *See* also, *Karatoole Edamat*
v. *Unni Kanan*, 26 M 649, F. B. (24 M. impliedly *overruled*)

Where a member of a Malabar *tarwad* sued the *karnavan* for an i
creased rate of maintenance, *held* that all the members of the *tarwad* we
necessary parties—*Mammali* v. *Pakki*, 7 M. 428

(h) Suit for Accounts between Principal and Agent.—Whe
an agent has to account to more principals than one they must all sue a
he is not liable to render separate accounts in separate suits to each of
principals to whom jointly he is accountable *Kadir Buksha* v *Raichi
nessa*, 62 I C. 766.

(i) Suit concerning Partnership Business.—One partner, though e
titled to bring a suit on behalf of the firm of which he is a member to recov
a debt due to the firm, has no power, in the absence of special authorit
to bind the firm by a submission to arbitration of the claim so brought.-
Ram Bharose v. *Kallu Mal*, 22 A. 135.

In a suit for dissolution of partnership and for accounts, all perso
interested in the partnership, are necessary parties.—*Srinath Pal* v. *Ha
Charan*, 7 C. L. J. 266.

In a suit concerning partnership business all the members are nece
sary parties.—*Raj Chander* v. *Ramgati*, 31 C. 487, P. C: 8 C. W. N 44
Gossain Gunga v *Dabee*, 25 W R. 118.

(j) Suit by One of Several Co-owners.—Some of several co-owne
cannot sue alone unless the co-sharers have refused to join or have otherwi

acted prejudicially to their interests.—*Dwarka Nath* v. *Tara Prosunno*, 17 C. 160; referred to in *Jibantinath* v. *Gokool Chunder*, 19 C. 760, and followed in *Sashee Sekhareswar* v. *Giris Chundra*, 1 C. W. N. 659. But see, *Tarini Kant* v. *Nund Kishore*, 12 C. L. R. 588: followed in *Bissesswar Roy* v. *Brojo Kant*, 1 C. W. N. 221, and *Pyari Mohun* v. *Kedarnath*, 26 C. 409, F. B.: 3 C. W. N. 271; followed in *Biri Singh* v. *Nawal Singh*, 24 A. 226, and in *Peria Karuppan* v. *Velayutham Chetti*, 29 M. 302, where it has been held that they may be made defendants without proof that they refused to join as plaintiffs. *See* also, *Mahabala Bhatta* v. *Kunhanna Bhatta*, 21 M. 373, and *Karattole Unni Kanvar*, 26 M. 649, F. B. If some co-owners refuse to sue, the proper course is to make them defendants.—*Kuttusheri Pishareth* v. *Vallotit Manakel*, 3 M. 234. Followed in *Balkrishna* v. *Municipality of Mahad*, 10 B. 32, and in *Vithilinga* v. *Vithilinga*, 15 M. 111. *See* also, *Balkrishna* v. *Moro*, 21 B. 151.

A recorded tenant canot sue alone to recover damages done to the tenure without joining the persons interested in it as parties.—*Iswar Chunder* v. *Satish Chunder*, 30 C. 207. 7 C. W. N. 126.

Purchasers of only an eight-anna share of an estate cannot sue under s. 37, Act XI of 1859, to cancel under-tenures.—*Dwarkanath* v. *Girish Chunder*, 6 C. 827. Followed in *Jatra Mohun* v. *Aukhil*, 21 C. 334.

One of the defaulting co-sharers may alone sue to have a *patni* sale set aside; *Gangadhar* v. *Khaja Abdul Aziz*, 11 C. L. J 34: 14 C W. N. 128 (12 B. L. R. F. B.: 21 W. R. 68 *explained*).

Where several co-sharers after serving a joint notice to quit, brought a suit for recovery of the land, the fact of withdrawal of one co-sharer from the suit will not prevent the remaining plaintiffs from obtaining a decree for possession of their shares of the land.—*Dwarkanath* v *Kali Chunder*, 13 C. 75.

(k) Suit for Arrears of Rent—By Whom may be Brought.—One co-sharer can sue for the entire rent making defendants, his co-sharers, who refuse to join in the suit as plaintiffs; and the right to bring the whole tenure to sale, remains intact.—*Pramada Nath* v. *Ramini Kanta*, 35 C. 331, P. C.: 12 C. W. N. 246: 7 C. L. J. 139 Followed in *Sashi Kumar* v. *Sitanath*, 7 C. L. J. 425: 35 C. 744. 12 C W. N. 835.

When rent is collected separately under an arrangement between the co-sharers and their tenant, each co-sharer can bring a separate suit for his share of rent.—*Guni Mahomed* v *Moran*, 4 C 96 2 C. L R 971. *See* also, *Girindra Chandra* v. *Sree Nath*, 7 C. L. J 512 In the absence of such an arrangement or separate collection, the proper course is to make all the co-sharers parties.—*Jadu Dass* v. *Sutherland*, 4 C 556 · 3 C. L. R. 223; *Gungrain* v *Sreenath*, 5 C 915, 6 C L R. 16 *Tarini Kant* v. *Nund Kishore*, 12 C. L. R. 588, and 1 C. W. N. 221 Where there is no contract to pay rent separately, the suit is not maintainable even if all the co-sharers are made defendants in the suit —*Lala Ram Saran* v. *Nem Narain*, 6 C W. N. 326 In *Jadoo Shat* v *Kadumbinee*, 7 C 150 · 8 C. L R 445 (following *Tara Chunder* v. *Ameer Mondle*, 22 W. R. 394), *Prem Chand* v. *Mokshoda*, 14 C 201; *Jugobundho* v. *Jadu Ghose*, 15 C. 47, and *Pergash Lal* v *Akhowri Balgobind*, 19 C. 735, it has been

pointed out that the proper course is to sue for the whole rent due making all the co-sharers parties. *See* also, *Dinanath* v. *Mohurum Mullick*, 7 C. L. R. 138.

One of several co-sharers cannot sue for his separate share of rent without making his co-sharers parties to the suit.—*Gopal* v. *Macnaghten*, 7 C. 751. *See* also, *Raj Narain Mitter* v. *Ekadasi Bag*, 27 C. 479, in which it has been held that a co-sharer can sue for apportionment both for the arrears alleged to be due and the future rent by making his co-sharers, parties. *See*, sections 188 and 188A of the Bengal Tenancy Act (VIII of 1885).

One suit cannot be maintained for the recovery of rent in respect of different and distinct liabilities with regard to separate holdings; *Mahipat Narain* v. *Kirat Singh*, 1 Pat. L. R. 458

(l) Suit for Enhancement—By Whom may be Brought.—A fractional shareholder cannot bring a suit for enhancement of rent. All the several joint landlords must join in such a suit.—*Baidya Nath* v. *Ilim*, 25 C. 917; 3 C. W. N. 225. In *Gopal Chunder* v. *Umesh Narain*, 17 C. 695, it has been held that all the joint proprietors must join in bringing a suit for enhancement of rent, for additional rent or for adjustment of rent. *See* also, *Haladhar Saha* v. *Rhidoy Sundri*, 19 C. 593, and *Bindu Bashini* v. *Peary Mohun*, 20 C. 107, and *Baidyanath* v. *Sheikh Jhin*, 2 C. W. N. 44.

One co-sharer cannot (even if he makes his co-sharers parties to his suit) sue for the enhancement of his share of rent.—*Guni Mahomed* v. *Moran*, 4 C. 96, F. B. Followed in *Kashee Kishore* v. *Alip Mondul*, 6 C. 149, in *Jogendro Chunder* v. *Nobin Chunder*, 8 C. 358. Referred to in *Kali Chandra* v. *Raj Kishore*, 11 C. 615. See, *Jatindra Nath* v. *Prasanna Kumar*, 38 C. 270, P. C.: 15 C. W. N. 74: 13 C. L. J. 51 P. C.

(m) Suit by One Co-sharer for Ejectment.—In a suit for ejectment of a person put into possession by all the co-sharers, all the co-sharers must join.—*Radha Prosad* v. *Esuf*, 7 C. 434. Followed in *Syed Gholam Mohiuddin* v. *Mussammat Khairan*, 31 C. 786; *see* also, 35 C. 541.

One of two joint-owners can bring a suit for ejectment, when the suit is brought under the contract law on a breach of the condition of a lease by the tenant.—*Haripria Debi* v. *Ram Churn*, 19 C. 541.

The owners of thirteen-anna share of a *julkar* sued to eject a lessee on his refusal to pay enhanced rent. *Held* that he could not ejected by a suit brought by one only of several proprietors.—*Bollye* v. *Akram* 4 C. 961.

(n) Suit by Creditor to Avoid Conveyance under Section 53 of the Transfer of Property Act.—A suit to set aside a conveyance alleged to be fraudulent within the meaning of sec. 53 of the T. P. Act, must be brought by or on behalf of all the creditors.—*Lala Hakim Lal* v. *Mooshahar Sahoo*, 34 C. 999· 11 C. W. N. 889: 6 C. L. J. 610.

(o) Suit for Cancellation of a Lease.—In a suit for cancellation of a *mokurari* lease granted by several co-sharers, all the co-sharers should join a plaintiffs.—*Reasut Hossein* v. *Chowar Singh*, 7 C. 470: 9 C. L. R. 260. *See* also, 35 C. 807. But see, *Ebrahim Pir* v. *Cursetji*, 11 B. 644.

(p) Putnidar Can Sue to Set Aside a Revenue Sale.—A putnidar is entitled to maintain a suit to set aside a revenue sale, as his interest is liable to be affected by the sale.—*Jahnnovi Chowdharani* v. *Secretary of State*, 7 C. W. N. 877 (17 C. 398 *referred to*).

(q) Parties in Mortgage Suits.—See *the cases noted under Or. XXXIV, r. 1.*

(r) Suit in the Name of Benamidar.—A *benamidar* cannot bring a suit for recovery of mortgage-debt.—*Munshi Basiruddin* v. *Mahomed Jalish Patwari*, 12 C. W. N. 409. See *Alik Jan Bibi* v. *Rambaran*, 12 C. L. J. 357.

A *benamidar* cannot maintain a suit for partition of joint property; *Atrabannessa* v. *Safatullah*, 22 C. L. J. 259; but in *Chowdhury Kirtibas* v. *Gopal Jin*, 10 C. L. J. 103, it was held that a *benamidar* can maintain a suit.

A *benamidar*, as such, is not entitled to maintain a suit for recovery of possession of immoveable property, of which he is a mere *benamidar*.—*Mohendra Nath* v. *Kali Proshad*, 30 C. 265. In *Sita Nath* v. *Nobin Chunder*, 5 C. L. R. 102 and in *Gopinath* v. *Bhugwat Pershad*, 10 C. 697, it has been held that a suit in the name of a *benamidar* should not be dismissed, but the beneficial owner should be made a party. The Allahabad High Court has taken a contrary view by holding that a *benamidar* can sue or appeal in his own name on behalf of the beneficial owner.—*Bachcha* v. *Gajadhar Lal*, 28 A. 44 : 2 A. L. J. 702.

The question, whether a *benamidar* should be allowed to sue or not must depend upon his showing whether the facts of the case are such as to give him some right to sue under the general law. When the legal estate is vested in the *benamidar* he is in fact a trustee and as such entitled to sue.—*Koothaperumal Rajah* v. *Secretary of State*, 30 M. 245 : 17 M. L. J. 174. Followed in *Kuptu Konan* v. *Thirugnana*, 31 M. 461.

A *benamidar* who takes a promissory note in his own name is entitled to sue upon it.—*Ramanuja* v. *Sadagopa*, 28 M. 205: 15 M. L J. 249.

(s) Suit by Contingent Reversioner during the Lifetime of Presumptive Reversioner.—The right to sue to set aside an adoption or alienation by a Hindu widow is, as a general rule, limited to the nearest reversioner, and if he without sufficient cause refuses to institute proceedings, or if he has precluded himself by his own act and conduct from so doing or has colluded with the widow, or concurred in the alleged wrongful act, the more remote reversioner will be entitled to sue by making the nearer reversioner a party to the suit.—*Anund Kunwar* v. *Court of Wards*, 6 C. 764, P. C. Followed in 19 B. 614, and in 18 M. 53. *See* also, *Phula* v. *Kanta*, 9 A. 441; *Raghupati* v. *Tirumalai*, 15 M 422, *Iswar Narain* v. *Janki*, 15 A. 132; *Chiruvola Punnamma* v *Chiruvola Perrazu*, 29 M. 390. 16 M. L J. 307, F B, *Sriniwash* v. *Monmohini*, 3 C. L J. 224; *Venkatanarayana* v. *Subbamal*, 38 M. 406, P C. 19 C W. N 641

Where the nearest reversioner precludes himself or herself from maintaining declaratory action by omitting to sue within the statutory period and thus practically concurs in an alleged improper alienation, the remote reversioner is entitled to maintain the suit.—*Abinash Chandra* v.

Harinath, 32 C. 62: 9 C. W. N 25. *See* also, *Govind Pillai* v. *Thayammal*, 28 M. 57; *Manmatha* v. *Rohilli*, 27 A. 406; *Jhandu* v. *Tarif*, 37 A. 45 P. C.

A Person in Constructive Possession can Maintain a Possessory Suit.—A person in constructive possession of land through his tenant, who is dispossessed, is entitled to bring a suit under s. 9 of Act I of 1877, where the tenant in collusion with the dispossessor, refused to bring the suit.—*Jagannatha Charry* v. *Rama Rayer*, 28 M. 238; *Janoki* v. *Dinamoni*, 13 C. W. N. 303, 305 and 835; *Akhil* v. *Akhil*, 15 C. W. N. 715 and 294: 10 C. L. J. 30; 12 C. L. J. 483. But *see*, 6 C. W. N. 616.

Power of Court to order separate trials.

2. Where it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may put the plaintiffs to their election or order separate trials or make such other order as may be expedient. [New.]

COMMENTARY.

This rule is new, and has been borrowed from English Or. XVI, r. 1. It lays down that if it appears to the Court that any misjoinder of the plaintiffs may embarrass or delay the trial, the Court instead of dismissing the suit, may put the plaintiffs to their election, that is, the Court may direct the plaintiffs to elect as to which one of them should proceed with the suit. The procedure laid down in this rule was adopted in *Aldridge* v. *Barrow*, 34 C. 662 and in *Varaj Lal* v. *Ramdat*, 26 B. *See* also, 26 A. 18 and 15 A. 380.

A Court has no power under this rule, to dismiss a suit; it may direct the plaintiffs to make election or direct separate trials; *Gur Prosad* v. *Gur Prasad*, 19 C. L. J. 316: 25 I. C. 438.

Who may be joined as defendants.

3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise. [S. 28.]

COMMENTARY.

This rule corresponds to s. 28 of the C. P. Code of 1882, with some additions and alterations and is the converse of r. 1. The rule has been amplified by following the wording of English Or. XVI, r. 4.

"The Committee realize that the words 'in respect of the same matter' in rule 3 have given rise to great difficulty, and they think it advisable to follow the wording of the English rule and to omit them."—See *the Report of the Special Committee.*

By the omission of the words "*in respect of the same matter*" which occurred in the old s. 28 and by substitution of the words "*in respect of or arising out of the same act or transaction or series of acts or transactions*" the scope of the present rule has been made wider. The words "*where if seperate suits were brought against such persons any common question of law or fact would arise*" have also been added in order to enlarge its scope. The judgment of Wallis, J., in *Aiyathurai Ravuthan* v. *Santhu Meeru Ravuthan*, 31 M. 252: 18 M. L. J. 238, clearly explains the distinction between the words "in respect of the same cause of action" in s. 26, and "in respect of the same matter" in s. 28 of the C. P. Code, 1882. The object of this rule seems to be to avoid multiplicity of suits if it could be done without embarrassment to any of the defendants. The general principle governing the joinder of defendants would seem to be that there must be a cause of action in which all the defendants are more or less interested, although the relief asked against them may vary, and that separate causes of action against separate defendants though quite unconnected but at the same time involving any common question of law or fact, may be joined in one action under the present rule. This rule is to be read with cl. (*b*), r. 4 and r. 5 of this Order.

Scope of the Rule.—The language of Or. I, r. 3 is extremely wide, and even if there be only one question common to all the cases, that is sufficient to justify a joint trial ; *Judan Singh* v. *Garbha Singh*, 25 P. W. R. 1921 : 59 I. C. 522.

Tests for Determining the Applicability of Or. I, r. 3.—Or. I, r. 1 quite as much as Or. I, r. 3 applies to questions of joinder of parties as also causes of action. To determine whether a suit has been constituted in conformity with Or. I, r. 3 two factors have to be considered. (1) could the right to relief against the defendants be said to be in respect of or arising out of the same act or transaction? and (2) would any common question of law or fact arise if seperate suits were brought? It is not necessary that all the questions of law or fact which arise should be common to all the parties. For this purpose there is no difference in principle between a claim founded on breach of contract and one founded on tort *Ramendra* v. *Brojendra*, 21 C. W N 724· 45 C. 111 . 27 C L. J 158.

The determining factors to the question whether a suit has been constituted in conformity with Or. I, r. 3 are, firstly, could the right to relief against the defendants be said to be in respect of or arising out of the same act or transaction? and secondly, would any common question of law or fact arise if separate suits were brought? *Krishna Jibon* v. *Muhammad Masinuddin*, 33 C. L. J. 369 . 63 I. C. 244 (45 C 111 *refd. to*).

Jurisdiction.—The plaintiff had distinct and separate causes of action against the first and second defendants. The cause of action against the first defendant arose within the jurisdiction and that against the second defendant arose outside the jurisdiction of the Court in which the plaintiff sued both the first and second defendants. *Held*, that the Court had no jurisdiction to try the suit as against the second defendant and that the joinder of both the defendants in the same suit was not permitted by Or. I, r. 3, C. P. Code. Or. I, r. 3 relates to a joinder of parties and it assumes the existence of a suit in a proper *forum*, the Court having jurisdiction to try the suit. If the Court has such jurisdiction then

Or. I, r. 3 might come into play; *Bengal and North Western Ry. Co.* v. *Sadaram Bhairodan*, 49 C. 895: 27 C. W. N. 82: A. I. R. 1922 Cal. 500.

The Old Section and the New Rule.—The corresponding s. 28 of the Code of 1882 ran as follows : "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, in respect of the same matter."

Under the present rule all persons may be joined as defendants against whom any right to relief in respect of the same act or transaction is alleged to exist, where, if separate suits were brought against such persons, any common question of law or fact would arise.

" All persons."—A ship is a " person " within the meaning of this rule; a suit may therefore be instituted against a ship as defendant; *Bombay-Persian Steamer Company* v. *Shepherd*, 12 B. 237.

" May be joined as defendants."—Before different sets of defendants can be joined in the same suit on different causes of action united in one suit, two conditions must be fulfilled : *first*, the right to relief sought in the suit must arise against all the defendants from the same act or transaction, or the same series of acts or transactions; and *secondly*, some common question, either of fact or law, should arise, if separate suits were brought against such persons, *Ahmedbhai Habibbhoy* v. *Sir Dinshaw Manekji*, 13 Bom. L. R. 1061.

The plaintiff may in one action unite several causes of action against several defendants ; provided that all such defendants are "jointly liable in respect of each and all such causes of action" and the condition precedent to the plaintiff being allowed to join several causes of action against several defendants is that such defendants must all have a joint interest in the main question raised by the litigation, and that causes of action joined in one suit against several defendants must be causes of action in which the defendants are all jointly interested. It is not necessary that every defendant should be interested as to all the reliefs claimed in the suit, but it is necessary that there must be a cause of action in which all the defendants are more or less interested, although the relief asked against them may vary; *Umabai* v. *Bhau Balwant*, 34 B. 358.

Distinction between This Rule and Or. II, R. 3.—Or. I, rule 3 provides for joinder of parties, and does not provide for joinder of different causes of action. Or. II, r. 3 provides for joinder of causes of action ; *Balgobind* v. *Gaja Laksmi*, 21 I. C. 438 and *Jankibai* v. *Srinivas*, 38, B. 120 (124). Or. II, r. 3 should be read subject to the provision of this rule; *Ramendra* v. *Brajendra*, 45 C. 111: 41 I. C. 944.

" Same act or transaction."—In reading Or. I, r. 3, it seems quite obvious that the word " *same*," which precedes the words " act or transaction," governs also the words "series of acts or transactions," and must be read before those words also. The *first* condition to be fulfilled before joining several persons as co-defendants in the same suit is that the right to relief sought in the suit must arise against all the defendants from the same act or transaction or from the same series of acts or transactions. The *second* condition to be fulfilled under this rule is that some common question either of fact or law should arise against the defendants if separate suits were brought against such persons. Before a plaintiff

can join several defendants in the same suit, *both* the conditions laid down in the rule must be fulfilled, first, the relief sought against the defendants whether jointly, severally or in the alternative, must arise from the same act or transaction or the same series of acts or transactions. And, secondly, there must arise between the plaintiff and all the defendants some common question of law or fact; *Umabai* v. *Bhau Balwant*, 34 B. 358.

Under Or. I, r. 3, C. P. Code, the test is not whether the decree awarded to the plaintiff against the defendants is joint, but whether it is alleged in the plaint that there is against the said defendants any right to relief in respect of the same act or transaction; *Khemomal* v. *Firm of Pessumal*, 13 S. L. R. 133: 53 I. C. 92.

" Jointly."—The general principle governing the joinder of defendants is that there must be a cause of action, in which all the defendants are more or less interested, although the relief asked against them may vary and that any question of law and fact common to them all may arise in the case.—*Mavji Manji* v. *Kuverji Narronji*, 31 B. 516: 9 Bom. L. R. 482.

Where the principal tenants of a village combined to keep their landlord out of possession, and induced others not to pay their rents, etc., the landlord, in a suit for establishment of his proprietary right ,and for a declaration that the defendants are his tenants, can join all of them as defendants. —*Lokenath* v. *Keshab Ram*, 13 C. 147.

Where a person having obtained the lease from the landlord took possession, but was subsequently dispossessed by several persons, who took separate leases of different portions of the land from the landlord. *Held* that the plaintiff may sue all the defendants, including the landlord in one suit for ejectment, and particularly so, when they combine to keep him out of possession. The cause of action of the plaintiff suing in ejectment cannot be affected by the title under which the defendants profess to hold possession, for what concerns the plaintiff is that another is wrongfully in possession of what belongs to him. What the plaintiff is entitled to claim is the recovery of the possession of his land as a whole, and not in fragments and all persons, who oppose him in the enforcement of that right ought to be made parties to the suit in which he seeks to eject them; *Nundo Kumar* v. *Banomali*, 29 C. 871 (24 C 831, *referred to*). Followed in *Bandhu Acharja* v. *Nathni* 7 C. L. J. 460 and in *Parboti* v. *Mahmua*, 29 A. 267: 4 A. L. J. 121.

Where several persons join in committing a tort, each is responsible for the injury sustained by the common act, and their liability is joint and several at the will of him to whom the wrong is done. He can sue any one or more of them at his election, and those sued, cannot insist on having the others joined as defendants.—*Harihar* v. *Bholi Pershad*, 6 C. L. J. 383.

An assault made by parties proceeding together and acting in conjunction as to time, place and assault, is a single act, and the cause of action is common to all parties —*Ramessur* v *Shibharain*, 14 W. R. 419.

In a suit in ejectment the person in actual possession need to be joined as parties.—*Banubi* v. *Narsingrao*, 31 B. 250.

A suit to recover possession against persons who were alleged to be joint trespassers, was held maintainable, although they set up various and distinct defences.—*Omur Ali* v. *Weylayet Ali*, 4 C. L. R. 455.

In a suit for the removal of a trustee of a Hindu temple, all persons interested in the trust must be made parties to the suit. S. 28, C. P. Code, 1882 (Or. I, rr. 3, 4), apparently refers to the action of the plaintiff at the time of presentation of the plaint in joining in the same suit as defendants parties against whom the right to any relief is alleged to exist —*Sailajananda* v. *Umeshananda*, 4 C. W. N. 462.

"**Severally.**"—It is competent to a reversioner suing for possession of immoveable property after the death of a Hindu widow to join as defendants both other reversioners in possession of the property claimed and also transferees of such property from the widow and the suit is not bad for multifariousness. In this case the Hon'ble Judges observed: "We are clearly of opinion that, whatever may have been the correct view of the law as it was prior to the present Code of Civil Procedure, the point is covered by the clear language of Or. I, r. 3"; *Balkrishna* v. *Hira Lal*, 36 A. 406: 12 A. L. J. 509 (16 A. 279 *declared obsolete*). *See* also, *Kubrā Jan* v. *Ram Bali*, 30 A. 560: 5 A. L. J. 647; *Ishan Chunder* v *Rameswar*, 24 C. 831; *Lala Rup Narain* v. *Musst. Gopal Debi*, 10 C. L. J. 58 P. C.: 13 C. W. N. 920.

The plaintiff, one of the reversionary heirs, sued to recover possession of a moiety of certain lands which were situate at different villages and in possession of different persons who were alienees by sale, mortgage or lease from the widow of the last male owner. *Held*, that although the lands are situate in several different villages, provided the venue for the trial is the same, the right of the plaintiff to have her claim tried in one suit is the same as if the different holdings were all in the same village. It is never any bar to a suit in ejectment that many persons are in possession The difficulties arising from variety of defences can be cured by the successive trial of the issues separately affecting different defendants; *Umabai* v. *Vithal*, 33 B. 293 (24 C. 831 and 29 C. 871 *approved*). Distinguished in *Ramanathan* v. *Mallaka*, 24 I. C. 813. *See* also, *Balgobind* v. *Gaja Lakshmi*, 21 I. C. 438.

Where two persons have combined to attack a third person, there is nothing to prevent him from joining them as defendants in a single suit for damages; *Varaj Lal* v. *Ram Dat*, 26 B. 259: 4 Bom. L. R. 878.

Different persons obtained decrees against the same judgment-debtor and attached certain property as belonging to him in execution of their respective decrees. A third person put in a claim to the attached property, which was disallowed. In a suit by the claimant to set aside the attachment of all the decree-holders and to have it declared that the attached property belonged to him, *held*, that all the attaching creditors are properly joined as defendants, as the right to relief against all the attaching creditors was in respect of the same matter (property) which the plaintiff claimed as his; *Raghunath* v. *Sarosh*, 28 B. 266; *see* also, 10 M. L. J. 234.

A person purchased property by private contract. Subsequent to his purchase the property was purchased by several persons in execution of decrees against his vendor. In a suit by the person to set aside the execution sale, *held*, that the vendor, the decree-holder, and the purchasers were proper parties —*Haranund* v. *Prosunno Chunder*, 9 C. 763: 12 C. L. R. 556; *Dorasamy Pillai* v. *Muthusamy*, 27 M. 94.

A suit for account against two different persons from different dates is not bad for misjoinder.—*Digambar* v. *Kallynath*, 7 C. 654: 9 C. L. R. 265.

In a suit for partition of joint family property by a minor against his father, vendees and mortgagees from the father and others who had obtained decrees against the father, it being alleged that the decrees were all collusive and fraudulent, are proper parties; *Shanmuka* v. *Arunachelam*, 45 M. 194: A. I. R. 1922 Mad. 332: 69 I. C. 961.

Where the owner of two villages sold under a decree obtained upon a mortgage, claims contribution proportionately against the owners of other properties included in the mortgage, and does not claim from them collectively one lump sum as contribution, he may join all the contributors in one suit, and is not bound to bring separate suits for contribution against the separate owners.—*Iben Husain* v *Ramdai*, 12 A. 110.

"In the alternative."—In a suit for recovery of money lent to the first defendant by plaintiff's agent (defendant No. 4), the latter was impleaded and relief against him prayed for in the alternative in respect of the sum, as the first defendant denied the loan *in toto* prior to suit. *Held* that this section warrants such alternative claims being made.—*Meyappa Chetty* v. *Periannan Chetty*, 29 M. 50. 16 M. L. J. 30; *Arunabhella* v. *Venkataswami*, 7 M. 123.

In a suit against six different parties, it appeared that the plaintiff was kept out of possession by one only, and another was liable for arrears of rent. *Held* that the suit was not improperly framed by adding an alternative prayer.—*Janokinath* v. *Ram Runjan*, 4 C. 949.

A purchaser of certain lands on demanding rent that accrued due after his purchase, was informed by the tenant that he had paid the whole rent in advance to the former landlord. He thereupon sued the tenant and the former landlord, praying a decree for rent against either *Held*, that the frame of the suit was unobjectionable —*Madan Mohun* v. *Holloway*, 12 C 555; *Kumud Nath* v *Sabitri Debi*, 18 C W. N. 180-*n* (4 C. 350; 6 C. L. J. 190 *referred to*); *Mowji* v. *Kuveri*, 31 B. 516.

The owner of an eight-annas share of an estate brought a suit against the tenants making his co-sharers *pro forma* defendants, with a prayer to recover his share of the rent from the tenant defendants or in the alternative from the *pro forma* defendants, in case the latter had realised the share of the rent due to the plaintiff *Held*, that the prayer for the relief against the *pro forma* defendants could be joined with the prayer for the recovery of the rent against the principal defendants inasmuch as Or. I. r. 3 of the C. P. Code provides for the joinder of such claims, and it is a well-established practice to join such claims; *Iswar Dalin* v. *Girindra Kumar*, 48 I. C. 726.

In a suit to have a *mokurari pottah* enforced as against one co-sharer granting it, and other co-sharers who repudiate it, and in the alternative to have the *salami* paid for it returned, *held* that, under s. 28, C. P. Code, 1882 (Or. I, rr. 3, 4), such an alternative claim may be allowed against one or more of the defendants.—*Raidhur Chowdhry* v. *Kali Kristna*, 8 C. 963; 11 C. L. R. 330. *See also*, *Serajul Huq* v. *Abdul Rahaman*, 29 C. 257; 6 C. W. N. 300,

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A *suit by the transferee of a mortgage* for sale against the mortgagor, in which is also included a claim for damages against the transferor, the original mortgagee, if it should appear that any portion of the mortgage debt had been discharged by the mortgagor before the transfer and so was not recoverable from the mortgagor, is a suit in respect of the " same matter " and a suit against several defendants, is not barred for misjoinder, if the suit, although in respect of different causes of action against different defendants, is in respect of the same matter; *Aiyathuria* v. *Meera*, 31 M. 252: 28 M. L J. 238 (8 C 171 and 963, 12 C. 555; 29 M. 50; 31 B. 516 *referred to;* 27 M. 80 *not followed*). Followed in *Kovuri* v. *Tallapragada*, 35 M. 39, where it has been held that the test as to whether this rule applies, is not whether the causes of action against the several defendants are the same, but whether the relief sought is in respect of the same matter; in other words, this rule authorizes the joinder in one suit of several defendants, where the relief claimed is sought in the same matter although the causes of action against them may be different.

SPECIAL CASES AS TO JOINDER OF DEFENDANTS.

(a) Necessary Parties in Mortgage Suits.—*See the cases noted under Or. XXXIV, r.* 1.

A suit for redemption against different mortgagees holding distinct mortgages is bad for multifariousness; *Govind Kandu* v. *Wajid Ali*, 37 I. C. 976.

(b) Necessary Parties in Partition Suits.—A suit which is in the nature of a partition suit cannot be properly dealt with unless all who are admittedly shareholders in the joint property are before the Court—*Pahaladh Singh* v. *Luchmunbutty*, 12 W. R. 256. Followed in *Kali Kanta* v. *Gouri Prosad*, 17 C 906 *See* also, *Mathuni* v. *Munraj*, 2 C 149; *Ashidibai* v. *Abdulla*, 31 B. 271 (291)

In a suit for partition after the father's death, between brothers, the sons of different wives, who are alive at the time when such suit is instituted, such *wives are necessary parties to such suit, as they are entitled to* a share with the sons.—*Tarit Bhoosun* v. *Tara Prosonno*, 4 C. 756: 4 C. L. R. 161.

Co-sharers in a joint estate created separate *putni* tenures in it. *Held*, that in a suit amongst the *putnidars* for partition, all the zemindars were necessary parties —*Parbati Churn* v. *Amiuddeen*, 7 C. 577: 9 C. L R. 170.

In a suit for partition, persons holding an interest of inferior degree are not necessary parties. A *durpuinidar* is not a necessary party in a partition suit —*Upendra Chandra* v. *Tafazzal Ahamed*, 7 C. L. J. 449: 12 C. W. N. 670.

In a partition suit all persons interested in the property to be divided must be brought before the Court. A purchaser or a mortgagee of a coparcener's share in the joint property is a necessary party to a suit for partition —*Sadubin* v *Rambin*, 16 B. 668.

In a suit for specific performance of an agreement by the members of

1882, the third defendant, a minor, was properly included as a party to the suit though he was not a party to the arrangement.—*Alagappa Mudaliar* v. *Sivaram Sundara*, 19 M. 211.

In a private partition amongst the co-sharers certain specific lands were allotted to a co-sharer who granted a *putni* lease of his share to third parties who were thenceforth in possession. Subsequently, under a partition by the Collector under Act VIII of 1876 (B. C.), the said lands were allotted to the plaintiffs who brought rent suits against the tenants making the *putnidars* defendants. *Held*, that the *putnidars* were properly made parties to the suit —*Hriday Nath* v *Mohobutnessa Bibee*, 20 C. 285.

Ordinarily only such persons should be added as defendants in a partition suit as are owners of the interest to be partitioned; but if it cannot be ascertained with precision whether some of the owners are alive, then both the unascertained owners and their legal representatives should be added as defendants. A Hindu wife whose husband is missing is a necessary party along with her missing husband; *Srinath* v. *Probodh Chandra*, 11 C. L. J. 580.

(c) Necessary Parties in Partnership Suits.—In a suit in respect of partnership, the purchaser of the rights and interests of a partner should be joined as a defendant; *Harrison* v. *Delhi & London Bank*, 4 A. 437.

In a suit brought upon a contract made by a firm, the plaintiff may elect as defendants those partners of the firm against whom he wishes to proceed allowing his right of suit against those whom he does not make defendants to be barred —*Lukmidas Khimji* v. *Purshotam Haridas*, 6 B 700.

To a suit for winding up a partnership, all partners having distinct interest must be parties; and where such a suit, brought against all the partners, is not maintainable against some, the suit must be dismissed; *Ramasami* v. *Veerappa*, 33 M. 423.

The plaintiff as a member of undivided joint Hindu family, appointed defendant as a manager of a business of the family, and then sued the defendant for damages for breach of the contract of service. *Held*, that the suit was not maintainable in the absence of the other partners of the business —*Alagappa Chetti* v *Vellian Chetti*, 18 M. 33.

In a suit by surviving partners for the recovery of a partnership debt which became due during the life of a deceased partner, the representatives of such deceased partner are necessary parties.—*Ram Narain* v *Ram Chunder*, 18 C. 86. But see *Moti Lal* v. *Ghelabhai*, 17 B. 6; *Aga Gulam* v. *Sasoon*, 21 B 412, and *Debi Das* v. *Nirpal*, 20 A. 365.

A suit was brought for partnership accounts, upon the objection of the defendants it was found that a necessary party defendant had been omitted, and such party was afterwards added as defendant at a time when the suit, as against him, was barred *Held*, that the whole suit was rightly dismissed —*Ram Doyal* v *Junmejoy*, 14 C. 791 (7 B 217, and 6 C 815 *followed*) Distinguished in *Jagdeo Singh* v. *Padarath Ahir*, 25 C 285.

See also cases noted under Or. XXX, r. 4.

(d) Suits Against a Firm or Corporation.—*See notes under Order XXIX, rule 1.*

(e) Necessary Parties in Rent Suits.—In a suit for rent if the tenant sets up the title of a third party, such third party ought not to be made a party to the suit, so as to convert a simple rent suit into a title suit.—*Lodai Mollah* v. *Kally Dass*, 8 C. 238, 10 C. L. R 581.

Although a purchaser of portion of a tenure is not personally liable for rent falling due before the date of purchase, a suit for recovery of rent for the whole claim is not bad, if such purchaser is joined as one of the parties, regard being had to the provisions of this rule, *Jogemaya Dassi* v. *Girindra Nath*, 4 C. W. N 560

It is competent to a plaintiff landlord to maintain his suit against any number of several joint tenants, *Sir Rameswar Singh* v. *Jaideb Jha*, 12. C. L. J. 591 (11 C. W. N 1026 *referred*), *see* also 12 C. L. J 642 noted below.

A landlord is not bound to sue all the heirs of a deceased tenant unless the succession is notified to him, he can sue one of the heirs who is in possession of a part of the holding—*Khetter Mohan* v *Pran Kristo*, 3 C W. N. 371; *see* also, *Kasi Kinkar* v. *Satyendra Nath*, 12 C L J. 642.

Where the persons liable to pay rent are *mutwallis*, all the *mutwallis* must be brought before the Court as defendants, inasmuch as *mutwallis* stand in the position of trustees—*Abdul Rob* v. *Eggar*, 35 C 182.

Section 28, C P Code, 1882 (Or I, rr. 3, 4), does not authorize a tenant to bring a suit, to have it determined which of two defendants, both of whom claimed rent from him, is his landlord—*Koylash Chandra* v. *Goluk Chandra*, 2 C W N 61

(f) Effect of Payment of Entire Rent to One Co-Sharer—If Such Co-sharer is a Necessary Party.—Where in a suit for rent the tenants pleaded payment of entire rent to one co-sharer, such payee is not a necessary party where decree is to be given only for the plaintiff's share; *Chokalingam* v. *Peria Karuppa*, 28 M L J. 197. 29 I. C. 141

In a suit by one co-sharer for his share of rent, if the tenant proves payment of his rent to other co-sharers, the suit should be dismissed; the remedy of the co-sharer who has not received his share of rent lies against his co-sharer and not against the tenant—*Ahmmudeen* v *Grish Chunder*, 4 C 350; referred to in 12 C 555. But see, *Azim Sirdar* v. *Ram Lall*, 25 C. 324, and *Harihar Pershad* v. *Bholi Pershad*, 6 C. L. J. 383.

(g) Suits in which Government is a Necessary Party.—In a suit to recover *chur* land on the allegation that the land was an accretion to plaintiff's estate, the defendant claimed the land under a settlement from Government *Held* that the Government as claiming a proprietary right in the disputed land, was a necessary party—*Cannon* v. *Bissonath*, 5 C. L. R. 154.

The Collector of the district is a necessary party to a suit by a purchaser against his vendor to compel mutation of name in the register.—*Virasami* v. *Rama Doss*, 15 M. 350.

Where plaintiffs based their claim to the land in dispute on a lease granted by Government and sued to eject the defendants, who also claimed to hold the land under a lease granted by Government subsequently to the plaintiff's lease, *held*, that the Government was a proper party.—*Kashi* v. *Sadashiv*, 21 B. 229.

The Government is, in a suit brought by the landlord for a declaration that the sub-soil of a *digwari* tenure belongs to him and not to the *digwar* or his lessee, a necessary party, as the Government has a substantial interest as affecting the profits derivable from the tenure.—*Brojonath* v. *Durga Peshad Singh*, 5 C. L. J 583: 31 C. 753.

In a suit by a person claiming certain lands, which had been resumed by the Government and settled with another party, the Government should be made a party.—*Mahomed Israile* v. *Wise*, 13 Bom L. R. (F. B.) 118 : 21 W. R 327; *Krishno Lall* v *Bhyrub Chunder*, 22 W R. 52. These cases have been considered and explained in *Girdharee Sahoo* v. *Hera Lal*, 2 C. L. R. 467.

The Secretary of State is not a necessary party to a suit to set aside a sale for arrears of revenue, but the Government have such interest as would, on their application, entitle them to be made a party.—*Bal Mokoond* v. *Jirijudhum*, 9 C. 271 : 11 C. L. R. 466. Referred to in *Balkishen Das* v *Simpson*, 25 C 833: 2 C. W. N. 513. Followed in *Jahnnovi Chawdhrain* v. *Secretary of State*, 7 C. W N 377, and distinguished in *Gobinda Chandra* v. *Hemanta Kumari*, 31 C. 159: 8 C. W. N. 657, where it has been held that in a suit to set aside a sale held under the provisions of the Public Demands Recovery Act, the Secretary of State is a necessary party. This case has been distinguished in *Raghuraj* v. *Moharaj*, 11 C. L. J. 385· 14 C W N. 606.

A suit against the Secretary of State is not one against any person or any real body corporate, but is one brought against a nominal defendant, who is put upon the record merely to enable the plaintiff to obtain the remedy—*Doya Narain* v *Secretary of State*, 14 C 256

In a suit by a tenant against his landlord, who is a *ghatwal* for declaration of occupancy rights in a *Ghatwali* land and for recovery of its possession, the Secretary of State is not a necessary party, though he may be a proper party, and, therefore, the suit cannot be dismissed for the non-joinder of the Secretary of State, *Kailash* v. *Dwarka Nath*, 35 I. C. 788.

(h) Suit for Possession by Heir Against Several Alienees from Last Owner.—A suit for possession on the ground of inheritance can proceed against a member of different alienees. The question is purely one of convenience ; *Lal Chand* v. *Manghiri*, 64 P W. R 1918: 59 P R. 1918 44 I. C 549

(i) Suit by Reversioner for Possession.—A reversioner after the death of the widow brought a suit for possession impleading the person in possession of the property and other reversioners in possession and also the transferees from the widow. *Held*, the suit is not bad for multifariousness and the plaintiff is entitled to join all to recover his share of the estate: *Bal Krishna* v. *Hiralal*, 36 A. 406.

(d) **Suits Against a Firm or Corporation.**—*See notes under Order XXIX, rule* 1.

(e) **Necessary Parties in Rent Suits.**—In a suit for rent if the tenant sets up the title of a third party, such third party ought not to be made a party to the suit, so as to convert a simple rent suit into a title suit.—*Lodai Mollah* v. *Kally Dass*, 8 C. 238. 10 C L R 581

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(g) **Suits in which Government is a Necessary Party.**—In a suit to recover *chur* land on the allegation that the land was an accretion to plaintiff's estate, the defendant claimed the land under a settlement from Government. *Held* that the Government as claiming a proprietary right in the disputed land, was a necessary party.—*Cannon* v. *Bissonath*, 5 C. L. R. 154.

The Collector of the district is a necessary party to a suit by a purchaser against his vendor to compel mutation of name in the register.—*Virasami* v. *Rama Doss*, 15 M. 350.

Or. I, r. 1 provides that two or more persons may be joined as plaintiffs in one suit, in whom any right to relief in respect of or arising out of the same act or transaction is alleged to exist. It authorizes several persons to bring a joint suit where the conditions mentioned in it are fulfilled, but it does not provide for those cases in which it is found in the course of trial, that out of the several plaintiffs only one or some of them are entitled to the reliefs and others are not. It is to meet such cases that this rule has been framed, by providing that judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief as he or they may be entitled to. The misjoinder of plaintiffs, to some of whom the relief claimed cannot be given, whilst there are others to whom it may be given, is a mere defect of form which is not fatal to the suit. See, *Umabai* v. *Bhau Balwant*, 34 B. 358 and other cases noted under rule 1.

Clause (b) of this rule corresponds to para. 2 of s. 28 of the old Code and it provides for those cases in which it is found in the course of trial, that one or some more of the plaintiffs are entitled to relief only against one or more of the defendants and not against all of them In such a case the Court instead of dismissing the suit, will give judgment against such one or more of the defendants as may be found to be liable according to their respective liabilities. For instance, in a suit for possession against several defendants with a claim, in the alternative, for arrears of rent, it was held that the suit was properly framed, and was not bad for misjoinder of defendants, even when it appeared that the claim for possession was sustainable only against some of the defendants, and that a portion of the claim for rent was directed against some defendants: the other portion being directed against all the defendants; *Janokinath* v. *Ram Ranjun*, 4 C. 949.

Defendant need not be interested in all the relief claimed.

5. It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him. [NEW.]

COMMENTARY.

This rule is new. It follows English Order XVI, r. 5 and is to be *read with rule 3.*

This rule provides that where a suit is brought against several defendants, the mere fact that every defendant is not interested in all the relief claimed in the suit is no ground for objection that the suit is bad for misjoinder of defendants.

Under this rule it is not necessary that every defendant should be interested as to the reliefs claimed in the suit. But it is necessary that there must be a cause of action in which all the defendants are more or less interested although the relief asked against them may vary; *Umabai* v. *Bahu Balwant*, 34 B. 358.

Joinder of parties liable on same contract.

6. The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes. [S. 29.]

COMMENTARY.

This rule exactly corresponds to s 29 of the C P. Code, 1882, and it follows English Or. XVI, r. 6.

"Severally liable."—This rule merely lays down the procedure for joinder of parties in suits based upon contracts, it has no application where there is misjoinder of causes of action; see, *Krishnappa* v *Maung Human*, 18 I. C. 181. Liability upon a contract may be, (1) several, (2) joint and several and (3) joint. This rule provides for cases for joinder of parties in cases mentioned in (1) and (2), and does not provide for a case mentioned in (3). For instance, if A and B execute a joint contract in favour of C, each making himself severally liable for its performance, they are separately liable upon the contract, and the obligee at his option, may eihter bring separate suits against A and B separately or he may bring one suit against A and B jointly.

"Jointly and severally liable."—The legal consequences of a *joint and several liability* and a *several liability* on a contract are the same. Thus, if A and B execute a bond in favour of C, making themselves *jointly and severally liable*, then C may, at his option, bring separate suits against A and B, or he may bring a joint suit against both of them for its enforcement.

Although in both the cases mentioned in (1) and (2) liberty is given to the obligee to bring either a joint suit or separate suits, the legal consequences in both the cases would not be the same For if a separate suit is brought against one or against some of the obligors out of several, and a decree is obtained against some of them only, and the decree remains unsatisfied, it may operate as a bar to a second suit against any one of the rest See *Hemandra* v. *Rajendra*, 3 C 353, *Gurusami* v. *Samurthi*, 5 M. 37; *Dick* v *Dhunji*, 25 B 378 · 3 Bom. L. R. 234. But in *Muhammad Ashkar* v. *Radheram*, 22 A 307, after reviewing all the English and Indian authorities on the point, it was held that judgment obtained against some only of the joint contractors and remaining unsatisfied is no bar to a second suit against other joint contractors In *Ramanjulu Naidu* v *Aravamudu*, 33 M 317, the Madras High Court, after reviewing all the English and Indian authorities, seems to have taken the same view as was taken in the above Allahabad case.

As this rule deals only with the procedure as to joinder of parties in suits upon contracts, this is not the proper place to discuss the legal consequences of bringing joint or separate suits Properly speaking it is a question of *res judicata*, which has been exhaustively dealt with under s. 11 under the heading "JUDGMENT OBTAINED AGAINST ONE OF SEVERAL JOINT CONTRACTORS, IF BARS A SUBSEQUENT SUIT AGAINST THE OTHERS." The reader should consult the cases noted thereunder and the provisions of s. 43 of the Indian Contract Act, IX of 1872.

This rule, as has been already said, does not deal with the joinder of parties, where the liability of the obligators is joint only; in such a case the plaintiff must bring his suit against all the joint contractors because the liability or obligation of all the joint contractors is single and undivided consequently, the cause of action is not distinct and is therefore indivisible: see *Dhunput Singh* v. *Sham Soonder*, 5 C. 291.

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Parties to Bills of Exchange, Hundis, etc.—The drawer and acceptor of bills of exchange can be joined as co-defendants in a suit brought by the holder of such bills.—*Pestonjee Eduljee* v. *Mahomed Ali*, 3 C. 541.

The endorsee of a cheque sued the endorser, alleging that the cheque had been lost, and claiming a duplicate of it, or the refund of the money he had paid the defendant on the cheque. *Held*, that the drawer of the cheque should be made a defendant.—*Baldeo Prasad* v. *Grish Chandra*, 2 A. 754. Referred to in *Jagannath* v. *Ram Das*, 213 P. L. R. 1914: 140 P. W. R. 1914.

Suit upon a Contract made by a Firm.—Section 43 of the Contract Act, IX of 1872, when taken with section 29, C. P. Code, 1882 (Or. I, r. 6), is clear that it is not incumbent on a person dealing with partners to make them all defendants in a suit. It is quite competent to him to institute his suit against such of the partners alone as he may choose, and such a suit would not be bad for non-joinder of the remaining partners.—*Narayana Chetti* v. *Lakshamana Chetti*, 21 M. 256 (6 B. 700 *refrd. to*).

In a suit brought upon a contract made by a firm, the plaintiff may elect as defendants those members of the firm against whom he wishes to proceed; 15 C. P. L .R. 51. Where two out of three joint debtors had promised to pay separately the suit could proceed against them only; *Bhagabat* v. *Madhub*, 23 C. 553.

When plaintiff in doubt from whom redress is to be sought

7. Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties. [New.]

COMMENTARY.

This rule is new It follows the English Or XVI, r 7

Object and Scope.—This rule is intended to provide for those cases where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, in such cases he may join two or more defendants for determination of the question as to which of the defendants is liable for his claim and to what extent. For instance, in a suit for recovery of money stated to have been lent, to a person by plaintiff's agent, where the alleged debtor had, prior to the suit, denied that any loan had been made to him by the agent, and the agent maintained that the loan was in truth made, the plaintiff impleaded the agent as a defendant *and prayed for relief against him in the alternative* in order to determine whether the debtor or his agent is liable in respect of the sum stated to have been lent See *Meyappa Chetty* v *Periannan Chetty*, 29 M. 50 16 M L. J 39. Here the plaintiff being in doubt as to whether the alleged debtor of the agent is liable in respect of his claim, was justified in joining both of them as defendants.

The plaintiffs were three of the co-sharers of a certain estate, a lady being a fourth co-sharer. By means of private arrangement among them, certain lands were assigned to the various co-sharers in severalty, other

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The plaintiffs were three of the co-sharers of a certain estate, a lady being a fourth co-sharer. By means of private arrangement among them, certain lands were assigned to the various co-sharers in severalty, other

lands remaining *ijmali* or joint as before. Some 40 years after, the lady co-sharer let out her share in the estate, in *putni*, to third parties, who were in possession. There had been separate possession of these lands by virtue of the private partition for the past 70 years Subsequently, the Collector, under Bengal Act VIII of 1876, effected a partition of the whole estate. In the course of the proceedings, the specific lands allotted to the lady co-sharer in the private partition were allotted to the plaintiffs, who thereupon instituted suits for rent against the tenants of the land, making the *putnidars* defendants. *Held*, that the *putnidars* were properly made defendants, and the Courts were justified in trying the question of the right to receive the rent as between the plaintiffs and the *putnidars*, *Hridoy Nath* v *Mohubutnessa*, 20 C. 285. Here the plaintiff being in doubt as to whether the tenants of the land or the *putnidar* is liable to him for rent, was justified in impleading the *putnidar* as defendant, for determination of the question as to whether the tenants or the *putnidars* are liable to him for rent.

One person may sue or defend on behalf of all in same interest.

8. (1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue, or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where, from the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party to such suit. [Ss. 30 & 32, para. 4.]

COMMENTARY.

Alterations Made in the Rule.—Sub-rule (1) corresponds to s 30 of the C P. Code, 1882 The only change is the substitution of the word "*persons*" for the word "*parties*" contained in the old section. The alteration seems to have been made on account of a contention raised in 9 C. 604 (606) Sub-rule (2) corresponds to para. 4 of s. 32 of the old Code, with the addition of the words "*or for whose benefit.*"

"We have, on the suggestion of the Advocate-General of Madras, added the words " or for the benefit of " after the words " on behalf of."—*See the Report of the Select Committee.*

Scope and Object.—It is a general rule that all persons interested ought to be made parties to a suit, however numerous they may be, so that the Court may be enabled to do complete justice by deciding upon and setting the rights of all persons interested and that the orders of the Court may be safely executed by those who are compelled to obey them and future litigations may be prevented This rule, no doubt, yields to the exigencies of

particular cases, and there are well-established qualifications of it; one of them is the power of the Court to make a representative order under this rule. See *Chudasama* v. *Parlapsang*, 28 B. 209; 5 Bom. L. R. 937. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.—LORD MACNAGHTEN in *Duke of Bedford* v. *Ellis*, 1901 A. C. 1. Where there are numerous parties, having the same interest in the suit, who are all before the Court, and are anxious to have the matter in dispute disposed of , but in order to save trouble and expense are desirous that " one or more of such parties " shall sue or defend on behalf of all in the same interest, permission should be granted; *Hiralal* v. *Bhairon*, 5 A. 503: 3 A. W. N. 155. When one multitude of persons are interested in a right, and another multitude of persons are interested in denying that right, and the right is a general right, some individual may be selected out of each multitude to represent the rest; *per* JESSEL, M. R., in *Commrs. of Sewers* v. *Gellatty*, 3 Ch. D. 615.

" May be sued or defend."—The above expression in this section also includes the case of numerous defendants having the same interest; in other words, a suit might be brought by plaintiffs, with the permission of the Court, against one or more members of a class, representing the rest; *Chuni Lal* v. *Ram Kishen*, 15 C. 460 F. B. (465-466).

Requisite Conditions under this Rule are (1). that there must be numerous persons having the *same interest* in one suit; (2) that necessary *permission* is obtained; and (3) that *notice* of institution is given to all persons interested.

" Numerous persons."—The point has been raised in several cases as to what constitutes " numerous."—In *Adamson* v. *Arumugam*, 9 M. 463 (466) it was held that the rule does not allow one or more persons to sue on behalf of the general public. In *Sajedur Raja* v. *Baidya Nath*, 20 C 397, the Madras case was referred to, and it was further held that a suit could not be brought on behalf of the Hindu community generally, as it was not capable of ascertainment, and that inasmuch as the section required notice to be served " upon all such parties," the words " numerous parties " meant parties capable of being ascertained. This decision was disapproved, and the point fully considered in *Manmatho* v *Harish*, 33 C. 905: 10 C. W. N. 867, and in *Prabhat* v. *Hari*, 24 C. W N 206. 54 I. C. 742, where it was held that the section should not in its application be limited to cases where the parties, though numerous, can be definitely ascertained A suit may be instituted under this section on behalf of a defined class of the general public, though that class may be composed of a more or less indefinite number of persons. This was a suit by the plaintiffs who were members of the *Satchasi* community on behalf of themselves and other members of the community for a declaration to take part in the management of the worship of a goddess and for joint possession with the defendants of the land on which the worship was carried on Suits have been allowed by one or more persons on behalf of a sect (*Srinivasachariar* v *Raghava*, 22 M. 28, 30; *Dhunput* v *Paresh*, 21 C 180; *Maharaj Bahadur* v *Paresh*, 31 C. 839, *Raghava* v *Rajaratnam*, 14 M 57; *Baldeo* v *Bir Gir*, 22 A 269), of a caste (*Ganapati v Savithri*, 21 M 10), worshippers at mosque (*Jan Ali* v. *Ramnath*, 8 C. 32); fellow-villagers (*Haradhone* v *Ramdayal*, 21 C 181; *Kalerkabir* v *Jan Mia*, 29 C. 100; *Thanakoti* v *Muniappa*, 8 M 496); or

class of villagers (*Amedbhoy* v. *Balkrishna*, 19 B. 391, *Bhundal* v. *Pandol*, 12 B. 221). The Mahomedan community (*Jawahra* v. *Akbar Hossein*, 7 A. 182) or the Hindu community (*Manmatha* v. *Harish*, 33 C. 905) is not the general public, but only a particular portion, though it is a large one of the general population of this country which consists of numerous races and creeds.

Certain members of the Dhobi community of Naraında, with the leave of the Court under Or. I, r 8, C P Code, sued on behalf of the community for a declaration of its title to an *akhra* alleged to have been established by the ancestors of the community and for recovery of possession thereof. It was found as a fact that the Dhobi community of Naraında had been owning the *akhra* and its properties from time immemorial through panchayats. *Held*, that the Dhobi community of Naraında had the right to hold and manage the property and maintain suits with respect thereto through panchayats and that the present suit which was properly constituted under Or. I, r. 8, C. P. Code, should succeed, *Probhat* v. *Hari*, 24 C W. N. 206: 54 I. C. 742. Similarly, property may be owned by a fluctuating body of persons like the inhabitants of a village, and a suit may be brought on their behalf under this rule, *Sivaraman* v. *Muthaya*, 12 M. 241. It has also been held that a person may render himself liable to a community like the Vysia community of Mogarala by agreeing to pay a certain sum of money to it, and a suit to recover it may be brought by the community under this rule; *Narasimhulu* v *Noota*, 44 M L J 240, 72 I C 95 A. I. R. 1923 Mad. 434

Where numerous members of a caste seek to enforce rights as against strangers or as against certain other members of the caste, Or I, r 8, C. P. Code, applies to the case It is not necessary for the persons asking for leave under Or I, r. 8 to obtain formally beforehand the authority of those whom they seek to represent Nor need they summon a caste meeting before bringing the suit; *Sivathal Periyava Nadar* v *Nana Chund Velmuruga*, 30 M L T 47 64 I C. 618

Premises belonging to a community were let out to the defendant. The president of the community who was authorized by a resolution of the community to file suits, sued to eject the defendant on the ground that the demised premises were required for letting to members of the community *Held*, that the resolution passed by the community did not entitle the plaintiff to sue in his own name, since there having been numerous members of the community with the same interest in the suit, notice of the institution of the suit, to all such persons as well as permission of the Court for filing the suit was necessary under Or I, r 8, *Atma Ram* v. *Narayan*, 23 Bom. L. R 972.

"Having the same interest"—Instances.—Where a number of persons in the same interest have occasion to assert and defend their rights, they should resort to the provisions of this rule; *Muringa Mangalath* v. *Valia*, 7 M. 87 See, *D'Cruz* v. *D'Silva*, 32 M 131

This section applies only to cases in which many persons are jointly interested in obtaining relief, and not to a case in which individual right has been violated.—*Jawahra* v. *Akbar Hussain*, 7 A 178 *See* also, *Thakersey Devraj* v. *Hurbhum*, 8 B. 432: *D'Cruz* v. *D'Silva*, 32 M. 131, and *Mohiuddin* v. *Sayiduddin* alias *Nawab Mean*, 20 C. 810. *See* also

Srinivasachariar v. *Raghava Chariar*, 23 M. 28, approved in *Sivagurunatha* v. *Ramaswami*, 11 M. L. T. 275: (1912) M. W. N. 105: 15 I. C. 399.

This section authorises some of the ryots of a village to sue the proprietor of it, for themselves and other ryots, for a declaration of their general rights, and for an injunction restraining the proprietor from interfering with those rights.—*Ahmedbhoy Habibbhoy* v. *Bal Krishna* 19 B. 361.

Where a person dies leaving numerous creditors, any one of them may sue on behalf of himself and the other creditors; *Oriental Bank Corporation* v. *Govind*, 9 C. 604; *Ebrahimbhai* v. *Fulbhai*, 26 B. 577. Similarly, a villager may bring a suit on behalf of himself and his fellow villagers for a declaration of a right of way and for an injunction against the defendant for obstructing the way; *Harish* v. *Pran Nath*, 26 C. W. N. 587; 69 I. C. 910.

A suit relating to a charity established under a charitable endowment may be instituted by any member of the class intended to be benefited by such charity, for the support and preservation of which the aid of the Court is invoked by means of the suit; *Ganapati* v. *Savitri*, 21 M. 10.

Under this section, a suit will lie at the instance of individual taxpayers for an injunction restraining a municipality from misapplying its funds.—*Vaman* v. *Municipality of Sholapur*, 22 B. 646.

A person collecting and receiving subscriptions for the purpose of building a temple, in pursuance of a resolution come to at a meeting of the community, holds them as a trustee, and a suit in respect thereof should be filed under this section.—*Mahomed Nathubhai* v. *Husen*, 22 B. 729.

In a suit to have certain property declared *waqf*, alleging that it was dedicated as *waqf*, and the profits applied to lighting a mosque and shrine, and the expenses of devotion, etc., it appeared that the plaintiff was not alone interested in the subject-matter of the suit *Held* that she could only sue on behalf of those interested after having obtained leave under this section.—*Lutifunnissa* v *Nazirun Bibi*, 11 C. 33. *See* also, *Jian Ali* v. *Ramnath*, 8 C 32 9 C L R 433 But see, *Zafaryab Ali* v *Bakhtawar*, 5 A 497, and *Jawahra* v *Akbar Husain*, 7 A 178

The disciples of a *muth* have sufficient *interest* within the meaning of this rule to maintain a representative suit to declare alienations made by the Mahant invalid; *Chidambaranatha* v *Nullasiva*, 41 M 124 · 42 I. C. 366.

It is open to the worshippers of a temple, under this rule, to bring a representative suit for a declaration that a permanent lease of temple property granted to the defendants in possession is invalid; *Veeramachaneni* v. *Soma*, 43 M. 410. 38 M L. J. 226 (1920) M W. N 393 (40 M. 212 F. B., and 41 M. 124 *followed*), or for recovering temple property from a trespasser; *Rangaswami* v. *Krishnaswami*, 44 M. L. J 116: 71 I. C. 463: A. I R. 1923 Mad 276

It is competent to a single defendant to raise a defence of a general custom without joining the other persons interested in the custom with

himself or getting himself made their representative under this section.—*Sitab Rai v. Dubal Nagesia*, 6 C. L J. 218.

Under this rule the Court has the power to allow a plaintiff to sue some persons as representing themselves and others having the same interest in the subject-matter of the suit, and the consent of the defendants on the record is not necessary;—*Ambalam v. J. M. Barthe*, (1912) M. W. N. 152.

Clubs and Other Associations.—A suit in respect of a matter in which a club or other association is interested cannot be instituted by the Secretary alone even if he is authorized by a resolution of the members of the club or association to do so In such a case the suit must be brought either by the Secretary on his own behalf and on behalf of the other members, or by all the members of the association under this rule; *Muhammadan Association v Bakhsi*, 6 A 284, *Michael v Briggs*, 14 M. 362. Unless the Secretary of a club has expressly accepted personal liability on a contract, entered into by him on behalf of the club, he cannot be sued personally on the contract, nor can the members be sued collectively through the Secretary, *North W. P. Club v Sadullah*, 20 A. 497. Similarly, a suit to eject tenants from property belonging to the caste cannot be maintained by the President of the Managing Committee of the caste, even if he is authorized to do so by a resolution passed by the members of the Committee. In such a case, the suit must be brought by him on behalf of all the members of the caste, *Atmaram v. Narayan*, 46 B. 132 64 I C 555; *Prabhat v Hari*, 24 C. W N 206.

Suit by a Member of a Community in his Own Right.—The meaning of this section is that with the permission of the Court a suit may be brought by one or more persons on behalf of all interested This section does not forbid them from suing in their own right, it merely says that if they desire to sue on behalf of others, they must obtain the permission of the Court —*Baiju Lal v. Bulak Lal*, 24 C 385

This is an enabling rule and it does not debar any member of a committee from bringing a suit in his own right, though the act complained of is injurious to the whole community Where Mahomedans belonging to a particular sect are restrained from using a mosque for prayer, any member of the sect who is entitled to use the mosque may bring a suit to enforce the right In such a case, it is not necessary that the suit should be brought by him on behalf of himself and all the members of the sect, *Maulvi v Jagat*, 2 Pat 391. 74 I C 403; A. I. R 1923 Pat. 475 In the same way, any member of a community may bring a suit to set aside unauthorized alienation of endowed property or formal administration of property belonging to the community; *Jawahra v. Akbar Hussain*, 7 A 178; *Gulfa v Basanta*, 32 A 284; *Dasondhay v. Mahammad*, 33 A. 666; *Rama Chandra v Ali*, 35 A 197, *Zafaryab Ali v. Bakhtawar*, 5 A. 497; *Mohiuddin v. Sayiduddin*, 20 C 810; *Shankarlal v. Dakor Temple Committee*, 28 Bom L R 300 A I. R. 1926 Bom. 170: 94 I. C. 47.

A beneficiary of a trust in respect of a Mahomedan *waqf*, interested in the maintenance of a mosque or other charitable institution, may, without having recourse to the provisions of Or. I, r. 8, C. P Code, and without suing in a representative capacity on behalf of the other benefi-

ciaries, sue for recovery of possession of property wrongfully alienated by the trustee and for the incidental declaration that the subject of the trust cannot be alienated; *Maulavi Mahomed Fahimul Huq* v. *Jagat Ballak*, 4 Pat. L. T. 675· 2 Pat. 391; *Sadiq Husain* v. *Khan Bahadur Hakim Mirza Nazir Hussain*, 9 O. L. J. 111: A. I. R. 1922 Oudh 1 66 I. C. 90; *Maulvi* v. *Jagat*, 2 Pat. 391: A. I. R. 1923 Pat. 475.

If the individual rights of the plaintiffs are infringed, they can maintain an action without joining others whose rights are equally infringed by the wrongful act; *Andi Moopan* v. *Muthvirama*, 29 M L. J. 91: 17 M. L. T. 543; *see* also, *Ramchandra* v. *Ali Muhammad*, 35 A. 197: 11 A. L. J. 233.

Where injury is threatened to a well constructed for the use of the people of a *mohalla*, any resident of the *mohalla* can bring a suit in his own right to restrain the threatened injury. In such a case the leave of the Court under Or. I, r. 8, C. P. Code, is not necessary to prove special damage; *Pokhar Das* v. *Raghu Ram*, 62 I. C. 988.

Binding Effect of Decree in Representative Suit.—In a suit where one person is allowed to represent others as defendants in a representative capacity, the general rule is that any decree passed in that suit can bind those others only with respect to the property of those others which he can in law represent and no personal decree can be passed against them, although the party record *eo nominee* may be made personally liable. This is the principle to be applied to suits brought under this rule. *Sahib Thumbi* v. *Hamid*, 36 M. 414: 12 I. C 1006. It has accordingly been held that a decree for injunction being a personal decree is not binding on those who are not actually parties on the record. *Sadagopachari* v. *Krishna Chari;* 12 M. 356 *Srinivasa* v. *Arayai*, 53 M. 483.

Persons conducting a suit on behalf of themselves and others with the leave of the Court under this rule have authority to enter into a compromise so as to bind those whom they represent; *Krishnama Chariar* v. *Chinnammal*, 24 M. L J. 192.

At What Stage of the Suit, Permission should be Obtained.—Permission must be obtained *before* the institution of the suit, otherwise it would be dismissed. Such leave cannot be granted at the hearing — *Oriental Bank*, v. *Gobind Lal*, 9 C. 604: 13 C. L. R. 142 But the Bombay and other High Courts have held that such permission may be granted at the hearing and may relate back to the institution of the suit. *Ebrahimbhai* v. *Fulbai*, 26 B 577; *Ramayyangar* v. *Krishnayyangar*, 10 M. 185; *Fernandez* v. *Rodrigues*, 21 B. 784 (F. B.), (followed in *Baldeo Bharthi* v. *Birgir*, 22 A. 269) Where leave has been so given it is immaterial that an application for permission to sue had been previously refused.—*Chenu Menon* v. *Krishna*, 25 M 399. *See* also, *Srinivasa* v. *Raghava*, 23 M. 28.

There is no doubt that the proper course is to obtain permission under Or. I, r. 8 before the suit is instituted But there is nothing in the rule to show that if it is not so done it cannot be granted afterwards. The mere fact that the leave of the Court was not obtained *before* the institution of the suit should not result in the dismissal of the suit. Permission under Or. I, r. 8 can be granted subsequent to the filing of

the suit The objection is not one affecting the jurisdiction of the Court; *Ahmed Ali* v *Abdul Majid*, 44 C 258· 21 C. W N 1144 (21 B 734, 25 M. 399, 23 M. 28, 22 A. 269 *folld.*; 8 C 32, 11 C 33 *refd to*; 9 C. 604 *dissented from*; 21 C. 180 *distd*, *see* also, *Nariman* v *Municipal Corporation of Bombay*, 47 B. 809: 25 Bom. L R. 689.

Whether the Permission should be Express.—Or I, r 8 does not require an "express" permission to be recorded by the Court, but, if such permission can be well gathered from the proceedings of the Court in which the suit was instituted, an Appellate Court may infer from such proceedings that permission was really granted —*Dhunput Singh* v. *Paresh Nath*, 21 C 180, *Kalu Khobir* v *Jan Meah*, 29 C 100, *Mukh Lal* v. *Jagdeo Tewari*, 35 C 1021, *Krishna* v. *Atul*, 39 C L J 612 84 I. C. 79: A. I. R 1924 C. 998; *Ismail* v. *Niamtkhan*, 101 I. C 738· A. I. R. 1927 Cal. 608. But see, *Hira Lal* v *Bhairam*, 5 A 602

Notice and Public Advertisement.—The Court in granting permission to sue to two plaintiffs on behalf of all the residents of a locality directed the plaintiffs to advertise and give notice to all the residents of the locality as regards the suit But the notice and advertisement were not issued. *Held*, that (1) the omission to issue notice was not fatal to the suit and would not result in its dismissal, (2) that the publication of notice was peremptory and must be complied with under Or. I, r 8 and that the case should be remanded to the trial Court for issuing notice and retrial of suit; *Shyam Lal* v *Musst Lalli*, 44 A. 231 F. B . 20 A L J 73· 65 I. C. 259; *Jadu Singh* v. *Sant Singh*, 8 P L T. 267· A. I R. 1927 Pat. 221.

It is the duty of the Court to cause service of notices or advertisements to be published as required by this section. If a plaintiff omits to move the Court for that purpose, his suit should not be dismissed on account of the failure of the Court to perform the duties imposed upon it by the section *Mukh Lal* v. *Jagdeo Tewari*, 35 C 1021; *Kartick* v *Guru Prosad*, 13 C W. N 104; *Shiam Lal* v *Mt Lalli*, 44 A 231· A. I. R 1922 A 16 65 I C 259.

Object of Notice.—This rule requires that the Court should exercise a judicial discretion in permitting some definite person or persons to sue or be sued on behalf of all the persons interested, and it further requires the Court to give to the persons interested notice of the institution of the suit which must include a notice of the names of the persons who have been permitted to represent others, so that the persons interested may have an opportunity of knowing who have been selected to represent them; *Kali Kanta* v. *Gauri*, 17 C. 906; *Ismail Munshi* v. *Niamat*, 101 I. C. 738: A. I. R. 1927 C. 608.

Fresh Permission for Appeal is Not Necessary if Permission Validly Granted for Suit.—If a permission has been validly granted for representation of the suit in the Court of first instance, no fresh permission is necessary for the purposes of an appeal if an appeal is preferred from the trial Court's decree. So far as this question is concerned, the proceedings in appeal may very well be regarded as proceedings in continuation of the suit and the result of the appeal would be taken as the result of the suit itself; *Ismail* v. *Niamat Khan*, 101 I. C. 738: A. I. R. 1927 C. 608.

Malabar Law.—Every member of a Malabar *tarwad* is entitled to be made a party, or to have notice in any suit the object of which is to affect the *tarwad* property.—*Kunnathurillah* v. *Narayanan*, 6 M. 121.

If it is sought to make a decree in a suit binding on a Malabar *tarwad*, the procedure laid down in this section should be followed, if the members are numerous.—*Elayachanidathil* v. *Kenatumkora*, 5 M. 201.

In a suit by junior members of a Malabar *tarwad*, to cancel certain mortgages executed by their *karnavan* and senior *anandravan*, on the ground that the debt secured was not binding on the *tarwad*, *held*, that all the members of the *tarwad* should have been joined actually or constructively under this section.—*Moidin Kutti* v. *Krishnan*, 10 M. 322.

A decree against the *karnavan* and senior *anandravan* is not binding on the junior members. If it is desired to extend its operations to those who were not parties to the suit, the procedure prescribed by this section should be followed —*Sridevi* v. *Kelu Eradi*, 10 M. 79. Followed in *Komappa* v. *Ukkaran*, 17 M 214.

A decree against a *karnavan* of a Malabar *tarwad*, as such, is binding upon the members of that *tarwad*, though not parties to the suit, in the absence of fraud or collusion. Explanation V of s. 13, C. P. Code, 1882 (s. 11) is not limited to the case of a suit under this section.—*Varanakot* v. *Varanakot*, 2 M 328. *See* also *Olayat Gobinda* v. *Damodaran*, 8 I. C. 435.

Competency of Court to Add Parties after Decree.—In a suit by three persons under s 14 of the Religious Endowments Act, a decree for damages was passed in favour of the plaintiffs. The plaintiffs neglected to execute the decree whereupon the Court added the trustees of the temple as plaintiffs to enable them to execute the decree. *Held*, that as the suit was brought by the plaintiffs in a representative capacity, it was competent to the Court under Or. I, r 8, C. P. Code to add parties even after the passing of the decree; *Swaminatha* v. *Kumaraswami*, 17 L. W. 422: 44 M. L. J 282 · (1923) M. W. N 239: (24 M L J. 192: 33 M 488: 20 M. L. J 546 · 28 M. 319 *followed*)

Misjoinder and non-joinder.

9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. [S. 31.]

COMMENTARY.

Object and Scope of the Rule.—This rule corresponds to s 31 of the C. P Code, 1882. The words " *or non-joinder of parties* " have been added, and the second para. of s 31 of the old Code has been omitted It follows the English Or. XVI, r. 11, and the principle laid down in *Mahabala Bhotta* v. *Kunhanna*, 21 M. 373, where it was held that the word "misjoinder" in this section comprehends cases of " non-joinder " as well as " misjoinder " This rule must be held to amount to a direction to the Court not to dismiss a suit on the ground of non-joinder. The

addition of the word "*non-joinder*" makes it clear that non-joinder is not fatal. Where it appears to the Court that the name of any party has been improperly joined, either as plaintiff or defendant, the Court may, instead of dismissing the suit, order it to be struck out under sub-section (2), r. 10. Similarly, when there has been non-joinder of parties, either as plaintiffs or defendants, the Court may under r 10 (2), order that such party may be added either as plaintiff or as defendant Section 99 of the present Code also lays down that no decree shall be reversed, etc., on account of any mis-joinder of parties, *see* 36 C. 780 20 I C 51

The latter part of this rule provides that "*the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it*"; this part of the rule clearly applies to cases where the rights and interests of the parties actually before the Court can be determined. But it has no application in cases where, under the substantive law, it is not possible to determine the rights of the parties before the Court.

For instance, a mortgage is indivisible one mortgagor cannot claim redemption of his own share alone. Again, the rule under the Mitakshara law is that no co-parcener has a definite share till a partition; in such cases the rule against the dismissal of suits for non-joinder of parties has no application; see *Nagarao* v *Nago*, 10 N. L. R. 72, *Gendan Lal* v *Baburam*, 9 A. L. J. 86

It follows therefore that this rule will apply where the rights and interests of the parties are determinable. But where the rights and interests are not defined or separable, as in the case of members of a joint Mitakshara family, from the rights and interests of those who are not before the Court, the Court cannot proceed to deal, under this rule, with the matter in controversy, so far as regards the rights and interests of the parties before it.

This rule does not apply when a cause of action arises against a number of persons jointly, because in that case, when one of such persons is eliminated, no cause of action subsists against the rest of them. If it does not subsist against all, it cannot subsist against any *one*; *Sanwal Singh* v *Ganesh Lal*, 35 A 441 11 A. L J 630.

It should be remembered that the provisions of this rule are applicable to misjoinder of parties only. Misjoinder of causes action is not the same as misjoinder of parties, misjoinder of causes of action is dealt with in Or. II, r 3

"No suit shall be defeated."—Though misjoinder, or non-joinder does not merit the dismissal of the suit, still, if a plaintiff after the Court decides that a certain person is a necessary party' refuses to make him a party, the suit should be dismissed; *Dewan Shibnath* v. *The Alliance Bank of India;* 3 P. R. 1915: 215 P. L R. 1914. 110 P W. R. 1914· 25 I. C. 480.

Where two parties contract with a *third* party, a suit by one of them making the other a co-defendant ought not to be dismissed merely because the plaintiff has not proved that the co-defendant has refused to join as a plaintiff. In such a case, if the plaintiff succeeds, the decree should be in favour of himself, and the defendant who should have been joined

as co-plaintiff; *Kamini Mohan* v. *Niharan Chandra*, 76 I. C. 576 (26 C. 409: 35 C. 331: 10 Bom. L. R. 66 *relied on*).

In actions upon contracts, if the defendant takes the objection of non-joinder in proper time, and if the plaintiff, notwithstanding the objection, insists upon proceeding with the suit without taking the steps to add the necessary parties, and if the Court finds that the objection is well founded, the suit must be dismissed.—*Ramsebuk* v. *Ram Lall*, 6 C. 815: 8 C. L. R. 457.

Under s. 31 of the Code of 1882, which did not contain a saving clause in favour of non-joinder of parties, as Or. I, r. 9 of the Code, 1908, a suit was liable to be dismissed for non-joinder of necessary parties; *Sheikh Faizu* v. *Sheikh Doman*, 19 C. L. J. 455.

Under Or. I, r. 9, the Court has no power to direct a suit to be defeated by reason of the misjoinder or non-joinder of the parties; it should take action under Or. II, r. 6; *Gur Prosad* v. *Gur Prosad*, 19 C. L. J. 316.

Where the defendant in a case has raised no objection as to the non-joinder of a co-plaintiff, the Court should not dismiss the suit on that ground, without framing an express issue and allowing the plaintiff to meet it; *Kedar Nath* v *Tulshi*, 21 I. C 182.

A suit will not fail by reason of non-joinder of parties in mortgage suits; the provisions of Or. XXXIV, r. 1 are subject to the provisions of Or. I, r. 9; *Ramcharan* v. *Md. Rashiduddin*, 10 A. L. J. 134.

This section provides that no suit shall be defeated by reason of misjoinder of parties But there is no section of the Code which permits a person to sue various defendants together, in respect of various causes of action. Therefore, where there is misjoinder of parties as well as of causes of action, the suit should be dimissed.—*Ram Narain* v. *Annoda Prosad*, 14 C. 681. *See* also, *Durgacharan* v *Jotindra Mohon*, 27 C. 493, in which the suit was dismissed for misjoinder of parties, and *Syed Abdul Rab* v *Eggar*, 12 C W. N 160, where the suit was dismissed for defect of parties

Where in a suit for a declaration of a right of way as a village road and for removal of obstruction thereon, an objection was taken that one of the persons in the servient tenement had not been made a party to the suit, which was overruled by the Courts below on the ground that it was taken at a late stage and the Courts below decreed the suit. *Held*, that the non-joinder of the person in question as a party to the suit was a fatal defect and on that ground the suit was dismissed; *Haran Sheikh* v. *Ramesh Chandra*, 25 C. W. N. 249.

The language of this rule is imperative, and no suit is liable to be defeated on the ground of non-joinder, even in the non-joinder is not attributable to any *bona fide* or any other mistake, *Mulji Taj Singh* v *Ransi Devraj*, 34 B 13, pp. 21-23.

Distinction between Necessary and Proper Parties.—There is a distinction between necessary and proper parties to a suit. Two conditions must be fulfilled in order that a defendant may be considered a necessary party, namely, first, there must be a right to some relief against him in respect of the matter involved in the suit, and secondly, his presence is

necessary in order to effectually and completely adjudicate upon and settle all the questions involved in the suit; *Sital Prasad* v. *Asho Singh*, (1923) Pat. 326.

There is a distinction between the non-joinder of proper persons but not necessary parties and non-joinder of parties whose presence is essential. In a suit for partition in a joint Hindu family, the grandsons are not necessary parties and are represented by their own father At the same time they may be proper parties and on an appeal the Appellate Court can direct the lower Court to bring them on record and give them separate allotments if they so desire; *Digambar Mahton* v. *Hanraj Mahton*, 1 Pat. 361: 3 Pat. L. T. 238.

Misjoinder.—Misjoinder means joinder of a party who ought not to have been joined either as plaintiff or defendant, or joinder of a person as plaintiff who should have been joined as defendant and *vice versa*. Misjoinder of party occurs when the provisions of Or. 1, r. 1 are not complied with. Misjoinder of parties can do real harm either to the plaintiff or to the defendant; the mistake can be remedied at any time under Or. 1, r. 10, and it cannot prejudicially affect, in particular, the course of defence or attack: see *Mulji Taj Singh* v *Bansi Devraj*, 34 B. 13, p. 20.

Non-Joinder.—Occurs when a necessary party is not joined as such. As to the proper time for taking objection as to non-joinder, *see r.* 13.

The non-joinder of a dormant partner as co-plaintiff in an action on a contract entered into with the firm or one of its members is not fatal to the suit; *Guzzu* v *Venkata*, (1915) M W. N. 864.

Defect of non-joinder of parties may be cured under Or 1, r 9; *Imperial Pressing Co.* v. *British Crown Assurance Corporation*, 41 C. 581 p. 585.

In a partnership suit the partners must be made parties or the suit will fail If a necessary party is not on the record, the proper course is to apply to have him joined. If he is not brought on the record at all, or if when he is brought on the record, the suit as against him is barred by limitation, the whole suit will be dismissed, *Ambica* v *Tarini*, 18 C. W. N. 464; *see* also *Jagat* v. *Udit*, 20 I C. 262, a case of Mitakshara joint family.

One of several heirs (sisters) of a deceased Mahomedan, can sue his widow for her own share of her brother's property, without impleading the other sharers; *Md. Afzal Khan* v *Kariman Bibi*, 11 A L. J. 619: 20 I. C. 658.

It is plainly the intention of the legislature that a suit shall not be defeated for non-joinder of parties. So far as the addition by the Court is concerned no question of limitation can arise; but when parties have been added by the Court, section 22 of the Limitation Act comes into play; *Nathi Lal* v. *Lala*, 9 A. L. J. 410. 14 I. C. 35.

In determining the question of non-joinder, the Court must confine itself to the claim before it; *Hari Chandra* v. *Humma Vithoba*, 24 Bom. L. R. 1318.

Where it appeared that no issue on the point was framed and the plaintiff had no opportunity to adduce evidence on the plea of non-joinder, *held*, that the suit was not liable to be dismissed on the ground of non-joinder of parties; *Umri Mal* v. *Jaigopal*, 217 P. L. R. 1910.

"So far as regards the rights and interests of the parties actually before the Court."—Or. I, r. 9 does not apply where the rights and interests of the parties actually before the Court cannot be determined. The change made in the new Code does not affect the rule regarding the indivisibility of a mortgage nor the rule under the Mitakshara that no co-parcener has a definite share till partition is made; *Nagarao* v. *Nagao*, 10 N. L. R. 72: 24 I. C. 831.

Or. I, r. 9 provides that no suit shall be defeated by reason of non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it; *Musst. Maryam Bibi* v. *Ram Das*, A I. R. 1922 All. 404.

Or. I, r. 9 deals only with cases where the Court can deal with the matter in controversy in the suit with regard to the rights and interests of the parties actually before it; *Madho Ram* v. *Jagat Singh*, 1 U. P. L. R. 7; 52 I. C. 18.

The Court cannot, by its decree, affect the rights of those who are not parties to suit. If therefore no decree can be passed without affecting the rights of absent parties, the suit cannot proceed in their absence and should be dismissed. If however, the right of the parties actually before it can be determined in the suit having the rights and interests of others unaffected, there is no reason why, even other parties might properly have been added, the Court should not determine the matters in controversy between the parties actually present; *Sital Prasad* v *Asho Singh*, (1922) Pat. 326; *Haran Sheikh* v. *Ramesh Chandra*, 25 C. W. N. 249

In an action for sale upon a mortgage of joint Hindu family property, when some only of the members of the joint family are made defendants, their rights and interests in the joint family property are neither defined nor separable from the rights and interests of those who are not before the Court. The Court, therefore, cannot proceed to deal, under this rule with the matter in controversy, so far as regards the rights and interests of the parties actually before it; *Gendan Lal* v. *Babu Ram*, 9 A. L J. 86.

Or. I, r. 9 is subordinate to Or. XXXIV, r. 1. A mortgage is indivisible and if all persons entitled to a share in the mortgage money are not on the record, the whole suit must be dismissed; *Girwar* v *Makbunessa*, 1 Pat. L. J. 468: *See* also 31 I. C. 814.

In a suit for profits of *zerait* land held by the defendants in excess of their shares, all the co-sharers were not made parties; *held*, that the suit must be dismissed for non-joinder of necessary parties in whose absence the excess could not be determined; *Ramasray* v *Sheonandan*, 1 Pat. L. J. 573.

Necessary Party in Appeal.—Under Or I, r. 9, C P. Code, a person who is a necessary party to the suit is a necessary party to the appeal; *Jitendra Nath* v. *Jhaku Mandar*, 3 Pat. L. T 456 ,66 I. C. 780.

10. (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a *bona-fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just. [S. 27]

Suit in name of wrong plaintiff.

(2) The Court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. [S. 32, paras. 1 & 2.]

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent. [S. 32, para. 3.]

(4) Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant. [S. 33.]

Where defendant added, plaint to be amended.

(5) Subject to the provisions of the Indian Limitation Act, 1877, section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons [S. 32, para. 5]

COMMENTARY.

Changes Introduced in the Section.—Sub-rule (1) corresponds to section 27 of the old Code. The word "*instituted*" has been subsituted for the word "*commenced*," and the words "*persons*" and "*with his or their consent*," have been omitted. It has been taken from English Or. XIV, r. 11.

Sub-rule (2) corresponds to paras 1 and 2 of section 32 of the C. P. Code of 1882. Material changes have been introduced in this sub-rule.

Sub-rule (3) corresponds to para 3 of s 32, sub-rule (4) with s. 33, and sub-rule (5) with para. 5 of s. 32 of the C. P. Code of 1882, with modifications.

It is not infrequent to find that a plaintiff after institution of a suit, discovers that he has sued the wrong persons, and cannot get full relief without adding some other person as co-plaintiff, or that some person other than the plaintiff is entitled to the relief prayed for. This rule contemplates such cases, and gives the Court power to add a new party in the former case and to substitute a new party in the latter case.

But the application of this rule is limited only to cases where it is established that the suit has been improperly instituted through a *bona fide* mistake; such mistake may obviously be one of fact or in law. See *Duckett* v. *Gover* (1877), 6 Ch. D. 82, and *Huges* v. *Pump House Hotel Co.*, (1902) 2 K. B. 485. In the latter case, it was pointed out that where the Court of first instance takes one view of the law, and the Court of appeal takes a contrary view, that in itself is sufficient evidence of *bona fides*, see *Charu Chunder* v. *Sarat Chunder*, 12 C. L. J. 537: 6 I. C. 87, which was a case of construction of a will and in which there was a *bona fide* mistake of law, on account of different views taken in the decisions of the High Court. The words "*bona fide mistake*" have also been explained in *Ganendra Nath* v *Surya Kanto*, 17 C. W. N. 462. Where a mistake is not made deliberately but honestly, the mistake is *bona fide*. For *instance, where a mother instituted a suit upon a mortgage bond within* the period of limitation as administratrix for the benefit of her sons, and after the period of limitation the names of her sons were added as plaintiffs, it was held that the change was one of form only and not of substance, and there was no introduction of new plaintiffs when the sons were brought on the record, and the suit was therefore not barred. *Nistarini* v *Sarat Chandra*, 22 C. L J. 270 20 C. W. N. 49. This rule however does not give a Court unlimited power to remodel the pleadings. *Turquand* v. *Fearon*, 4 Q. B D. 280.

Scope of the Rule.—An order under Or. I, r. 10 ought not to be made when the plaint discloses no cause of action against the parties sought to be newly added, *Beema Rout* v. *Dasarathi*, 40 C 323.

Under the terms of Or I, r. 10 (1) the circumstances under which a person can be added as a plaintiff in a suit are strictly limited. A defendant cannot ask to be made a plaintiff merely on the ground that he would have brought a suit, if he had thought of doing so; *Amolak Rao* v. *Gobind Rao*, 15 N L R 21: 49 I. C 34.

Where Suit Instituted in the Name of Wrong Plaintiff, etc.—Where a suit is instituted by a person having no right to institute it, in the *bona fide* belief that he is entitled to do so, the Court has power under this section to substitute the right person as plaintiff.—*Krishna Bai* v *Collector of Tanjore*, 30 M. 419: 2 M. L. T. 447.

A suit might be continued even where the original plaintiff had no right to sue, provided that the defective institution was due to a *bona fide* mistake, *Perincheri* v. *Unnichennan*, 69 I. C. 413. 1923 M 180 (30 M. 419 *relied on*).

Where a suit is instituted in the name of a wrong person as plaintiff by a *bona fide* mistake, the Court has power to substitute the names of the right persons as plaintiffs, and this power is not excluded in cases where the person originally had no right to institute the suit. The words of Or.

I, r. 10. "Where a suit has been instituted in the name of a wrong person as plaintiff" are comprehensive enough to include cases where the original plaintiff had no cause of action and their interpretation must not be restricted to cases where the plaintiff has some right to sue; *Firm of Gerimal Harrison* v. *Firm of Raghunath Kalianji*, 66 I C. 873, *see* also, *Gundappa* v. *Manjappa*, 2 Mys. L J. 1.

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In a partition suit all persons interested in the property to be divided must be brought before the Court A purchaser or mortgagee of a coparcener's share is a necessary party.—*Sadu Bin* v. *Ram Bin*, 16 B. 608; *Kalikanta* v. *Gouri*, 17 C. 906; *Amrut* v. *Mukund* 5 N. L. R. 150.

A person who would be represented by a party on the record and bound by the decision against that party is entitled to be impleaded under Or. I, r. 10 (2), C. P. Code to protect his interests; *Rajaratnam* v. *Halasya sundaram*, 44 M. L. J. 322: 72 I. C. 156.

I, r. 10 "Where a suit has been instituted in the name of a wrong person as plaintiff" are comprehensive enough to include cases where the original plaintiff had no cause of action and their interpretation must not be restricted to cases where the plaintiff has some right to sue; *Firm of Gerimal Harrison* v. *Firm of Raghunath Kalianji*, 66 I. C. 873; *see* also, *Gundappa* v. *Manjappa*, 2 Mys. L. J. 1.

This section applies only to a suit and not an appeal filed in the name of wrong person.—*Dwarka Nath* v. *Devendra Nath*, 4 C. W. N. 58. But the language of s. 107 has now been altered. *See* also, *Gopal Das* v. *Budree Das*, 33 C. 657: 10 C. W. N. 662, *referred to* in 12 C. L. 537.

Where a plaint purports to be filed by a Municipal Board with the addition of the name of the chairman as plaintiff, the error is not one of substance but merely of form, and may be corrected under the provisions of Or. I, r. 10, C. P. Code, if the objection is taken in the trial Court; *Shamsuddin Khan* v. *Agha Siyid Fateh Shah*, 75 I. C. 937.

This section authorizes substitution at any stage with the consent of the person substituted, provided that it is necessary for the determination of the real matter in dispute.—*Heinger* v. *Droz*, 25 B. 433, p. 464.

Where the plaintiffs sued to recover property belonging to the estate of a testator claiming to be his executors under a will, which contained no express nor implied appointment of executors, the plaint was amended on second appeal by substituting the adopted son as plaintiff, with one of the present plaintiffs as his next friend.—*Seshamma* v. *Chennappa*, 20 M. 467.

An Appellate Court has power to make an order under ss. 27, 32 or 53, of the C. P. Code, 1882 and in order to give effect to any of those sections, it can remand a case; *Habib* v. *Baldeo*, 23 A. 167; *see also*, *Meah Uzir* v. *Savai*, 43 C. 938.

Sub-rule (2). Court's Power to add Parties.—Cases where Addition has been Allowed.—This rule provides for non-joinder or misjoinder of parties; for non-joinder or severance of several causes of action provision is made in Or. II, rr. 3, 6; *Khader Saheb* v. *Chotibibi*, 8 B. 616.

Or. I, r. 10 (2), C. P. Code gives the Court power to add either as plaintiff or as defendant *any person*, whether already a party, as defendant or plaintiff so as to enable it effectually and completely to adjudicate upon and settle all the questions involved in the suit; *Mahomed Sirajuddin* v. *Shah Ghulam Jailani*, 59 I. C. 233.

Or. I, rr. 3, 4 refer to the action of a plaintiff at the time of presentation of the plaint; but Or. I, r. 10 refers to the action of the Court at a stage subsequent to the presentation, in adding a party whose presence before the Court may be necessary to adjudicate upon and settle all the questions involved in the suit; *Sailajananda* v. *Umeshanand*, 4 C. W. N. 462.

The second defendant in a suit applied for leave to add a third party as defendant. The plaintiff objected. *Held*, that the power to add a third party is discretionary, but is widely exercised even though the addition may add new issues. If however serious embarrassment or incon-

venience be caused to the plaintiff, the addition is not effected; *Balmukund Rina* v. *Bisson Doyal*, 46 C. 48: 50 I. C. 51.

Where an application is made under Or. I, r. 10 for the addition of a person, whether as plaintiff or defendant, such person should as a general rule, be added only where there are questions directly arising out of, and incidental to, the original cause of action, in which such person has identity or community of interest with the original plaintiff or defendant.—*Naraini* v. *Durjan*, 2 A. 738. *See* also *Mahomed Badsha* v *Nicol Fleming*, 4 C. 355: 2 C. L. R. 330.

In a suit for recovery of arrears of rent instituted against one of the heirs of the original tenant whose name was recorded in the landlord's *Sherista*, the remaining heirs of the tenant were on their application added as parties to the suit. *Held* that although the added defendants were not strictly necessary parties to the adjudication of the question arising between the plaintiff and the original defendant, yet they were not improperly added as parties to the suit; *Guru Prasanna* v. *Samiruddin*, 44 I. C. 465.

The object of Or I, r. 10 is to to enable the Court to try and determine, once for all, material questions common to the parties and to third parties, and not merely questions between the parties to the suit.—*Vydianadayyan* v. *Sitaramayyan*, 5 M. 52 But persons indirectly interested cannot be made parties; *Pundit Rupchand* v. *Fateh Chand*, 6 I. C. 36.

Where the presence of a party is necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, such party should be added; *Upendra* v. *Sheik Sobhan*, 15 C. L. J. 6.

A legatee is entitled to sue an executor for a legacy bequeathed to him by a testator. In such a suit the executor may apply for his own protection that other legatees shall be made parties; and it is within the discretion of the Court to decide whether the addition of such parties is necessary under Or. I, r. 10 in order to adjudicate upon and settle all the questions involved in the suit.—*Purshottam* v. *Kala Govindji*, 26 B. 301.

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In a partition suit all persons interested in the property to be divided must be brought before the Court. A purchaser or mortgagee of a coparcener's share is a necessary party.—*Sadu Bin* v. *Ram Bin*, 16 B. 608; *Kalikanta* v. *Gouri*, 17 C. 906; *Amrut* v. *Mukund* 5 N. L. R. 150.

A person who would be represented by a party on the record and bound by the decision against that party is entitled to be impleaded under Or. I, r. 10 (2), C. P. Code to protect his interests; *Rajaratnam* v. *Halasya sundaram*, 44 M. L. J. 322: 72 I. C. 156.

Where a joint family property, though held in certain shares by several co-parceners, was mortgaged as a whole and redeemable on payment of the whole sum, *held* in a suit by one co-sharer for redemption, that all persons in whom portions of the equity of redemption were vested must be made defendants.—*Naro Hari* v. *Vithalbhat*, 10 B. 648.

In a suit to determine the rights of the contending mortgagees, the representatives of certain mortgagors were held to be necessary parties.—*Hughes* v. *Delhi and London Bank*, 15 C. 35.

The representatives of three out of four Hindus who were joint *shebaits* sued to have an alienation made by the fourth *shebait* alone set aside; they did not make the latter a party to the suit. *Held*, that he was a necessary party.—*Rajendro Nath* v. *Mahomed Lal*, 8 C. 42.

In a suit under s. 92, C. P. Code for removal of a hereditary trustee, the son of the defendant is entitled to be added as a party defendant and it is open to a Court under Or. I, r. 10 to add a party as defendant in the suit as in any other suit, *Vythialingam* v. *Ramalingam*, (1917) M. W. N. 550. 6 L. W. 9 (36 B. 168 *dissented from*; 36 M. 264, 21 M. L. J. 952 *folld.*)

As a general rule all co-contractors ought to be joined as plaintiffs, but where there are three co-contractors or three co-sharers, two of them co-plaintiffs and the other a co-defendant, the suit ought not to be dismissed simply because it has not been shown that the co-sharer defendant has refused to join as a co-plaintiff.—*Pyari Mohan* v. *Nobin Chunder*, 26 C. 409, F. B.

In a suit upon a bond, of which the obligor was therein described as the manager of a *Muth*, the defendants were the sons of the obligor (since deceased). *Held*, that the representatives of the *Muth* were rightly added as defendans, *Thirthasami* v. *Gopala*, 13 M. 32.

Cases where Addition of Parties has Not been Allowed.—Where the plaintiffs refused to add the receiver as a party with the leave of the Court appointing him, although they had notice of such appointment, the Court was not bound to add him as a party of its own motion, *Jotindra* v. *Sarfaraj*, 14 C. W. N. 653.

Persons who according to the plaintiff in a partition suit have no interest whatsoever in the suit properties need not be made parties. The words "question involved in the suit" do not mean all claims which may possibly be put forward by anybody. Rr. 9 and 10 of Or. 1 I should be construed together; *Sitaramaya* v. *Ramappaya*, 5 L. W. 207.

This rule does not empower a Court on finding that a plaintiff must fail, to import into the case as co-plaintiff, a person who has a different cause of action inconsistent with that of the original plaintiff, and who moreover has not paid court-fees on the new claim. *Maung Shew Paw* v. *Mi Pan Zi*, 31 I. C. 332. *See* also *Bhima Rout* v. *Durga Prosad*, 17 C. L. R. 183 p. 186. 40 C. 323 p. 330.

This section does not authorize the Court to introduce into a suit as a defendant, a person who claims the property in the suit by a title quite distinct from that under which any of the parties to the suit claims,—*Kalian*

Rai v. *Ram Ratan*, 18 A. 306. See *Joygobind* v. *Gouree Proshad*, 7 W. R. 201. But see *Saroda Pershad* v. *Kylash Chunder*, 7 W. R. 315.

This section as far as addition of plaintiffs is concerned, only applies to those cases in which the original party who brings the suit has some title to sue. But if a plaintiff at the time he brings his suit has no interest in the subject-matter thereof, the joinder of a person as a co-plaintiff who has an interest cannot alter the plaintiff's position or confer on him any right to sue —*Chunder Coomer* v. *Gocool Chunder*, 6 C. 370. *See* also, *Bhanu* v. *Kasinath*, 20 B. 537; and *Subbaiyar* v. *Kristnaiyar*, 1 M. 383; *Koegler* v. *Prosunno Coomar*, 2 C. 472. *See*, however, *Bahola Pershad* v. *Ram Lal*, 24 C. 34, in which a different view seems to have been taken, and *Abdullah* v. *Abdul*, 13 I. C. 350, reversing 11 I. C. 223

A defendant who has assigned all his interests in the subject-matter of the suit, and has no longer any interest in it, has no right to be made a co-plaintiff. A plaintiff who has no right of action when he brings his suit can not remedy the defect and acquire the right by joining with him persons who have the right of action.—*Sayad Abdul Hak* v. *Gulam Jilani*, 20 B. 677.

In an ejectment suit by a landlord against his tenant, the Court should not bring on the record the person from whom the plaintiff holds the land, nor persons claiming to hold it from a third party, nor such third party.—*Sankaran* v. *Ananthanarayan*, 20 M. 375.

Parties should not be added in a suit for rent so as to change it into a suit for title though questions of title may be incidentally investigated in a suit for arrears of rent, *Abdul Gafur* v. *Ali Miah*, 28 C. W. N. 805 82 I. C. 369: A. I. R. 1925 Cal. 26.

In a suit for rent defendant alleged that a third person had a joint interest with the plaintiff in the property in respect of which rent was due *Held* that it was improper to add him as co-plaintiff, and if added at all it should be as defendant,—*Google* v. *Prem Lall*, 7 C. 148.

Where joint tenants are jointly and severally liable to pay the whole rent, the Court has discretionary power to order the other tenants to be added as co-defendants, where some only are sued; but where the whereabouts of other tenants are not known, the Court is right in not making other tenants parties; *Livingstone* v. *Feroz Din*, 107 P. R (1914): 203 P. L R. 1915

In a suit for specific performance of a contract, a stranger to the contract cannot be made a party to the suit.—*Luckumsey Ookerda* v *Fazulla*, 5 B 177. In *Mokund Lall* v. *Chotay Lall*, 10 C. 1061, it has been held that the principle laid down in 5 B. 177, is only applicable where from the plaintiff's case it appears that a third party, not a party, to the contract, has a distinct interest from that of the other parties to the contract, which interest is sought to be declared null and void. *See*, however, *Alagappa Mudaliar* v. *Sivarama Sundara*, 19 M 211.

Where the defendant accepted the *pattah* from, and executed a *muchlaka* to plaintiff in respect of his share, the plaintiff need not join his co-sharers as parties in a suit to enforce acceptance of *pattah* and enforcement of *muchlaka*.—*Purushattama* v. *Raju*, 11 M. 11.

Court's Power of Substitution.—Where the plaintiff prays for substitution of a person as heir of the defendant who has died, the judge should raise an issue as to whether the person is the heir of the deceased.—*Kanai Lall* v. *Sashi Bhusan*, 6 C. 777: 8 C. L. R. 117 A person before substitution should satisfy that he is the representative of the deceased; *Md. Husain* v. *Khusal*, 9 A. 131.

Or. I. r. 10, of the C. P Code gives very wide powers to a Court in the matter of substituting or adding a plaintiff. The power is, however, only to be exercised if the Court is satisfied that the suit was instituted through a *bona fide* mistake; *Gusaun Lal* v. *Ram Rakha Mal*, 50 I. C. 128.

It is not correct to substitute the assignee of the original plaintiff as the plaintiff on the record, the proper course being to add him as a party-plaintiff if he desires it —*Sushee Bhusan* v. *Muddon Mohun*, 2 C. L. R. 297.

A sued his brother for his share of the estate of their deceased father. *A* having been transported for life, his sons applied to be made plaintiffs on the ground that they had a joint interest with their father. *Held that* the sons were properly added as plaintiffs —*Byreddi* v. *Chinna*, 6 M. 331

Court's Power of Striking off Parties.—An order striking the name of a defendant off the record of a suit cannot be made under this section at a period subsequent to the first hearing of the suit —*Abbasi Begum* v. *Im-Dadijan*, 18 A. 53 *See* also, *Singa Reddi* v *Madava Rau*, 20 M. 360, p. 362; and *Nanak Chand* v *Durant*, 9 P. R. 1906 19 P. L. R. 1906, where it has been held that the Court has no power, of its own motion without application to strike out the name of one of the plaintiffs after the first hearing. *See* also, *Khader* v *Chotibibi*, 8 B. 616.

An application for striking out the names of certain defendants placed on the record as heirs of a deceased defendant and for substitution of the names of certain others as executors of the said deceased is an application under the section; *Syed Hossein Ali* v. *Abdur Rahim*, 7 C. W. N. 529.

Court's Power of Transposition of Parties.—Or. I, r 10 of the C P. Code authorizes the Court to make an order for transfer of a party from the category of the defendant to that of plaintiff, at any stage of the proceedings The power of the Court depends on the question whether the case is *sub judice*. The Courts have always been reluctant to place a narrow construction upon this provision of the law and to restrict the exercise of this discretionary power; *Debendra* v. *Narendra*, 24 C W. N. 110: 30 C. L. J. 417. But the Court should not make an order transferring a defendant to the category of plaintiffs, if the result of so doing would be to change the character of the suit; *Jagabandhu* v. *Haris*, 36 C. L. J 92·A. I. R. 1922 C. 459: 76 I. C. 915.

Under Or. 1, r. 10 (2) and s 107 C P. Code, the appellate Court has the power to transpose a respondent to the category of appellants in order to further the ends of justice; *Surjya Kanta* v. *Tarak Nath*, 44 C. L. J. 243: A I. R. 1927 C. 37.

A Court can under this section add parties to a suit as well as transpose a party from his position as *pro forma* defendant, and array him amongst the plaintiffs after amendment of the plaint.—*Pitambar* v. *Toolsee*, 7 W. R. 39 *Municipal Council of Kumbakonam* v. *Veeraperumal*, 28 M. L. J. 147: (1915) M. W. N. 143.

The Court has jurisdiction in an administration suit (if it be found that the original plaintiff has no right of suit) to make one of the defendants entitled to share, as party plaintiff. It is not necessary to find *bona fide* mistake for the Court to act under Or. I, r. 10 of the C. P. Code; *Bhimangowd* v. *Eswara Gowd*, 9 L. W. 79: (1918) M. W. N. 929: 49 I. C. 189.

Where in a partition suit, the plaintiff withdraws his claim for moveables after a preliminary decree by consent had been passed as regards the immoveable properties, and the Court subsequently allowed the transposition of some of the defendants as plaintiffs and allowed the suit to proceed regarding the moveables. *Held*, that the procedure adopted was correct and fell within the provisions of Or. I, r. 10; *Surampalli Ramamurthi* v. *Surampalli Reddi*, 12 L. W. 563.

It is true that the provision of s 32 of the Code of 1882, that the Court might make a plaintiff a defendant, and a defendant a plaintiff has been omitted from the present Code; but, it was omitted as redundant as the provision of Or. I, r. 10 (2) for striking out or adding parties is sufficient to cover the case of such a transposition, being, in effect, the striking one party off the side of the suit in which he had been placed and re-adding him in the opposite side; such transpositions are frequent in partnership cases; *Brojendra Kumar* v. *Gobinda Mohan*, 20 C. W. N. 752 (7 B. 167 and 20 B. 677 *referred to*).

In a suit for partnership accounts one of the defendants filed his written statement supporting the plaintiffs. He was made a plaintiff by order of the Court —*Muthia Chetti* v. *A. V. Subramaniem*, 18 C. 616.

Striking out Name of Party Improperly Joined.—The introducing a party who has no connection with the relief claimed in the plaint is an instance of such impropriety; *Rama Rao* v. *The Raja of Pittapur*, 42 M. 219, 49 I. C. 835.

" Who ought to have been joined."—Necessary parties are parties " who ought to have been joined," that is parties in whose absence no decree at all can be passed; *Kishen Prasad* v. *Har Narain*, 33 A 272; *Shaha Sahib* v. *Sadasiv*, 43 B. 575 Proper parties are those whose presence is necessary to enable the Court to adjudicate upon the matter in dispute more effectually and completely, *Shaha Sahib* v. *Sadasiv*, 43 B. 575: 51 I. C. 223; *Guruvayya* v. *Anandt*, 28 B. 11, 17, *Sri Mahant* v. *Board of Commissioners of Hindu Religious Endowments, Madras*, 51 M. L. J. 148: A. I. R. 1926 M. 927.

" Whose presence before the Court may be necessary."—A person whose presence is necessary for a complete and final decision of the question involved in the suit may be added as a defendant, though no relief may be claimed against him; *Khasi* v. *Sadashiv*, 21 B. 229

Misdescription of Defendant.—Where there is a misdescription of a defendant in the cause title of a suit, the Court has complete power to make the necessary correction without any regard to lapse of time; *Manni* v. *Crooke*, 2 A 296, *Saraspur Manufacturing Co.* v. *B. B. & C. I. Ry. Co.*, 47 B. 785: A. I R. 1923 B. 452 But where in a suit against a Railway Company, the plaint described the defendant as the " Agent " of the Railway Company, and where subsequently the plaintiff sought to amend the plaint by bringing the Company on the record. *Held*, that

it was not a case of misdescription and so no amendment should be allowed after the expiry of the period of limitation for the suit, *Agent, B. N. Ry.* v. *Behari Lal*, 52 C. 783. A I R 1925 C 716, *East Indian Ry. Co.* v. *Ram Lakhan*, 3 Pat. 230. A. I. R 1925 Pat. 37

"Questions involved in the suit."—The words "questions involved in the suit" in Or. I. r 10 do not mean all claims which may possibly be put forward by anybody to the property. Order I rr. 9 and 10, should be construed together. Where a Court directs the addition of parties under Or. I r. 10, the plaintiff must obey the order of the Court and cannot proceed with the suit as originally constituted Persons who, according to the plaintiff and the defendant, have no interest in the properties ought not to be directed to be made parties by the Court to a partition suit The question is one of jurisdiction and not discretion The High Court will interfere in revision and set aside the order in order to relieve a party from embarrassment; *Sitaramayya* v. *Ramappaya*, 5 L. W. 207: 39 I. C. 160.

"Questions involved in the suit" refer to questions as between plaintiffs and defendants, and not to questions which may arise between co-plaintiffs or or co-defendants *inter se*, *Har Narayan* v *Kharag*, 9 A. 447; *Vithu* v. *Bhenia*, 15 B 145; *Sri Mahant* v *Board of Commissioners of Hindu Religious Endowments, Madras*, 51 M L J 148 A I R 1926 M. 927; *Vythilinga* v *Sadasiva*, (1926) M. W N 575 A. I. R. 1926 M. 836.

Application to be Added as Party.—This rule does not contemplate any application to the Court by the person proposed to be added — *Mohindra Bhusan* v. *Shoshee Bhoosan*, 5 C. 882

A Court may in the exercise of its discretion under this rule add a party on his own application —*Rabbaba* v *Noorjehan*, 13 C 90

Power to Add Parties after Decree.—A suit for partition, even where the report of the Commissioner is confirmed, is a pending litigation until the Court signs the final decree, and an order directing a party to be added under this rule can be made in such a suit before it has actually terminated —*Jotindra Mohan* v *Bejoy Chand*, 32 C 483. See *Lakhmichand* v *Gulabchand*, 35 B 393

Powers of the addition of parties are exercisable even after a suit has been reinstated on an application under s 103, C P Code, 1882.—*Tikam Singh* v. *Thakur Kishore*, 18 A 188

It is not competent to a Court in a mortgage suit, to make a person who was not a party to the preliminary decree, a party to the final decree where such person should have been made a defendant before the previous preliminary decree; Or I, r 10, C. P. Code, refers to a stage of the proceedings not concluded by a decree, *Raghu Nath* v *Sheolal*, 13 N. L R. 69; 39 I. C. 849; dissented from in *Krishna Iyer* v. *Subramanya*, 46 M. L. J. 368. *Beni Madho* v *Yusuf Hasain Khan*, 26 O C. 317: 10 O. L. J. 232: 72 I. C. 1031.

Suit against a Dead Person.—When a suit is instituted against a person who was dead prior to such institution, the plaint cannot be amended by bringing his legal representative on the record, because a suit against

a dead man is a nullity from the first; *Ram Protap* v. *Gauri Shankar*, 25 Bom. L. R. 7 11: A. I. R. 1924 B. 109; *Veerappa* v. *Tindal*, 31 M. 86.

Appellate Court's Power under this Rule.—An Appellate Court has power to make an order under this rule, and in order to give effect to any of the provisions of the above rule it is necessary that it should in certain cases send back the case to the Court of first instance.—*Habib Baksh* v. *Baldeo Prosad*, 23 A. 167. An appellate Court has power to add necessary parties.—*Mammali* v. *Pakki*, 7 M. 428.

Under section 107 (2) of the C. P. Code, the appellate Court has the same powers as are conferred on Courts of original jurisdiction, including the powers given by this section; see *the cases noted under s.* 107.

An appellate Court has power to strike out the name of a party or to direct new parties, to be added to the suit, whether as plaintiffs or defendants—*Vasudeb Bal Krishna* v. *Salubai*, 10 B 227.

The Court on second appeal is competent to bring on the record persons who had been originally joined in the suit, but not in the lower appellate Court.—*Paya Malathil* v. *Kavamel Amina*, 19 M. 151. But see, *Chuni* v. *Lala Ram*, 16 A. 6; *see* also *Pachhauri* v *Ram Khilawan*, 37 A. 57.

In a second appeal pending in the High Court, the plaintiffs-appellants applied to transfer defendants Nos 4 and 5 with their consent to the category of plaintiffs for continuing the suit for their benefit as well as defendants 4 and 5 *Held*, that the application could not be granted, as, if granted, it would be necessary for the added plaintiffs to discard the entire evidence on the record and succeed on a case which was contradictory to the evidence put forward; *Jagabandhu* v. *Harischandra*, 36 C. L. J 92.

Where an appellate Court is of opinion that a person not a party to the suit should be a party to the record, its proper course is to remand the case to supply the defect of parties.—*Mihun Lal* v. *Intiaz Ali*, 18 A. 332.

Where a person other than the person alleged by the appellant claims to be legal representative of a deceased respondent, the Court should under the rule proceed to make such claimant also a party to the appeal.—*Athiappa* v. *Ayanna*, 8 M. 300 But in *Vithu* v. *Bhima*, 15 B. 145, following *Bhagirthibai* v. *Baya*, 5 B 264, and *Hara Narain* v. *Kharak Singh*, 9 A. 557, it has been held that where rival parties claim to be the representatives of a deceased plaintiff, they cannot all be admitted on the record as legal representatives, of the deceased plaintiff. In *Muhammad Husain* v. *Kassalo*, 10 A. 223 (F. B.), it has been held that when a plaintiff-respondent dies pending appeal, and a party on his own application is substituted as his legal representative, and subsequently the defendant-appellants apply to substitute another person as his true legal representative, the Court should, either before or at the hearing of the appeal, ascertain and determine for the purposes of the prosecution of the appeal which of such persons is the true legal representative of the deceased appellant *See* also, *Oula* v *Beepathe*, 7 M. 209.

Right of Appeal against an order under this Rule.—Under the present Code no appeal is allowed from orders passed under this rule; but the order passed under this rule may be objected to in an appeal from the final decree

that is, any error, defect or irregularity in an order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal; see *notes and cases under section* 105.

Orders passed under Or. I, r. 10 joining a person as plaintiff are in the discretion of the Court and are not appealable; *Bibijan Bibi* v. *Abdul Jabbar*, 36 I. C. 919.

Order if subject to Revision.—An order refusing to add a party as a defendant is not subject to revision under s. 115 But the High Court may interfere under s. 107 of the Government of India Act, 1915, if there is a denial of the right of fair trial; *Rabbaba* v. *Noorjehan*, 13 C. 90; *Kali Rai* v. *Tulsi Ram*, 4 Pat 723: A. I. R 1925 Pat 207· 93 I. C. 932.

Sub-rule (3)—A Person cannot be made a Plaintiff without his Consent.—No person can be added as a plaintiff unless he has previously consented thereto; and, if a person objects to be added as a plaintiff, the proper course is to make him a defendant —*Uma Sundari* v *Ramji Haldar*, 7 C. 242; 9 C. L R 13 A person cannot be made a plaintiff against his will —*Beharee Lall* v *Radha Nath*, 22 W R 229 But in *Tara Chunder* v. *Ameer Mundul*, 22 W. R 394, it has been held that persons might be made co-plaintiffs without their consent

Sub-rule (4)—Where Defendant is added Plaint should be Amended.—This rule does not contemplate that upon the addition of defendants to a suit, a cause of action different from that upon which the suit is founded, which may have accrued to the plaintiff against the added defendants, should be added to the claim All that the section requires is, that when a defendant is added the plaint should be amended in such manner as may be necessary The amendment therein referred to is not such an amendment as would add to or alter the nature of the suit as originally brought —*Hingu Lal* v *Baldeo Ram*, 24 A. 553

Amendment of plaint by bringing the proper party as plaintiff cannot relate back to date anterior to application to add party; and if such application was made after the right to sue was barred, such amendment should not be allowed, the mistake should be corrected before the limitation period of the suit expires, *Subbaraya* v *Vaithinatha*, 33 M 115; 7 M. L. T. 185

Sub-rule (5)—Addition of Plaintiff—Limitation.—In actions upon contracts, all persons, in whom the right to any relief exists should be joined as plaintiffs, and if the suit is originally brought by some one of them, and others are joined when the suit as regards them is time-barred, the whole suit must be taken as barred —*Kalidas Kevaldas* v. *Nathubhagvan*, 7 B. 221. (3 C. 26, *dissented from*); *Ram Sebuk* v. *Ram Lall*, 6 C. 815: 8 C. L. R. 457. (3 C · 26 *dissented from*) Followed in *Ramdayal* v. *Junmejoy*, 14 C. 791; *Fatmabhai* v. *Pirbhai Virji*, 21 B. 580, *Imamuddin* v. *Liladhar*, 14 A. 524. Referred to in *Lutchmanen* v. *Siva Prokasa*, 26 C. 349: 3 C. W. N. 100. But in *Shirekuli Timapa* v. *Ajjibal Narashim*, 15 B. 297, it has been held that when necessary parties are added after the expiry of the period of limitation, the suit should not be wholly dismissed where objection for want of parties was not taken by the defendant, nor any issue was framed on the point. *See also*, *Guruvayya*

v. *Dattatraya*, 28 B. 11; followed in *Bhola Ray* v. *Jung Bahadur*, 19 C. L. J. 5 (14 C. 400 *doubted*); *Pateshri Narain* v. *Rudra Narain*, 26 A. 528, and *Thakurmani Singh* v. *Dai Rani Koeri*, 33 C. 1079. See, *Srirangachariar* v. *Rama Sami*, 18 M. 189, in which it has been held that the whole suit is not liable to be dismissed. In *Jagdeo Singh* v. *Padarath Ahir*, 25 C. 285, it has been held that the rules laid down in the above cases do not apply to actions upon torts. *See* also, *Harihar Pershad* v. *Bholi Pershad*, 6 C. L. J. 383. In *Ram Krishna* v. *Ramabai*, 17 B. 29, it has been held that when application to make co-plaintiffs is made within time, but they are joined after the prescribed period of limitation, the suit is not time-barred, as the delay on the part of the Court in granting the application cannot prejudice the interests of the parties.

In a suit instituted within the prescribed period of limitation, the plaintiff assigned his interests, and the assignees were substituted on the record in the place of the original plaintiff after the said period had expired. *Held* that the suit was barred by limitation.—*Harak Chand* v. *Deonath*, 25 C. 409. (5 C. 720, *distinguished*). *See*, however, *Ram Nath* v. *Uma Churan*, 3 C. W. N. 756, and *Janhabi* v. *Brojomohini*, 7 C. W. N. 817.

Substitution of Plaintiff—Bona fide mistake—Limitation.—The change of parties as plaintiffs in conformity with the provisions of this section, does not give rise to such a question of limitation as arises upon the addition of a new person as a defendant under Or. I, r. 10.—*Subodhini Debi* v. *Ganoda Kanta*, 14 C. 400. Followed in *Ravji* v. *Mahadeo*, 22 B. 672 and in *Nistarini* v. *Sarat Chandra*, 22 C. L. J. 279: 20 C. W. N. 49. Distinguished in *Fatamabai* v. *Pirbhai*, 21 B. 580 and doubted in 19 C. L. J. 5 and in 33 M. 115.

Where persons are added as plaintiffs under this rule the period of limitation counts from the date when the suit was originally instituted.—*Behari Lal* v. *Ram Chand*, 149 P. R. (1907)

A suit to recover a debt due to a firm was brought in the name of the firm by its manager, but on the objection of the defendants a partner was subsequently joined as co-plaintiff *Held* that the case was one of misdescription and not of misjoinder, and therefore the provisions of s. 22 of the Limitation Act did not apply, and subsequent addition of a partner's name came within the provisions of this section —*Kasturchand* v *Sagarmal*, 17 B. 413. Followed in *Vadi Lal* v. *Sha Khushal*, 27 B. 157.

Addition, Substitution or Transposition of Parties—Limitation.—Where a *pro forma* defendant is subsequently made a plaintiff, s. 22 of the Limitation Act does not apply, as the added plaintiff is not a " new plaintiff "—*Nagendrabala* v. *Tarapada*, 8 C. L. J. 286: 13 C. W N. 186: 35 C. 1065. *See* also *Dwarkanath* v. *Monmohun*, 21 C. L J. 611: 19 C. W. N. 1269: 38 C. 342: 18 C. L. J. 3; 34 B. 91. But see, *Jibanti Nath* v. *Gokool Chundra* 19 C. 760; *Sundrammal* v. *Rangasami*, 18 M. 189, p. 192, and *Krishna* v. *Mekamperuma*, 10 M. 44.

Where a party is added on application, the addition must be deemed to have effect from the date of application; *South India Industrial Ld.* v. *Mothy Narasimha*, 52 M. L. J. 199: 25 M. L. W. 477: 100 I. C. 680: A. I. R. 1927 M. 468 (17 B. 29 *folld*; A. I. R. 1925 M. 487 *dissented from*).

The provisions of section 22 of the Limitation Act, 1877, do not apply to cases of persons who are brought upon the record as *pro forma* defendants.—*Mohamed Ishaq* v. *Sheikh Akramul Huq*, 12 C. W. N. 84.

A Court may, under section 32, C. P. Code 1882 add a party necessary to a suit, although it may be obliged by the Limitation Act to dismiss the whole suit on account of the claim being barred with regard to the party so added.—*Imamuddin* v. *Ladadhar*, 14 A. 524 *See* also, *Dari Bhagavanlu* v. *Tadepatri*, 33 M. 246, p. 249

There is no provision in either the C P. Code or the Limitation Act which says that a party cannot be added after his right of suit or liability to be sued (as the case may be) is barred by the provisions of the Limitation Act; *Shivubai Rajaram* v. *Shiddeswar Martand*, 45 B. 1009. 23 Bom. L. R. 405.

A suit was brought for partnership accounts Upon the objection of the defendant it was found that a necessary party defendant had been omitted, and he was added at a time when the suit against him was barred. *Held*, that the whole suit was rightly dismissed.—*Ram Dayal* v *Junmenjoy* 14 C. 791. *See* also *Ambica Charan* v *Taraichandra*, 18 C. W N. 464.

Where a relief was originally claimed against a party who had to be represented by some person, the proper representation of that party subsequently made has not the effect of adding a new defendant to the suit.—*Peary Mohon* v. *Norendra Nath*, 32 C 582 · 9 C W N 421 affirmed in 37. C 229 P. C *See* also, *Virchand* v. *Konde*, 17 Bom L R 685 · 39 B. 792.

Substitution of executor in place of the legal representative of a deceased testator, against whom the suit was originally brought, is not addition of a new defendant within the meaning of s 22 of the Limitation Act, 1877.—*Mohunt Pudmalall* v *Lukhmi Ram*, 12 C W N 8.

Where in a suit a person is added as defendant at the instance of the Court after the prescribed period of limitation, s 22 of the Limitation Act, 1877, bars the plaintiff's *remedy as against the added defendant.—Ramkinkar* v. *Akhil Chandra*, 35 C 519, F B. *See* also, *Imam Ali* v *Baij Nath*, 33 C 613, *Jagat* v. *Udit*, 20 I C 262 But see, *Guruvayya* v *Dattatraya*, 28 B 11 and *Pateshri* v *Rudra*, 26 A. 528 and *Khadir* v. *Rama*, 17 M. 12.

In a suit to recover the price of work done to the Government, a servant was originally made the defendant, and the Secretary of State was subsequently added as a defendant. *Held*, that for the purpose of limitation against the Secretary of State, the suit should be considered to have been instituted on the date when he was made a party.—*Mandardhar Aitch* v. *Secretary of State*, 6 C. W. N 218.

Held, by the Full Bench that it is competent to a Court sitting under s. 559, C. P. Code, 1882 (Or. XLI, r. 20), to add a person as respondent in an appeal, although the time within which an appeal might have been preferred as against such person has expired.—*Bindeshri Naik* v. *Ganga Saran*, 14 A. 154. *See* also, *Court of Wards* v. *Gaya Prasad*, 2 A 108, and *Ranjit Singh* v. *Sheo Prasad*, 2 A. 487.

Other cases.—A Revenue Court has power to add or dismiss parties under this section notwithstanding that the provisions of this section are not made applicable to the procedure of the Revenue Court, by N. W. P. Rent Act XVIII of 1878,—*Shib Gopal* v. *Baldeo Sahai*, 2 A. 264.

This section does not apply to the case of substitution, dismissed or addition of parties in divorce proceedings.—*Ramsay* v. *Boyle*, 30 C. 489.

11. The Court may give the conduct of the suit to such person as it deems proper. [S. 32, last para.]

Conduct of suit.

COMMENTARY.

This rule corresponds to the last para. of s. 32 of the old Code and has been taken from English Or. XVI, r. 39. The word "*person*" has been substituted for the word "*plaintiff*." The effect of the substitution is that the Court may now give the conduct of the suit to one of the plaintiffs or it may give the conduct of the defence to one of the defendants.

The general rule is that the conduct of the case should rest with the plaintiff, but the matter is in the discretion of the Court with which the Appellate Court should not interfere except on very strong grounds; *Re Swire*, 21 Ch. D. 647.

12. (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding; and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

Appearance of one of several plaintiffs or defendants for others.

(2) The authority shall be in writing signed by the party giving it and shall be filed in Court. [S. 35.]

This rule exactly corresponds to s 35 of the Code of 1882; "*where*" has been substituted for "*when*" in the beginning. Or. III, r. 1, provides for appearance through recognised agents and pleaders.

Where one of several representatives of a deceased joint-creditor applies for the execution of a decree, a general power-of-attorney is not necessary, but it is sufficient if the applicant is authorized to act for the other representatives —*Ambaram* v *Hemat Singh*, 2 Bom H. C 103.

13. All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived. [S. 34.]

Objections as to non-joinder or misjoinder.

COMMENTARY.

This rule corresponds to s. 34 of the Code of 1882 with some change. The words "*unless the ground of objection has subsequently arisen*" are important and they will be clearly understood when read with Or. VIII, r. 8, which says that any ground of defence which has arisen after the institution of the suit, may be raised by the defendant or plaintiff in his written statement; see, *Shyama Charan* v. *Mokshoda*, 15 C. W. N. 703 (704): 13 C. L. J. 481 (484). Misjoinder of causes of action is dealt with in Or. 11, r. 7.

Objections as to Non-Joinder or Misjoinder should be Taken at the Earliest Opportunity.—All objections as to non-joinder of parties must be taken at the very earliest opportunity. Where the defendants took such an objection at a very early stage, and the suit was barred when the parties were added as against them. *Held* that the suit might proceed as if it was not barred.—*Hazari Mal* v. *Bhawani Ram*, 5 A. L. J. 554: 30 A. 538; *Kaliyanna Goundan* v. *Tima Nicken*, 41 I. C. 527.

Objection for want of parties should be taken before the first hearing; *Raj Narain Bose* v. *Universal Life Assurance & Co.*, 7 C. 594 (603); and at the earliest possible opportunity.—*Mohini Mohun* v. *Bungsi Buddan*, 17 C. 580 (P. C). *See* also, *Purshottam* v. *Kala Govindji*, 26 B. 301; *Sitaramayya* v. *Ramappaya*, 5 L. W. 207: 39 I. C. 160.

An objection as to non-joinder of parties cannot be allowed to be raised after settlement of issues; *Kollichina Venkataramayya* v. *Gudavalli*, 25 I. C. 222.

Objections as to Non-joinder or Misjoinder should Not be Allowed to be Taken for the First Time in Appeal.—This section requires that all objections for want of misjoinder or non-joinder of parties should be raised at the earliest possible stage and cannot be raised in appeal; *Parmasiva* v. *Krishna*, 14 M. 498 (500); *Fakirapa* v. *Rudrapa*, 16 B. 119; *Purshottam* v. *Kala*, 26 B. 301; *Malaguri Garudiah* v. *Narayana*, 3 M. 359; *Tulsha* v. *Gopal Rai*, 6 A. 632, and *Hira Lal* v. *Ram Jas*, 6 A. 57; *Obhoy Gobind* v. *Hurry Churn*, 8 C. 277; *Kannu Kurup* v. *Sankata Varma Raja*, 44 M. 344: 40 M. L. J. 282. But in *Ghulam Kadir* v. *Mustakim Khan*, 18 A. 109, objection to non-joinder was allowed to be taken for the first time in appeal.

The objection as to non-joinder of parties is not essential, but merely formal, and weight should not be attached to it when it is first taken on second appeal.—*Moidin Kutti* v. *Krishnan*, 10 M. 322; *Boydonath* v. *Girish Chunder*, 3 C. 26; see *Dursun Singh* v. *Durbejoy*, 9 C. L. J. 623; *Bhaja Chowdhury* v. *Chuni Lal*, 5 C. L. J. 59.

An objection as to mis-joinder will not be allowed to be raised in second appeal even though it was raised in the pleadings but the objection was not pressed in either of the Courts below; *Kuppuswami* v. *Narasimha Iyer*, 21 M. L. T. 382: (1917) M. W. N. 333: 38 I. C. 715.

Waiver of Objection.—A defendant cannot be deemed to have waived the objection for want of parties by not having taken it before the first hearing. The expression "first hearing" in this section means the earliest opportunity which a defendant may have of raising any question as to want of parties.—*Imamuddin* v. *Liladhar*, 14 A. 524, p. 526.

Where the objection was not taken at the earliest opportunity, it must be deemed to have been waived; *Paramsiva* v. *Krishna*, 14 M. 498; *Purshottam* v. *Kala*, 26 B. 801; *Debi Saran* v. *Mahabir*, 7 I. C. 102. *See* also, *Annada Prasad* v. *Jogesh*, 23 I. C. 862; *Ahmedbhai* v. *Dinshaw Maneckji*, 13 Bom. L. R. 1061.

"Unless the ground of objection has subsequently arisen."—These words are new but the principle was acted upon previously; for instance, where, after the first hearing and before decree, a co-parcener or remainderman or reversioner is born, or where a woman (who is a party) is married to a man who is not party to the suit, or where adoption takes place after institution of suit; *Modhe* v. *Dongre*, 5 B. 609. *See* also, *Dhurm Das* v. *Shama Sundari*, 3 M. I. A. 229; *Hari Saran* v. *Bhubaneswari*, 16 C. 40.

ORDER II.

FRAME OF SUIT.

Frame of suit.

1. Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. [S. 42.]

COMMENTARY.

This rule exactly corresponds to s. 42 of the Code of 1882.

Object and Scope of the Rule.—This rule enjoins that every suit shall be so framed as to prevent further litigation on the subject-matter in dispute. See, *Lala Surja Prosad* v. *Golab Chand*, 27 C. 724 p. 761; it is the intention of the Legislature that all matters in dispute between the parties relating to the same transaction, should be disposed of in the same suit.—*Saral Chand* v. *Mohun Bibi*, 25 C. 371: 2 C. W. N. 201. The phrase " subjects in dispute," as has been fully explained in *Ramaswami* V. *Vythinatha*, 26 M. 760: 13 M. L. J. 448 signifies the jural relation between the parties to the suit, for the determination of which the suit is brought. The object of the rule is to require the plaintiff to bring forward his *whole* case as to the matter of litigation on the question of right involved in the suit and not to require him to unite all the causes of action which he may have against the defendant in respect of the *corpus* or subject-matter of the suit. Or. II, rr. 1 and 2 are not exhaustive of the law of *res judicata*.

This case has been followed in *Masilamania* v. *Thiruvengadam*, 31 M. 385, in which it has been held that where a person whose suit for recovery of property as reversioners on an alleged relationship to a person was dismissed, subsequently brought a suit for the same property as reversioner to the same person under a different kind of relationship, *held*, that the subsequent suit was barred and that the plaintiff was bound under this rule to frame his suit in which manner as to afford ground for a final decision as to his claim as reversioner and to prevent further litigation concerning it. The object of this rule is to require the plaintiff to bring forward his whole case as to the matter of litigation on the question of right involved in the suit. The expression " subjects in dispute " means the subject of litigation, that is the right which one party claims as against the other and demands the judgment of the Court. A plaintiff should always state in his plaint all grounds of attack on which he can claim the same relief against the same defendants: such grounds, may be cumulative, each entitling him to the relief claimed, or may be urged in the plaint in the alternative. The trial of the claim in the alternative in one suit would tend to avoid a multiplicity of suits; *Narendra Nath* v. *Abhaya Charan*, 4 C. L. J. 437: 11 C. W. N. 20: 34 C. 51 F. B.

Where a person claims as heir to a person, the "matter" within the meaning of the rule is heirship, and he is bound to include in one suit all the different grounds on which he bases his heirship, "as far as practicable". It will not be *practicable* to join in one suit the different grounds only when the evidence in support of one ground will be destructive of the other.

This rule is to be read with Explanation IV to s. 11 of the Code, which says that every ground which could or ought to have been urged in support of the claim actually made in the suit shall be deemed to have been adjudicated upon therein whether it was actually urged or not. Failure to frame the suit in such a manner as to afford ground for a final decision upon the subjects in dispute is punished by Explanation IV to s. 11 or by the next rule of this Order.

Joinder of Causes of Action.—Where a number of persons made defamatory allegation against the plaintiff, a suit against all of them to recover damages for defamation will not lie, unless it is proved that the defendants made those allegations acting together, as each publication of libel or slander is a distinct tort and a separate suit would lie against every person uttering and publishing the slander; *Digambar Das* v. *Bisweswar*, 41 I. C. 1 2.

Suit to include the whol claim.

2. (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

Relinquishment of part of claim.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Omission to sue for one of several reliefs.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation.—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action. [S. 43.]

Illustration.

A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906, and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.

COMMENTARY.

This rule corresponds to s. 43 of the C. P. Code of 1882 The important changes introduced in this rule are the substitution of the word "*relief*" for the word "*remedy*" in sub-rule (3) and the omission of the words "*obtained before the first hearing*" which occurred in the old Code after the words "*leave of the Court*" in the same clause. The words "*and successive claims arising under the same obligation*" have been added after the word "*performance*" in the explanation S. 34 of the Ceylon C. P. Act is very similar to this rule and its object and meaning have been explained in *Saminathan* v *Pana Lana*, 18 C. W N 617 P. C. noted below.

Object and Scope of the Rule.—This rule is founded on the principle that a man should not be vexed twice for one and the same cause; *Balmakund* v. *Sangari*, 19 A 383, *Umed Dholchand* v. *Pir Saheb*, 7 B. 134, 136), and is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action, different causes of action, even though they arise from the same transaction. The first part of the clause makes it incumbent on the plaintiff to include the *whole of his claim* which the plaintiff is entitled to make in respect of the cause of action, *i e*, one and the same cause of action. The second portion makes it incumbent on him to ask for the *whole of his remedies* The explanation is not intended to be an illustration of the foregoing provisions, but a substantive enactment making what otherwise would be independent causes of action, one cause of action for the purposes of the section; *Saminathan* v *Palaniappa*, 18 C W. N. 617 P. C : 41 I. A. 142, *Parmeshri Das* v *Fakira*, 2 Lah. L. J 466. 1 Lah. 457 · 59 I C 71 This rule is directed to securing the exhaustion of the reliefs in respect of a cause of action and not to the inclusion in one and the same action of different causes of action even though they arise out of the same transaction; *Rohini Nandan* v *Jadu Nandan*, 30 C. W. N 873 A I R 1926 Cal. 1022 97 I C. 73

Splitting of Claim.—This and the preceding rule are aimed at preventing multiplicity of suits in respect of the same cause of action. The object of the present rule is to "prevent further litigation" upon the "subjects in dispute." This rule requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the *same* cause of action He is not entitled to split his cause of action into parts and bring separate suits in respect thereof. If he omits to sue in respect of, or intentionally relinquishes, any portion of his claim arising from the same cause of action, he is precluded by this rule from suing again in respect of the portion so omitted or relinquished, though he may state in his plaint that he intends to bring a second suit in respect of the portion so omitted; *Maksud V. Nargis*, 20 C 322 But he cannot be said to have omitted to sue in respect of a portion of his claim unless he was, at some time before the institution of the suit, aware or informed of the claim or of the facts which would give him a cause of action; *Vasudevan* v. *Arunachala*, (1926) M. W N 94 · 93 I. C I., *Venkata* v. *Krishna Swami*, 6 M. 344; *Amanat* v. *Imdad Husain*, 15 C. 800; *Batul* V. *Munni Lal*, 32 A. 625. If he was aware of the claim and omitted to sue, he cannot sue again in respect thereof, even if the omission was accidental or involuntary; *Bazlor Rahim* v *Shamsunnissa*, 11 M. I A. 551.

Or. II, r. 2. C. P. Code, expresses the general intention of the legislature that a plaintiff shall not be permitted to split his cause of action in parts and bring separate suits in repect thereof. There is nothing in the above rule which compels a plaintiff to include in one and the same action different causes of action even though they arose from the same transaction. This is the general intention of the legislature and the second paragraph in the rule merely provides the penalty for non-compliance with the first paragraph of the rule; *Hardeo Singh* v. *Bhawani Singh*, (1921) Pat. 125: 60 I. C. 496.

An exception to this rule is to be found in Or. XXXIV, r. 14, which permits of a suit being brought for sale upon the mortgage where in a previous suit on the same mortgage, a simple money decree had been asked for and obtained, in spite of the provisions of Or. II, r. 2; *Indarpal* v. *Mewa Lal*, 36 A. 264, and the notes to Or. XXXIV, *post*.

Distinction between this Rule and Explanation IV of S. 11 (Res Judicata).—The maxim of the law upon which this rule as well as the rule of *res judicata* is based, is that no man ought to be vexed twice for one and the same cause, and the main object of both is to prevent multiplicity of suits. The principle of *res judicata* is that the matter which has been *once decided or deemed to have been decided* cannot be raised again; whereas this rule prescribes that the matter which could have been offered for the decision of the Court but was intentionally not offered or kept back and in consequence of the omission the matter could not be decided in the previous suit such matter cannot be separately sued in a subsequent suit. *The points of distinction have been fully and exhaustively dealt with under Explanation IV of s 11.*

Meaning of "Cause of action."—Test for Determining its Identity.—Cause of action has been already explained in s 20. The term "cause of action" as used in this rule means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.—*Salima Bibi*, v *Muhammad*, 18 A. 131. Followed in *Rahim Buksh* v. *Amiran Bibi*, 18 A. 219. *See* also, *Rajjo Kuar* v. *Debi Dial*, 18 A. 432; *Narsing Das* v. *Mongal Dubey*, 5 A. 163; *Musa Yakub* v. *Mani*, 29 B. 368: *Dan Dial* v. *Munna*, 36 A 564: 12 A L. J. 955 A cause of action arises when a legal right is infringed —*Ram Prosad* v *Sachi Dassi*, 6 C. W. N. 585 (588). See *Bande Ali* v *Gokul*, 34 A. 172 (174).

The "cause of action" is the cause of action which gives occasion for and forms the foundation of the suit, and if that cause enables a man to ask for a larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by dependant proceedings; *Mahammad Hafeiz* v *Muhammad Zakariya*, 49 I A 9 44 A. 121 A. I. R. 1922 P. C 23: 65 I. C. 79, *Pittapur Raja* v *Suriya Ram*, 8 M. 520: 12 I. A. 116.

The words "cause of action" may be statements of the wrong for which the plaintiff seeks redress. In England "cause of action" has been defined as every fact, which if traversed, the plaintiff would have to prove to entitle him to the relief he claims—in other words "cause of

action" has been interpreted as meaning a statement of all the facts which give rise to the plaintiff's right to relief.—*Sundar Jha v. Bansman Jha*, 33 C. 367: 10 C. W. N. 508, and *Haramoni v. Harichurn*, 22 C. 833.

To determine whether the suit is barred and the cause of action is the same, we have to look to the plaint or the facts relied upon to constitute the cause of action in the first suit; and if on those facts it was open to him to ask for the relief prayed for in the second suit, the latter would be barred. It is only when the cause of action is the same that Or. II, rr. 1 2 & 3 bar the suit; *Saliman Saib v. Hassain*, 38 M. 247. 25 M. L. J. 125; see also, *Naganada v. Krishna Murti*, 34 M. 97 p. 107; and *Ramaswami v. Vythinatha*, 26 M. 760, where it has been held that the real test is whether the cause of action and the transaction on which the two suits are based was the same and not whether the transaction was sought to be established in different modes or by different means.

The "cause of action" upon which the plaintiff may base various claims in one suit under Or. II, r. 2 does not depend upon the character of the relief for which he prays It refers to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour, to every fact which it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court. If the evidence required to support two claims is different in any material respect, the causes of action are different, *Kashi Nath v Rama Chandra*, 38 B. 144: 16 Bom. L R 454 *See* also, *Sonu Khusal v Bahinibai*, 40 B. 351: 18 Bom. L R 45.

One test which is valuable in considering whether the causes of action are identical is whether the evidence which would suffice to enable the plaintiff to obtain a decree in both suits is the same; *Mahomed Umar Khan v. Amtul Rahim Bibi*, 45 A. 376. 21 A L J 267

"In respect of the same cause of action."—A claim "in respect" of a cause of action is a claim founded on that cause of action. The difference between a claim "founded on" cause of action and a claim "arising out of a cause of action" seems to be more a difference of metaphor than a difference in the quality of the claim, *Subbaraya v. Rathnavelu*, 32 M. 830.

This rule requires that, if all rights arising out of the same cause of action are not sued for together, the portion abandoned cannot be separately sued for afterwards, but it does not enact a similar penalty for all rights under the same or similar titles, the right to sue for which, may require different issues to be tried and may arise under different dates and causes of action, and the defendants as to which may be either only one party or different parties altogether.—*Mothoor Mohun v Khemunkurre*, 5 W. R. (P. C.) 162: *Ramhurry v. Mothoor Mohun*, 20 W. R (P. C.) 540 See, *Sumeka Dasi v. Baikuntha*, 30 I. C 607.

Upon settlement of accounts between plaintiffs and defendants Rs. 3,085-6-9 was found due by the defendants, who gave the plaintiff an order on their agents to pay Rs. 2,500 and promised to pay the balance within a month. Plaintiff filed two suits—one for Rs. 2,500 and other for the balance of the debt. The lower Courts decreed both the claims. *Held* that the plaintiff had only one cause of action, and that decree in one of the suits must be reversed.—*Appasami v. Samasami*, 9 M. 279

Where a contract for the sale and purchase of goods is broken by the purchaser, in part by refusal to take delivery, and in part by refufal to pay for goods delivered, both breaches having occurred before any suit is brought, the vendor is debarred by Or. II, r. 2 from bringing two suits against such purchaser, his claim being one arising out of one cause of action and based on one and the same contract. The meaning of the words "cause of action" in this rule discussed and explained.—*Duncan Brothers & Co.* v. *Jeetmul*, 19 C. 372 (the view taken by Wilson, J., in 12 C. 339, approved). *See* also, *Murti* v. *Bholaram*, 16 A. 165. *See*, however, *Mandal & Co.* v. *Fazul Ellahie*, 41 C. 825.

Plaintiff sued the defendant for possession of a piece of land on which stood two palm trees, without asking any relief in respect of the trees. The suit was dismissed. He subsequently sued the same defendant for declaration of title to and possession of, the two palm trees. *Held* that the claim arose, out of the same cause of action as that in the former suit and was, therefore barred; *Maksud Ali* v. *Nargis Dye*, 20 C. 322. *See* also *Rangasami* v. *Krishna*, 22 M. 259; *Kali Kumar* v. *Aslam*, 20 C. W N. 163.

The plaintiff sued the defendant company for damages for having dismantled a building situate on certain land which was stated to belong to the plaintiff in certain undivided share The plaintiff assessed the damages as for the value of the plaintiff's share in the building but asked for no relief in respect of the possession of the said property. The Munsif gave the plaintiff a decree for damages which was confirmed on appeal. He subsequently sued the defendant company for recovery of separate possession of the land after declaration of his title thereto. *Held*, that the cause of action in the present suit was the same as in the former suit and that the plaintiff was by Or. II, r 2; C. P. Code, precluded from suing for the relief now claimed;—*Khardah Company, Ltd.* v. *Durga Charan*, 46 C. 640; 58 I. C. 636.

A usufructuary mortgagee, who never obtained possession, brought a suit against the mortgagor to recover the unpaid interest up to date of suit, and obtained a decree, which was satisfied by the sale of the judgment-debtor's property. Subsequently he sued for the principal, together with the residue of interest up to date of suit. *Held*, that as the cause of action to recover the principal accrued at the time when the former suit for interest was brought, the present suit was barred, *Hikmutulla* v *Imam Ali*, 12 A. 203. But see *Sri Chatlapa* v. *Balapa*, 7 B 446, and *Vashvant* v. *Vithal*, 21 B. 267, and *Badi Bidi* v. *Sami Pillai*, 18 M. 257.

According to the terms of the lease, the plaintiff sued to eject the defendant for non-payment of rent *Held*, that the plaintiff's subsequent suit for arrears of rent was barred, as the claim for possession and the claim for rent ought to have been enforced in the previous suit for possession; *Kashi Nath* v. *Nathoo*, 38 B 444: 16 Bom. L R. 454.

The plaintiff having obtained a decree against the defendant for the payment to her a monthly sum for her maintenance, subsequently sued to have it constituted a charge on certain land. *Held*, that the claim in both suits arose out of the same cause of action, and the second suit was barred; *Rangamma* v. *Vohalayya*, 11 M. 127, *Saminatha* v. *Rangathammal*, 12 M 285.

The plaintiffs sued the defendants for possession of certain land and trees standing upon the land, alleging that the defendants had interfered with their possession by wrongfully taking away the fruits. They subsequently sued for the value of the fruits upon those trees. *Held*, that as the cause of action, *i.e.*, the taking of such fruit was in both suits identical, the second suit was barred —*Debi Dial* v. *Ajaib Singh*, 3 A. 543.

Suits Based upon Non-existent Cause of Action or upon False Cause of Action, Whether Bar to a Suit on the True Cause of Action.—When a former suit is brought either on a non-existent cause of action or upon a false cause of action, that will not bar the institution of a suit on the true cause of action; *Dasarathy Naidu* v. *Palala Kumaramull Raja*, 24 M. L. T. 311: (1918) M. W. N. 427: 45 I. C. 969.

Distinct Causes of Action.—This rule does not bar a suit when the cause of action in the subsequent suit is different. It requires that every suit shall include the whole of the claim arising from the same cause of action *i.e.* the cause of action for which the suit is brought, not that every suit shall include every cause of action or every claim which the plaintiffs have against the defendant Therefore, where there is no identity of causes of action, the plaintiff is not bound to unite them in one suit.—*Pittapu Raja* v. *Suriya Rau*, 8 M. 520, P. C.; *Mahomed Riasat* v. *Hosani Banu*, 12 C. 157 (P. C.); *Ittaphan* v. *Manavikrama*, 21 M. 153; *Mullick* v. *Sheo Pershad*, 23 C. 821, 825, *Amanat* v. *Imdad*, 15 C. 800, *Hanuman* v. *Hanuman*, 19 C. 123: 18 I. A. 158; *Dampanaboyina* v. *Addalla*, 25 M. 736; *Musst. Ketki* v. *Dinabandhu*, 10 C. L. J. 83: *Md. Kamil* v. *Musst. Imtiaz Fatima*, 10 C. L. J. 297 P. C.; *Lallu Prasad* v. *Balu Lal*, 76 I. C. 218; Musst. *Bhag Jogin* v. *Sakhi Mahton*, 1923 Pat. 234.

Under Or. II, r. 2, every suit must include the whole of the claim arising from one and the same cause of action and it is not necessary that every suit shall include every claim or every cause of action which the plaintiff might have against the defendant. The test is, whether the cause of action in the subsequent suit is different from the cause of action in the earlier suit. If the answer be in the affirmative, the subsequent suit is not barred, even though it might have been open to the plaintiff to unite the cause of action with the cause of action in the prior suit; *Kulada Prasad* v. *Khudiram*, 37 C. L. J. 545: 27 C. W. N. 673: A. I. R. 1923 Cal. 371.

Where the plaintiff brings a suit for possession on basis of a sale-deed in his favour, he is not bound to ask in the alternative for damages or for the return of his purchase-money in case possession could not be given, the cause of action for the two reliefs being distinct. The cause of action for the former relief is the execution of the sale-deed, while for the latter, a breach of its terms. Therefore, a second suit for damages for breach of covenant is not barred by Or. II, r. 2; *Pattracharıar* v. *Alamelumangai*, 25 M. L. W. 11: A. I. R. 1927 Mad. 273: 100 I. C 40.

If the cause of action in the subsequent suit is different from that in the first suit, the subsequent suit is not barred under Or. II, r. 2, of the C. P. Code. What the rule requires is that every suit shall include the whole of the claim arising from one and the same cause of action and not that every suit shall include every claim or every cause of action which the

plaintiff may have against the defendant; *Maharajah of Cooch Behar* v. *Raja Mahendra Ranjan*, 34 C. L. J. 465.

The mere fact that the title to the property in dispute in two suits is the same and the property is also the same does not necessarily show that the causes of action in respect of the two suits are the same. It is not necessary that all the causes of action should be joined in the same suit, but the suit should include the whole claim arising out of the same cause of action, that is the cause of action for which the suit is brought; *Manmatha Nath* v. *Jagat Ram*, 59 I. C. 517.

The provisions of Or. II, r. 2, of the C. P. Code apply to bar those suits only in which the cause of action and the defendants are the same as in the previous suit. The rule would not apply to the case of two separate properties held under separate titles as the keeping of the plaintiff out of possession of these would give rise to distinct causes of action within the meaning of the rule; *Musst. Bindo* v. *Ramchandra*, 41 A. 583: 17 A. L. J. 658.

Where a plaintiff originally sued for a certain sum upon his *khatta-books*, an objection was taken by the defendant that he ought have sued upon a certain *hath-chitta* whereupon the plaintiff amended his plaint by suing for the amount admittedly due upon the *hath-chitta*, in addition to the amount he claimed upon his khatta books. *Held*, that when the plaintiff amended his plaint by suing upon the *hath-chitta*, his causes of action, which when the suit was originally framed, was distinct, became united and that there was no relinquishment in the original suit.—*Ram Tarrun* v. *Hossein Buksh*, 3 C. 785: 2 C. L. R. 385; (11 M. I. A. 468 *folld.*).

Plaintiff had paid the defendants a sum of money on contract under which defendants undertook to renew a Kanum, and had previously sued the defendants unsuccessfully for specific performance of that contract. Plaintiff now sued to recover the money. *Held*, that the suit was not barred by this rule.—*Parangodan* v. *Perumtoduka*, 27 M. 380.

Former suit brought by the plaintiff against her deceased husband's brother for non-payment of her dower, does not bar a subsequent suit for declaration of her right to possess for life the estate of her husband in accordance with a proved local custom, the causes of action in the two suits being quite distinct.—*Mahomed Riasat* v. *Hosani Banu*, 21 C. 157, P. C.

A plaintiff omitted to claim relief in a suit on an adjusted account which he subsequently claimed in a suit based upon a mortgage. *Held*, that the causes of action for the two suits being distinct, the omission to claim the relief in the earlier suit did not operate as a bar to the subsequent suit under this rule.—*Hanseraj Lakhmidas* v. *Lalji Anandji*, 28 B. 447.

The dismissal of a suit for possession by A, against B, on the ground that B held the property as a mortgagee, is no bar to a subsequent suit by A against B for redemption; *Jai Mal* v. *Ganesh Mal*, 4 Lah. 187: A. I. R. 1924 Lah. 143: 75 I. C. 528.

An agriculturist mortgagor can sue for an account upon a mortgage, without at the same time asking for redemption. Such a suit will not

The plaintiffs sued the defendants for possession of certain land and trees standing upon the land, alleging that the defendants had interfered with their possession by wrongfully taking away the fruits. They subsequently sued for the value of the fruits upon those trees. *Held*, that as the cause of action, *i.e.*, the taking of such fruit was in both suits identical, the second suit was barred.—*Debi Dial* v. *Ajaib Singh*, 3 A. 543.

Suits Based upon Non-existent Cause of Action or upon False Cause of Action, Whether Bar to a Suit on the True Cause of Action.—When a former suit is brought either on a non-existent cause of action or upon a false cause of action, that will not bar the institution of a suit on the true cause of action; *Dasarathy Naidu* v *Palala Kumaramull Raja*, 24 M. L. T. 311; (1918) M. W. N. 427: 45 I. C. 969.

Distinct Causes of Action.—This rule does not bar a suit when the cause of action in the subsequent suit is different It requires that every suit shall include the whole of the claim arising from the same cause of action *i e.*, the cause of action for which the suit is brought, not that every suit shall include every cause of action or every claim which the plaintiffs have against the defendant Therefore, where there is no identity of causes of action, the plaintiff is not bound to unite them in one suit.—*Pittapu Raja* v. *Suriya Rau*, 8 M. 520, P C ; *Mahomed Riasat* v. *Hosani Banu*, 12 C. 157 (P. C.); *Ittaphan* v. *Manavikrama*, 21 M. 153; *Mullick* v. *Sheo Pershad*, 23 C 821, 825, *Amanat* v *Imdad*, 15 C 800, *Hanuman* v. *Hanuman*, 19 C. 123. 18 I. A 158, *Dampanaboyina* v *Addalla*, 25 M. 736; *Musst. Kethi* v *Dinabandhu*, 10 C. L. J. 83 *Md. Kamil* v. *Musst. Imtiaz Fatima*, 10 C. L. J 297 P. C.; *Lallu Prasad* v *Balu Lal*, 76 I. C. 218; *Musst. Bhag Jogin* v. *Sakhi Mahton*, 1923 Pat 234.

Under Or. II, r. 2, every suit must include the whole of the claim arising from one and the same cause of action and it is not necessary that every suit shall include every claim or every cause of action which the plaintiff might have against the defendant The test is, whether the cause of action in the subsequent suit is different from the cause of action in the earlier suit If the answer be in the affirmative, the subsequent suit is not barred, even though it might have been open to the plaintiff to unite the cause of action with the cause of action in the prior suit; *Kulada Prasad* v. *Khudiram*, 37 C L J 545 27 C. W N. 673. A. I. R. 1923 Cal. 371.

Where the plaintiff brings a suit for possession on basis of a sale-deed in his favour, he is not bound to ask in the alternative for damages or for the return of his purchase-money in case possession could not be given, the cause of action for the two reliefs being distinct. The cause of action for the former relief is the execution of the sale-deed, while for the latter, a breach of its terms. Therefore, a second suit for damages for breach of covenant is not barred by Or II, r 2, *Pattrachariar* v. *Alamelumangai*, 25 M. L. W. 11: A I R. 1927 Mad 273 100 I. C. 40.

If the cause of action in the subsequent suit is different from that in the first suit, the subsequent suit is not barred under Or II, r. 2, of the C. P. Code. What the rule requires is that every suit shall include the whole of the claim arising from one and the same cause of action and not that every suit shall include every claim or every cause of action which the

advanced and damages for breach of the contract. Held, that Or. II, r. 2 did not bar the second suit; *Main Singh* v. *Allah Ditta*, 2 Lah. L. J. 304: 55 I. C. 630.

A filed a suit against B to redeem the land in dispute. The Court dismissed the suit, finding that the alleged mortgage was not proved. A then sued B for ejectment. *Held*, that the ejectment suit was not barred, the causes of action being essentially different.—*Naro Balvant* v. *Ram Chandra*, 13 B. 326. *See* also *Cuppa Nayudu* v. *Venkata*, 20 M. 82.

Plaintiff obtained a decree against the defendant for specific performance of contract of sale, in pursuance of which the price was paid and a conveyance executed. Plaintiff then sued for possession, when it was found that the sale did not bind the interest of the defendant's son and on grounds of convenience, plaintiff was awarded the value of defendant's share instead of a decree for partition. He now sued to recover the balance of the price paid. *Held*, that the suit was not barred by this rule.—*Venkatarama* v. *Venkata Subrahmanian*, 24 M. 27.

Where there was no determination at marriage whether the dower would be prompt or deferred, a suit brought during the lifetime of the husband for prompt portion of the dower will not bar a subsequent suit for recovery of the deferred portion; *Uma Begum* v. *Muhammadi Begum*, 33 A. 291.

One co-sharer suing another for exclusion from joint property and omitting to include in his claim a portion of the property of which he seeks possession, is not debarred by this rule from suing to have the joint property partitioned, including the portion omitted from the former suit, the causes of action in the two suits being different.—*Abdul Nasir* v. *Rasulan*, 20 C. 885

Where a plaintiff has sustained at the same time an injury in respect of his proprietary or permanent interest in an estate, and also an injury in respect of a temporary or leasehold interest in such estate, and files suits for redress in both causes of action, it cannot be said that the two causes of acion are identical.—*Upendra Lal* v. *Secretary of State*, 20 C. 716.

The dismissal of a former suit for cancellation of a document for non-payment of Court-fees, does not bar a second suit for declaration that the document was executed for nominal purposes and was not intended to take effect, since the causes of action in the suits are not the same —*Nagathal* v. *Ponnusami*, 18 M. 44.

A suit for divorce does not bar a subsequent suit for partition of joint property, as the causes of action of the suits are distinct; *Mang Pe* v. *Ma Lon Ma Gale*, 38 C. 629 P. C.: 21 M. L. J. 749: 13 Bom. L. R. 464; *see* also, *Gandia* v. *Sivanapa*, 38 M. 1162: 27 M L. J. 520.

When money is due on two or more bonds at the time of the institution of the suit, and the bonds appear to have been originally passed in respect of one claim, it is not incumbent upon the plaintiff to sue upon both bonds in one action, as each bond was a separate contract, and created a separate and distinct cause of action.—*Umed Dholchand* v. *Pirsaheb*, 7 B. 134. *See* also *Sesha Ayyar* v. *Krishna Ayyangar*, 24 M. 96 and *Anantanarain* v. *Savithri*, 36 M. 151. 22 M. L. J. 231.

Or. II, r. 2 clearly contemplates a separate suit in respect of each distinct cause of action; the rule, however, is subject to certain modifications, as set out in rr. 3, 4, 5; *Mullick Kefait* v. *Sheo Pershad*, 23 C. 821, p. 825.

A suit for possession of property from the execution-purchaser after a suit to set aside the execution sale is not barred, where it is found that at the date of the previous suit the plaintiff was not aware that the execution-purchaser had obtained possession.—*Ambu* v. *Ketlilamma*, 14 M. 23.

See *cases under heading " Distinct cause of action—Cases where subsequent suit not barred," post.*

Different Causes of Action Arising from the Same Transaction.—A number of causes of action may arise out of the same transaction, and this rule does not enjoin that they should all be included in one suit; *Payana* v. *Pana Lana*, 18 C. W. N. 617 P. C.: 41 I. A. 142.

Where a person agreed to purchase 10 bales of yarn and took delivery of 7 bales, and refused to accept the other 3 bales, a suit against him to recover damages for non-acceptance of 3 bales is no bar to a subsequent suit to recover the price of the 7 bales delivered. A claim for the *price* of goods sold is a cause of action of a different nature from a claim for *damages* for non-acceptance of goods pursuant to a contract, although arising under one and the same contract; *per* GARTH, C. J., in *Anderson* v. *Kalakarla*, 12 C. 39. In this suit WILSON, J., took a different view saying that the claims having arisen under the same contract, the cause of action was one and the subsequent suit was barred. In *Duncan Brothers* v. *Jeetmull*, 19 C. 372, the opinion of WILSON, J., was approved. These two cases show that all existing breaches of the same contract must be joined in the same suit; but they have been held not to apply to the case where there are separate contracts, though contained in the same instrument; *Yashvant* v. *Vithal*, 21 B. 267: *Mandal & Co.*, v. *Fazul* 41 C. 825. Where goods are delivered under separate orders, each order and delivery of goods is a separate contract and a separate cause of action, unless it is proved that all the goods were delivered as under a single contract; *Ahmed* v. *Fakir*, 1 Rang. 694: A. I. R. 1924 Rang. 145: 79 I. C. 755.

Suit Against one Debtor If a Bar to Suit Against Another Debtor.—Order II, r. 2, C. P. Code, applies only where the defendant in the subsequent suit was also the defendant in the previous suit. The rule does not apply when the subsequent suit is brought against a different defendant; *Kashi Bai* v. *Sheoram Khupchand*, 47 I. C., 896.

Omission to Sue or Relinquishment of Part of Claim.—The omission in a previous suit against one of several joint promisors is no bar to a subsequent suit against another joint promisor for the *portion so omitted*; *Ramanjulu* v. *Aramudu*, 33 M. 317.

Order II, r. 2, C. P. Code, is directed against two evils, the splitting of claims and the splitting of remedies. If a man omits from his suit a portion of his claim, he shall not afterwards sue in respect of it; if he omits one of his remedies he cannot afterwards pursue it; *Harnam Singh* v. *Bhola Singh*, 2 U. P. L. R. 108: 56 I. C. 966.; *Diwan Chand* v. *Ralla Ram*, 8 Lah. L. J. 381: A. I. R. 1926 Lah. 559.

The provisions of Or. II, r. 2, not only apply to the plaintiff in a suit, but also apply to the case of a defendant, who claims a set-off under Or.

VIII, r. 6. A defendant, therefore, who sets up a claim by way of set-off; cannot split it in half, and while enforcing a portion of it also bring a suit to enforce the remainder.—*Nawbut Pattak* v. *Mohesh Narayan*, 32 C. 654: 1 C. L. J. 364.

Although a party may be barred under this section from suing again in respect of the same cause of action, it is clear that it is only the remedy of suing which is barred. The right, whatever it might be, to which a party is entitled, still subsists. "To sue" in this section means to make a legal claim or to take legal proceedings against any person; it does not necessarily mean to file a suit by means of a plaint such as is referred to in the Code. Taking any legal proceedings in matters of any kind would be "to sue."—*Vajeram Sakerram* v. *Purshotumdas*, 7 Bom. L. R. 138.

Where two suits were instituted simultaneously, and one of such suits had been determined, then, assuming that the claims in such suits arose out of the same cause of action, and should have been included in one suit, this rule is no bar to the entertainment of the second suit; *Kaleshar* v. *Jagan Nath*, 1 A. 650. Referred to in *Murti* v. *Bholaram*, 16 A. 165.

Plaintiff's former suit to recover damages for the breach of a contract on the part of the defendant for not having made over possession to him of certain lease-hold properties, bars a subsequent suit to recover damages for the profits which had accrued due at the time of the institution of the first suit and for which he had omitted to sue.—*Sheo Sunkur* v. *Hridoy*, 9 C. 143 (6 C. 791 *followed*) Affirmed by the Privy Council, in 12 C. 482.

Held by the Judicial Committee that a subsequent suit brought by the appellants for specific performance of the agreement was barred by Or. II, r. 2. The agreement was the only cause of action in both suits brought by the appellants, and as in the former suit they had made it the basis of a claim for transfer of the estate, which they had in the former suit omitted to do —*Rangayya Goundan* v *Nanjappa Rao*, 24 M. 491 P. C.: 6 C. W. N. 17 P. C.

A suit by a reversioner against a transferee from a Hindu widow having a limited estate, to recover two out of three properties alienated to him, is a bar to a subsequent suit against him to recover the third; *Darbari* v. *Gobind*, 46 A. 822: A. I. R 1924 All 902: 80 I. C. 31.

A suit for redemption of two out of three plots comprised in one mortgage is a bar to a subsequent suit for redemption of the third plot; *Bhau Daji* v. *Pathlu*, 24 Bom. L. R 1157: A. I. R. 1923 Bom. 63: 73 I. C. 862.

A suit to recover money misappropriated by a manager of a joint estate, after a similar suit for other sums misappropriated by him, is barred; whether the omission was by mistake or not, it must be taken to have been relinquished —*Ganesh Chandra* v. *Ram Coomar*, 3 B. L. R. 365: 12 W R. 79. *See* also *Manohur Das* v. *Seetal Pershad*, 23 W. R. 418

Relinquishment of a portion of a claim by a guardian precludes a subsequent suit for the portion relinquished, by the minor, on attaining majority.—*Gopal Rao* v. *Narasingha Rao*, 22 M. 309.

A claim once abandoned as in excess of the jurisdiction of the Court in which the suit is filed, may be revived if the case is transferred to a Court

having jurisdiction over the entire claim, including the portion abandoned. —*Ram Lal* v. *Bhajahari*, 1 C. W. N. 32.

Where properties are situated in two or more districts, the institution of a suit in one district for recovery of property situated herein, bars a subsequent suit for property situated in another district, where the cause action in both the suits is the same The withdrawal of the previous suit without permission does not remove the bar; *Miaz Ahmed* v. *Abdu Hamid*, 30 A. 279.

The relinquishment by a plaintiff of a portion of the claim under Or. II, r. 2 (1), C. P. Code, applies primarily to relinquishment before institution of the suit. The rule has no application to any part of a dismissed claim abandoned in appeal. No such abandonment can affect the jurisdiction of the appellate Court; *Sheikh Nur Khan* v. *Shaikh Rahim*, 54 I. C. 655.

Order II, r. 2, C. P. Code, does not debar a plaintiff from including in his claim certain additional profits omitted in a previous suit under a misapprehension that the profits were paid annually and not, as was subsequently ascertained to be the fact, half-yearly; *Babu Nihal Singh* v. *Musst. Najuban*, 4 U. P. L. R. 16: 65 I. C. 585.

Effect of Relinquishment of Claim.—The statement in a plaint was: " I claim Rs. 1,191 as due to me but I shall be satisfied with a decree for Rs. 700." *Held* that though his relinquishment of Rs. 491 was based on the supposition that Rs. 1,191 was due to him he ought not to be tied down to such relinquishment when, as a matter of fact, what is found due to him is less than Rs. 1,191, provided he does not get more than Rs. 700; *Sinnathambi* v. *Sellam*, 8 M. L. T. 436.

Omission, Accidental or Deliberate.—Omission to include the whole claim in the former suit does not bar a second suit, where the plaintiff was not aware of his right when he brought the first suit.—*Amanat Bibi* v. *Imdad Husain*, 15 C. 800 (P. C); *Ram Khelawan* v. *Jaskaran*, 21 O. C. 307: 1 U. P. L. R. 19. *See* also *Ambu* v. *Ketlilamma*, 14 M. 23, and *Mariathodi* v. *Appu*, 15 M. 296, in which it has been held that the words " omit to sue " must refer to an omission which might have been avoided, not to an omission to claim that which a party could not know he was entitled to. The P. C. case was followed in *Batul Kunwar* v. *Munni Lal*, 32 A. 625: 7 A. L. J. 738; and in *Gora Chand* v. *Basanta Kumar*, 15 C. L. J. 258. *See* also *Lachman Singh* v. *Sanwal Singh*, 1 A. 543. But where the omission was deliberate, the subsequent suit will be barred; *Abdul Hakim* v. *Karan Singh*, 37 A. 646: 13 A. L. J. 929: 30 I. C. 951.

The words " if a plaintiff omits to sue or intentionally relinquishes any portion of his claim, he [illegible] ect of the portion so omitted or relinquished, [illegible] involuntary omission as well as acts of delit [illegible] *Ruheem* v. *Shumsoonnissa Begum*, 8 W. [illegible] Followed in *Syed Abdulla* v. *Hurkishen Singh*, 2 C. L. J. 490.

Where a person alleging to be the heir of another sues for the recovery of a portion of the estate from another alleged to be in wrongful possession of the same, the omission to sue for the remainder operates as a bar to a subsequent suit for the recovery of the same; *Bhadmāl Sheo Lal* v. *Zumkari*, 65 I. C. 338.

Order II, r. 1 of the C. P. Code refers to a case where there has been a suit in which there has been an omission to sue in respect of a portion of the claim and a decree has been made in that suit. In that case a second suit in respect of the portion so omitted is barred; *Upendra Narain* v. *Raja Janaki Nath*, 45 C. 305: 22 C. W. N. 611: see also, *Kali Kumar* v. *Aslam*, 20 C. W. N. 163: 33 I. C. 139.

As to the effect of omission by mortgagee to ask for both the remedies, *viz.* sale of hypothecated property and personal decree against the mortgagor, see *Gulam Husain* v. *Muhammadalli*, 31 B. 540.

Even an accidental or involuntary omission of a portion of claim is covered by this rule; *Janardan* v. *Sahib Prosad*, 43 C. 95: 20 C. W. N. 475.

Exceptions to the Rule Against Splitting of Reliefs.—Sub-rule (3) provides that where a person entitled to more reliefs than one in respect of the same cause of action omits, except with the leave of the Court, to sue for all such reliefs, he cannot afterwards sue for any reliefs so omitted. Or. XXXIV, r. 14 is an exception to this rule, because under Or. XXXIV, r. 14, a suit by a mortgagee to recover the mortgage debt from the mortgagor personally does not bar a subsequent suit by him for sale of the mortgaged property; *Indar Pal* v. *Mewa Lal*, 36 A. 264: 23 I. C. 429.

Omission to Sue for One of Several Reliefs.—When a person is entitled to more than one relief in respect of the same cause of action, he may sue for all the reliefs or he may sue for one or more of them and reserve his right, with the leave of the Court, to sue for the rest; *Pestonji* v. *Abdool*, 5 B. 463. But if no such leave is obtained, he will be precluded from suing for any reliefs so omitted, *Abdul Hakim* v. *Karam Singh*, 37 A. 646: 30 I. C. 951. His subsequent suit will not, however, be barred if the right to the relief in respect of which it is brought did not exist at the date of the institution of the former suit; *Piari* v. *Khiali Ram*, 3 A. 857. Owing to the omission of the words " obtained before the first hearnig, " which occurred after the words " the leave of the Court " in the corresponding s. 43 of the old Code, it is now competent for the plaintiff to ask for and obtain the leave at any stage of the suit.

Where the plaintiff, without the leave of the Court, sued the defendant for recovery of rent only, where it was competent for him under the terms of the lease to sue both for arrears of rent and also for possession on failure to pay the rent every year, it was held that he could not afterwards sue for possession, *Subbaraya* v. *Krishna*, 6 M. 139. So, where the plaintiff first sued the defendant for specific performance of a contract to sell immoveable property, and then sued him for possession of the property agreed to be sold, it was held by the Madras High Court that the subsequent suit for possession was barred; *Narayana* v. *Kundasami*, 22 M. 24. But in *Nathu* v. *Budhu*, 18 B. 537; *Krishnaji* v. *Sangappa*, 27 Bom. L. R. 42: A. I. R. 1925 Bom. 181, it was held that the subsequent suit for possession was not barred. Similarly, where X agrees to sell his property to Y, and then enters into a contract to sell it to Z, and Y sues X for a permanent injunction restraining him from selling the property to Z, and the suit is dismissed. It was held that the dismissal of this suit is no bar to a subsequent suit by Y against X for specific performance of the contract; *Sardari Mal* v. *Hirde Nath*, 6 Lah. 384.

Explanation.—The history of the Explanation is this: Under Act VIII of 1859, it was decided that arrears of rent of successive years are several and distinct causes of action in respect of which a plaintiff may institute separate suits. *See*, 2 W. R. (Act X of 1859), 31; this decision was followed in 17 W. R. 380, and 24 W. R 326. Then, in s. 43 of Act X of 1877, the Explanation with the illustration was added, whereby the above decisions were overridden. Subsequently, the Explanation with the illustration was reproduced in s. 43 of Act XIV of 1882 without any alteration in the law.

In Or. II, r. 2, the Explanation has been reproduced, with the addition of the words, "*successive claims arising under the same obligation.*" The added words have only given *express* recognition to the decision in 6 C. 791, *Tarak* v. *Panchu.*

The Explanation is not int [illegible] -sections (1), (2) and (3), but a substantive [illegible] and a collateral security *for its performa* [illegible] purposes of the rule; otherwise they would be two independent causes of action. See *Payana* v. *Pana Lana*, 18 C. W. N. 617 P. C.: 41 I. A. 142. In *Kishan Narain* v. *Pala Mal*, 4 Lah. 32, 34: 50 I. A 115: A. I. R. 1922 P. C. 412: 72 I. C. 187, their Lordships of the Privy Council observed: "The explanation shows that a personal claim for the mortgage money under a mortgage and the enforcement of the security for the debt are to be regarded as the one and the same cause of action. That provision is in marked distinction to the law of this country, where a mortgagee is at liberty to appoint a receiver under his deed to sue for the debt and to take proceedings for sale or foreclosure independently and at the same time. It is important, therefore, in considering the effect of the Code, to bear in mind that its obvious intention is to establish a rule of law different from that accepted here."

Successive Claims Arising under the Same Obligation Constitute a Single Cause of Action.—The words "successive claims arising under the same obligation" have been added to the Explanation for the purpose of giving express recognition to the decision in 6 C. 791 (*Tarak* v. *Panchu*), where it was held that a claim *in respect of all arrears of rent constitutes a* single cause of action.

It is true that the scope of the identity of the cause of action has been extended by the addition of the Explanation, but only in so far as it supersedes those cases in which it was held that a suit on a collateral security given for a debt would not bar a suit for the debt itself. The *meaning of* this rule and the explanation has been fully explained in *Mandal & Co.* v. *Fazul Ellahi*, 41 C. 825 pp. 830-835.

Distinct Causes of Action—Cases where Subsequent Suit Not Barred.

First Suit for Possession, Subsequent Suit for Mesne Profits.—Claims for the recovery of possession of immoveable property and for mesne profits are distinct claims, and separate suits will lie in respect of each claim.—*Lalessor Babui* v. *Janki Bibi*, 19 C. 615: followed in *Ponnammal* v. *Rama Mirda*, 38 M. 829. 28 M. L. J. 127: 17 M. L T. 125: (1915) M. W. N. 180 F. B.; *Ram Chandra* v. *Ladha*, 26 Bom. L. R. 288. A. I. R. 1924 Bom. 368: 80 I. C. 259. *See* also, *Tiruppati* v. *Narasimha*, 11 M. 210; followed in *Gutta Saramma* v. *Maganti*, 31 M. 405. But see, *Lalji Mal* v. *Hulasi*,

8 A. 663; *Venkoba* v. *Subbanna*, 11 M. 151; *Mewa Kuar* v. *Baharasi Prosad*, 17 A. 533; *Debi Dial* v. *Ajaib Singh*, 8 A. 543; *Ganesh Ram* v. *Mohesh Ram*, 13 C. W. N. 669; *Rukminibai* v. *Venkatesh*, 31, B. 517; *Miyan Khan* v. *Surfaraz Khan*, 60 I. C. 65; similarly, a suit for mesne profits is not a bar to a subsequent suit for possession; *Monohur Lal* v. *Gowri Sunkur*, 9 C. 283; *Tirupati* v. *Narasinha*, 11 M. 210. On the other hand, it has been held by the Allahabad High Court, in *Mewa Kuar* v. *Banarsi Prasad*, 17 A. 533, that a suit for possession is a bar to a subsequent suit for mesne profits accrued due prior to the date of the suit; but such a suit is not a bar to a suit for mesne profits accrued due subsequent to the suit for possession; *Sheo Kumar* v. *Naraindas*, 24 A. 501.

After recovery of possession in execution of decree under s. 9 of the Specific Relief Act (I of 1877), plaintiff sued to recover mesne profits for the time during which he was out of possession. *Held* that the suit was not barred; *Sheo Kumar* v. *Narain*, 24 A. 501; *Thavasi* v. *Arumugam*, 30 M. L. J. 326.

A prior suit for possession does not bar a suit for mesne profits due for a period subsequent to the institution of the prior suit. The cause of action for such mesne profits is one which has accrued subsequent to the suit for possession; *Equitable Coal Company, Ltd.* v. *Bagala Sundari*, 71 I. C. 972

(b) Suits for Arrears of Rents of Successive Years.—A suit for arrears of rent of previous years after a suit for rent of subsequent year is barred.—*Taruck* v *Panchu*, 6 C. 791; approved in *Adhirani* v. *Raghu*, 12 C. 50. *See* also, *Madho* v *Murli*, 5 A. 405; *Balaji* v *Bhikaji*, 8 B 164; *Alagu* v. *Abdoola*, 8 M. 147; *Shanmugam* v. *Syed Gulam*, 27 M. 116 In *Rajan Eswara Dass* v. *Venkatorover*, 21 M. 236, it has been held that this does not preclude him from adopting any other remedy the law gives him to enable him to recover his rent, as for instance, by distraint under the Rent Act. In *Sudduruddin Ahmed* v. *Bani Madhab*, 15 C. 145 (F. B.), it has been held, that the dismissal of a suit for rent at an enhanced rate is no bar to subsequent suit for rent at the rate originally fixed (9 C. 919 *overruled*). In *Gunga Prasad* v. *Dig Bijai Singh*, 18 I C 288, it has been held that this rule does not apply where rent was suspended but due at the time of institution of prior suit.

The claim for rent of several successive years constitutes one whole claim in respect of the cause of action even though the claim for one year be taken to have been extinguished by satisfaction and subsequently revived by cancellation of such satisfaction; *Sayed Abdulla* v. *Hurkishen*, 2 C. L. J. 490.

A plaintiff who has obtained a decree for an abatement of rent may afterwards sue for refund of excess rent paid, notwithstanding that he might, if he had chosen, have included this claim in his suit for abatement of rent *Okhoy Koomar* v *Mahatap Chunder*, 5 C. 24.

Deposit of rent under s 61, B. T Act (VIII of 1885), is equivalent to part payment Notice of deposit under s 63 of the Act does not give a fresh cause of action in respect of the balance then due In a suit for such balance, the landlord is bound to include a claim for all arrears of rent due at the time of the institution.—*Atul Krishna* v. *Nripendro Narain*, 1 C. L. J. 114.

Where a landlord has an alternative remedy, either to treat a sum as rent and to recover it as such, or to maintain a suit for damages, the mere fact that he adopted one of these courses in a previous litigation does not debar him from following a different and alternative course in a subsequent litigation; *Banku Behary* v. *Gopal Chunder*, 14 C. L. J. 589.

A suit to eject a tenant holding under a lease does not bar a subsequent suit to recover arrears of rent under the terms of the lease. The claim for rent is a distinct cause of action from that for recovery of possession, *Subraya* v. *Rathinavelu*, 32 M. 330; *Nandan Singh* v. *Ganga Prosad*, 37 A. 512.

In a prior suit the lessor had sued the lessee for rent and obtained a decree. Subsequently the lessees had neglected to pay the cesses due on the land and the lessor was compelled to pay the same. In a subsequent suit by the lessor for recovery of the cesses so paid, *held* that the subsequent suit was not barred by Or. II, r. 2, C. P. Code, *Mahendra Nath* v. *Abinas Chandra*, 27 C. W. N. 521. A. I. R. 1923 Cal. 615.

(c) Declaratory Suits.—Where a previous suit for declaration of title and confirmation of possession has been dismissed for want of prayer for possession, a subsequent suit for declaration of title and for possession is not barred.—*Jibunti Nath* v. *Shib Nath*, 8 C. 819: 10 C. L. R. 537, followed in *Nonoo Singh* v. *Anund Singh*, 12 C. 291; and in *Mohan Lal* v. *Bilaso*, 14 A. 512. *See* also, *Komolay Kaminy* v. *Lokenath*, 8 C. 825-*note*: 11 C. L. R. 183, *Ram Sewak* v. *Nakched*, 4 A. 261, *Tulsi Ram* v. *Ranga Ram* 1 A. 252; *Darbo* v. *Kesho Rai*, 2 A. 356. *See* also, *Sarasuti* v. *Kunj Behari*, 5 A. 345. *Suliman* v. *Hassan*, 38 M. 247: 25 M. L. J. 125; *Bandi Ali* v. *Gokul Misser*, 34 A. 172. But *see*, 11 M. 127, 10 M. 347, 12 M. 285, 22 M. 259, 6 M. L. J. 51.

Although in a title suit there may be a claim in the alternative for a right of way, it may also be left to a second suit. Therefore the fact that the right of way was not claimed in a previous title suit would not bar a suit for a declaration of a right of way either by the rules of *res judicata* or by the provision of Or. II, r. 2, C. P. Code, *Kalachand* v. *Jotindra Nath*, 57 I. C. 852.

A suit for possession of property will not be barred under Or. II, r. 2, C. P. Code by reason of the dismissal of a previous suit for declaration and injunction restraining defendants from disturbing plaintiff's possession on account of the failure of the plaintiff to prove possession, *Aiyanar Raja* v. *Alagar Raja*, 52 I. C. 434.

A declaratory decree for accounts only, does not bar a subsequent suit for recovery of money and other debt that may be found due by the defendant to plaintiff on an adjustment of accounts.—*Kalidhun* v. *Shiba Nath*, 8 C. 483: 11 C. L. R. 57. *See* also, *Gobind Mohun* v. *Sheriff*, 7 C. 169.

A former suit for a mere declaration of title bars a subsequent suit asking for consequential relief (injunction); *Sardar Singji* v. *Ganpat*, 14 B. 395.

(d) Suits for Damages.—A decree for damages for wrongful dismissal bars a subsequent suit for wages, for the two months next succeeding the date of the first suit.—*Simpson* v. *Cleghorn*, 6 C. L. R. 91.

A person whose property had been wrongly attached sued for a declaration that the property was his and not liable to attachment and obtained a decree. Subsequently, he sued to recover damages for wrongful attachment. *Held*, that the subsequent suit was not barred by Or. II, r. 2, C. P. Code, as although he could have joined a claim for damages with his suit for a declaration he was not bound to do so; *Maika Lal* v. *Nalir Ahmed*, 7 O. L. J. 310: 55 I. A. 657.

A suit for damages for wrongful detention of a cart and bullocks seized in execution of a decree against a third party, is barred after a decree in a former suit for value of the same property; *Punju* v *Oodey*, 18 W. R 337.

A suit for damages for wrongfully taking away cattle after suit for value of the same cattle is barred.—*Mohubut* v. *Shoorendro*, 4 W. R., S. C. C. Ref., 20.

(e) Mortgage Suits.—A mortgagee sued the mortgagor for the principal, interest and also for sale of the mortgaged property in the Court within the jurisdiction of which the defendant resided. That Court dismissed the suit so far as it related to the property and the claim for principal, but awarded the interest claimed against the defendant personally. Subsequently the mortgagor sued in the Court, within the jurisdiction of which the property was situate, for recovery of the principal by sale of the mortgaged property. *Held* that the second suit was not barred —*Narasinga Rau* v *Venkatanarayana*, 16 M 481 *See* also, *Girish Chunder* v *Ramessuree*, 22 W R 32 But see, *Bungsee Singh* v. *Soodist Lall*, 7 C. 739 · 10 C L. R 263.

A mortgage for a term of two years executed in 1904 provided for realisation of interest alone by the mortgagee by suit. The interest was in arrears after 1905. The mortgagee instituted a suit in 1908 for the interest then due reserving the right to sue for the principal and future interest The suit was decreed. In 1914 he instituted a suit for the principal and interest still due *Held* that the suit was barred under Or 11, r 2, C P C., *Kishan Narain* v *Pala Mal*, 44 M L J 123 . 27 C W N 802 P C. . 38 C L. J 126 P C (49 I A 9 *folld*)

After a suit by a mortgagee for declaration of his lien over the mortgaged properties, a second suit by him against certain attaching creditors of his mortgagor for a declaration of his lien over certain surplus revenue sale-proceeds, of some of the mortgaged properties, realized previously to the institution of the first suit, was not barred, *Kristo Dass* v. *Ram Kant*, 6 C 142

It is not competent to the holder of two mortgages on the same property from the same person, to maintain a suit on the latter only for sale of the property subject to the prior mortgage —*Keshavaram* v *Ranchhod*, 30 B. 156 Ref. to in *Dhondo* v. *Bhikaji*, 39 B 138, *Hari Narain* v *Kusum Kumari*, 37 C. 589; *Gobinda* v *Lala Harihar*, 14 C. W. N. 1053. But see, *Sundar Singh* v. *Bholu*, 20 A. 322, and *Gobind* v *Harihar*, 38 C. 60.

Where there has been a suit between an agriculturist mortgagor and his mortgagee for account merely, a subsequent suit for possession on payment of the money declared to be due is barred —*Bhau Balaji* v *Hari Nilkantrav*, 7 B. 377. But see, *Lalu Chand* v. *Giriappa*, 20 B. 469.

Where a mortgagee obtains a decree for possession on the basis of the mortgage, no further suit for possession could be obtained unless it could be shown that possession had been taken under the decree and the Judgment-creditor has been subsequently dispossessed; *Har Chand Singh* v. *Narain Singh*, 67 I. C. 281.

A mortgagee at first sued for foreclosure, but the suit was dismissed on the ground that he was not entitled to such remedy until the expiration of the mortgage term. He subsequently sued to recover his money by enforcement of lien against the mortgaged property *Held* that the second suit was not barred —*Piari* v. *Khiali Ram*, 3 A 857.

A previous unsuccessful suit by a usufructuary mortgagee for recovery of his mortgage money is not a bar to subsequent suit by him for possession of mortgaged property.—*Raghava Chariar* v. *Seshadri Iyengar*, 15 M. L. J. 374. *See* also, *Shibu Bera* v *Chandra Mohun*, 3 C. L. J. 81-*n*.

A mortgagee is not debarred by Or. II, r. 2, C. P Code, from suing for the possession of the mortgaged property on the strength of a stipulation conferring upon him the option to sue for interest or for possession in the event of the mortgagor's failure to pay interest at the stipulated time, because on the occurrence of previous default, the mortgagee sued only for interest and not for possession; *Parmeshri Das* v *Takira*, 2 L J. 466: 1 L. 457: 59 I C 71 *See* also *Budha Khan* v *Suleman*, 71 P. W. R. 1917: 41 I. C. 576

The usufructuary mortgagee of certain land gave a lease of it to the mortgagor, the latter hypothecating the land as security for payment of the rent. Arrears of rent accruing, the mortgagee sued the mortgagor for the same in the Revenue Court, and obtained a decree. Subsequently he sued in the Civil Court to recover the amount of such decree by the sale of the land *Held*, that the second suit was not barred, *Banda Hasan* v. *Abadi Begum*, 4 A 180. Followed in *Imami Begum* v. *Gobind Prasad*, 4 A. 318 *See* also, *Chuni* v *Banaspat*, 9, A. 23, *Pindi* v. *Lal Chand*, 36 I C. 209.

Under a mortgage executed in 1902, the principal sum borrowed was Rs 1,200 and it was payable in instalments of Rs. 100 on default of payment of any one instalment the whole of the balance was to be paid at once. In the years 1903 and 1904, the mortgagors paid Rs 44 only. In 1905, the plaintiffs filed a suit to recover the amount of the first two instalments and obtained a decree In 1917, plaintiffs (mortgagees) filed a suit for recovery of the remaining instalments with interest *Held*, that the suit was barred by Or II, r. 2, C. P Code; *Shrinivasa* v. *Chambasapa Gowda*, 25 Bom. L. R. 203: 72 I. C. 290 (20 Bom L R. 773, 37 A. 400; 43 A. 671 *folld.*; 39 M. 981 *dissented from*).

The obligee of a mortgage-bond sued for money and enforcement of lien; the mortgaged property was in possession of a person at an execution sale, but he was not made a party. *Held*, that a subsequent suit against the purchaser to make the property liable was not barred, *Baharaichi* v. *Surju*, 4 A. 257.

A plaintiff who seeks to redeem a mortgage or specific lease and fails in such a suit, because the mortgage or lease is not proved, is not thereby precluded from seeking to redeem the same property or a portion thereof

from another specific mortgage or to eject on the strength of his title, the person in possession.—*Ramaswami* v. *Vythinatha*, 26 M 760. Followed in *Thrikaikat* v. *Thiruthil*, 29 M. 153 F. B.: 16 M. L. J. 48; see *Ram Sahai* v. *Ahmadi Begum*, 33 A. 302; *Parambath* v. *Puthen*, 28 M. 406; *Maung Kyaw* v. *Magauk*, 8 Bur. L. T. 101: 27 I. C. 732.

A usufructuary mortgagee, who never obtained possession, sued the mortgagor to recover the unpaid interest up to date of suit and obtained a decree which was satisfied by the sale of the judgment-debtor's property. Subsequently he sued for the principal and residue of interest up to date of suit. *Held*, that the second suit was barred; *Hikmutullah* v. *Iman Ali*, 12 A. 203.

In a suit for redemption of a usufructuary mortgage, the mortgagor is bound to claim for surplus profits, if any; *Ram Din* v. *Bhup Singh*, 30 A. 225.

Two persons each held a mortgage over the same property from the same mortgagor, executed on the same day; each instituted a suit for sale on the same day, without making the other a party, and obtained decrees, and in execution each purchased the mortgaged property under his own decree. The representatives of one of the mortgagees got possession; the representatives of the other mortgagee sued for possession of the moiety of the property, or in the alternative for redemption of the other mortgage. *Held* that the suit was not barred; *Balmokund* v. *Sangari*, 12 A. 370.

Subsequent suit by mortgagee on first mortgage is not barred by previous suit on second mortgage; *Moro Raghunath* v. *Balaji*, 13 B. 45.

A purchaser of the equity of redemption of a share of certain mortgaged property brought a suit against the mortgagee in possession to recover his share on payment of the whole mortgage-debt and obtained decree and possession thereof. He having subsequently purchased the remaining share of the mortgaged property from the mortgagor, sued for possession thereof. The defendant pleaded that the suit was barred by s. 43, C. P. Code, 1882, inasmuch as the plaintiff might have recovered the share in the former suit. *Held* that the plea was bad —*Brahannayaki* v. *Krishna*, 9 M. 92.

Where in a suit for redemption of a portion of the mortgaged property, the plaintiff succeeds and obtains a decree, he is debarred from bringing a fresh suit for recovery of possession of the remaining portion of the mortgaged property; *Bhau Daji Khade* v. *Pathu Malu Sabh*, 73 I. C. 862.

(f) Partition Suits.—A suit brought by some members of a family against the other members of the same family for partition of the joint-family property, does not preclude a second suit by the same plaintiffs for partition of other property belonging jointly to their family and strangers.—*Purushottam* v. *Atmaram*, 23 B 597, *Gulab Shah* v. *Haveli Shah*, 87 P. R. 1915; see *Debi Shahi* v. *Gauri Sankar*, 15 O C. 81, *Abdur Nasir* v. *Rasulan*, 20 C 385 *See*, however, *Ukha* v *Daga*, 7 B. 182, *Anji* v. *Thatha*, 10 M. 347

First suit based on the general right of a co-parcener to claim partition of the joint estate—Refusal of Judge in first suit to allow plaint to

be amended so as to include claim to partition based on an award—Second suit based on award not barred —*Thakore Becharji* v. *Thakore Pujaji*, 14 B. 31.

A person holding joint family property with another is not precluded by Or. II, r. 2 from suing for a partition of it by reason of such property not having been included in a previous partition suit. The cause of action for partition of joint property is a constantly recurring one; *Mansharam* v. *Ganesh*, 17 C. W. N. 521; *Ram Harak* v *Ramlal*, 38 A 217.

Plaintiff brought a suit for partition of a house situated in Allahabad and for a declaration that a deed of gift in respect of it was invalid. He had brought a previous suit at Sultanpur for partition of property situated there alleging that he had been dispossessed. *Held* that Or. II, r. 2 of the C. P. Code did not bar the suit; *Ram Harakh* v *Ram Lal*, 38 A. 217: 14 A. L. J. 257.

In a suit for partition, the plaintiff has to include the whole of his claim, that is to say, the whole of the properties which are alleged by him to be properties of the joint family, immoveable properties, moveable properties, and funds which according to him have resulted from joint business carried on by members of the joint family and on behalf of all and such a suit cannot be treated as one for the recovery of possession of both immoveable and moveable property requiring for their joinder, Court's leave under Or. II, r. 4, C. P. Code An order passed in such a suit requiring the plaintiff to elect to proceed either with the claim for the recovery of immoveable properties or with the claim for the recovery of the moveables and funds is erroneous; *Beni Madhab* v. *Gobind Chanda*, 22 C. W. N. 669; 46 I. C. 165.

(g) Suit for Specific Performance—Subsequent Suit for Recovery of Earnest Money.—Plaintiff's suit for specific performance of a contract of sale of immoveable property in his favour was dismissed and he subsequently brought a suit for recovery of earnest money from the defendant. *Held*, that the claim for the recovery of the earnest money was based on a different cause of action from the claim for specific performance and that Or II, r 2, C. P. Code, was no bar to the subsequent suit; *Munni Babu* v. *Koer Kamta Singh*, 45 A. 378. 21 A. L J. 265: A. I. R 1923 All. 321.

(h) Suits on Instalment Bonds.—An instalment bond gave the creditor option to enforce full payment on a single default being committed or to waive it. The creditor first sued for some instalments which had fallen due and subsequently for the balance. *Held*, Or. II, r. 2 did not bar the second suit; *Keshav Rao* v. *Suklia*, 19 N L. R. 170.

In a suit to recover money due on an instalment bond, the plaintiff sued to recover the amount of one instalment only, although by that time two instalments had accrued due. *Held*, that the subsequent suit to recover the second instalment was barred: *Narayana* v. *Nimba Hari*, 8 Bom. L. R. 547; *Mackintosh* v. *Gill*, 12 Bom L R. 37; 20 W. R. 358.

(i) First Suit for Interest Only—Second Suit for Principal and Interest—If Maintainable.—If a mortgagee to whom a cause of action to realise, the whole mortgage security has accrued, exercises the option given to him by the document and sues for interest alone, he must be deemed to have relinquished his claim for further relief under Or. II, r. 2, C. P. Code.

and a second suit for principal and interest is not maintainable; *Muhammad Hafiz* v. *Mirza Muhammad Zakariya*, 44 A. 121: A. I. R. 1922 P. C. 23: 65 I. C. 79: 49 I. A. 9 P. C; *Kishan Narain* v. *Pala Mal*, 4 L. A. P. 32: 50 I. A. 115 P. C.: A. I. R. 1922 P. C 412.

A mortgage bond provided among others that interest would be paid to the creditor monthly; if for any reason the interest was not paid for six months, the creditor would be competent to realise by suit without waiting for the expiry of the term either the unpaid interest or the principal and interest with costs from the debtors, the property hypothecated and other properties moveable and immoveable of the debtors It was also stipulated that if the bond was not paid within the period fixed then the whole amount and interest etc, would be realised by the creditor by suit. The interest being in arrears, a suit was filed for the interest *only* "according to the terms of the bond." It was decreed without contest. The mortgagees then instituted a suit for the amount due under the bond and interest which accrued due afterwards The mortgagors contended that the suit was barred under the provisions of Or. II, r. 2, C P Code *Held* that the suit was so barred; *Mahomed Zakariya* v *Mahomed Hafiz*, 39 A. 506: 15 A. L. J. 557: 41 I. C. 233 The decision in this case was upheld by the Privy Council in 26 C W. N 297: 49 I. A. P. C

Where the time stipulated for payment of the principal is one year after the date of the mortgage but interest is payable monthly, a default in the payment of interest gives rise to a cause of action and a suit for interest alone does not bar a subsequent suit for principal *Maung Kyin Pein* v. *Ma Pwa Me*, 4 U. B. R (1921) 62: 64 I. C. 953

When principal and interest are both due under a mortgage bond, there can be only one suit for both. This cannot be overridden by an agreement that separate suit might be brought, *Gangaram* v *Abdul Rahman*, 28 P. R. 1907. *See* also *Brij Lal* v *Ram Khelawan*, 268 P W R 1912.

(j) First Suit on Promissory Note—Second Suit for Recovery of the Same Money Based on Accounts.—A suit for recovery of money due under a pro-note was filed in the Munsif's Court but dismissed for default of appearance Another suit was then filed to recover the same mony based on entries in the account books *Held* that the cause of action was the same and the suit was not maintainable, *Mundar Bibi* v *Baij Nath Prasad*, 42 A 1903: 18 A L J. 81 54 I C 424

Effect of Withdrawal of Suits.—The provisions of this rule do not apply to cases where the previous suit has been withdrawn with liberty to bring fresh suit.—*Venkata Shetti* v *Ranga Nayak*, 10 M 160 Followed in *Behari Lal* v *Baran Mai*, 17 A. 53; in *Buta* v *Bishen Das* 37 P L R 1911; 9 I. C 956 *See* also, *Ilahi Baksh* v *Imam Baksh*, 1 A 324, and *Mul Chand* v. *Bhikari Dass*, 7 A. 624 But when a plaintiff withdraws without permission, the suit must be regarded as practically dismissed He cannot bring an action for a claim which he ought to have included in a former suit; *Hari Nath* v. *Syed Hossainali*, 2 C. L. J. 480 10 C W. N. 8

Applicability of the Rule to Execution Proceedings.—This rule does not apply to proceedings for execution of decree. The C. P. Code, does not prevent a person from making separate and successive applications for execution of a decree giving different reliefs, in respect to each such relief.—

Radha Kishen v. *Radha Pershad*, 18 C. 515; *Sadho Saran* v. *Hawal Pande*, 19 A. 98 (F. B.); *Ibrahim* v. *Ghulam Hussain*, 15 S. L. R. 11: 62 I. C. 507; *Upendra* v. *K. P. Dutt*, 53 C. 582: A. I. R. 1926 Cal. 1019: 96. I. C. 562.

A decree for possession and mesne profits may be executed successively and separately; *Lingam v. Mallapragada.* (1915) M. W. N. 793: 2 L. W. 688: 30 I. C. 246 (12 C. L. J. 6 *not followed;* 41 C. 1 *referred to*). *See* also, *Balasubramania* v. *Swarnammal*, 38 M 199: 25 M. L. J. 367.

The provisions of Or. II, r. 2, C. P. Code, are not applicable to proceedings for restitution which are really proceedings in execution; *Soma Sundaram* v *Chhokalinga*, 40 M. 780: 5 L. W. 267, *Kripasindu* v. *Balbhaga Das*, 3 Pat. L. J. 367: 47 I. C. 47.

Applicability of Or. II, r. 2 to Proceedings in Revenue Courts.—*Or.* II, r. 2, C. P. Code, which requires that every suit shall include the whole of the claim which plaintiff is entitled to in respect of the cause of action is applicable to proceedings in Revenue Court for recovery of arrears of rent. It applies not only to cases of deliberate relinquishments but also of accidental or involuntary omission; *Pratab Chandra v. Secy. of State*, 35 C. L. J. 304: A. I. R. 1922 Cal. 101.

Joinder of causes of action.

3. Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit. [S. 45.]

COMMENTARY.

This rule corresponds to s. 45 of the old Code, and follows English Rule 1 of Or. XVIII.

Principle and Scope.—This rule no doubt authorizes a plaintiff to unite in the same suit several causes of action against the same defendant or defendants *jointly*, but it does not authorize a plaintiff to unite different causes of action against the same defendant or defedants in which they are not all jointly interested, their interests being but distinct and separate The word "*jointly*" in this rule means that all the defendants in a suit must be jointly liable in respect of "each and all" of the causes of action which the plaintiff unites against the defendants in the same suit. That this is the correct meaning of the term "*jointly*" will appear from the judgment of STRAIGHT, J., in *Bhagwati Prasad* v. *Bindeshri*, 6 A. 106, where his Lordship observed that joint interest in the main questions raised by the litigation is a condition precedent to the joinder of several causes of action

against several defendants. The Full Bench of the Allahabad High Court in *Narsingh Das* v. *Mangal Dubey*, 5 A. 163, also put similar interpretation upon the word "*jointly*." In *Mullick Kefait Hossain* v. *Sheo Pershad Singh*, 23 C. 821 (826), s. 45, which corresponds to the present rule, was similarly interpreted: "There is no provision in the Code allowing distinct causes of action, in which the defendants are not jointly interested, to be united in the same."

In *Burstall* v. *Beyfus*, (1884) 26 Ch. D. 35, p. 39, the Lord Chancellor, LORD SELBORNE, says: "To bring into one claim distinct causes of action against different persons, neither of them having anything to do with the other (and only historically connected), is not contemplated by Or. XVIII, r. 1 corresponding to this rule, which authorizes the joinder, not of several actions against distinct persons, but of several causes of action."

The rule has been fully explained by DAVAR, J., in *Umabai* v. *Bhau Balwant*, 34 B. 358, where his Lordship observed: "The result of the authorities seems to me to be that the plaintiff may in one action unite several causes of action against several defendants, provided that all such defendants are "*jointly liable in respect of each and all of such causes of action*," and that the condition precedent to the plaintiff being allowed to join several causes of action against several defendants, is that such defendants must all "have a joint interest in the main question raised by the litigation" and that causes of action joined in one suit against several defendants, must be causes of action in which "the defendants are all jointly interested." It is not necessary that every defendant should be interested as to all the reliefs claimed in the suit, but it is necessary "that there must be a cause of action in which all the defendants are more or less interested although the relief asked against them may vary "

This rule deals with the joinder of several *causes of action*, while Or. 1, r. 3 deals with the joinder of defendants in one suit. Or. 1, r. 1 deals with *joinder of plaintiffs*.

Similar statement of the law was also made by PEACOCK, C. J., in the Full Bench case of *Raja Ram* v. *Luchman Pershad*, 8 W. R. 15: B L R. Sup. Vol. 731, and in *Motee Lal* v. *Ranee*, 8 W. R. 64.

Summary.—It is thus clear that a plaintiff may unite different causes of action in one suit against different defendants, who are jointly liable in respect of each and all of such causes of action, and that the condition precedent to the plaintiff being allowed to join several causes of action against several defendants is that such defendants must all have a joint interest in the main question raised by the litigation

Cause of Action.—The expression " cause of action " has been explained in the notes to s. 20 and Or. II, r 2.

The Plaintiff May Unite.—Under this rule the plaintiff is authorized to join several causes of action against the same defendant or defendants in one suit; but his right to combine several causes of action is subject to the proviso contained in sub-section (2), that is, the aggregate value of the united causes of action comprised in the suit is cognizable by the Court in which the suit is instituted. The right to join in one suit several causes of action against the same defendant or defendants cannot be exercised unless

the Court to which the plaint is presented has jurisdiction over the causes of action. See *Jivraju* v. *Purushotam*, 7 M. 171. *See* also *Chiragh Din* v. *Bhagwan Das*, 100 P. R. 1913.

"Save as otherwise provided."—The application of this rule is subject to the provisions of sub-section (2) of this rule and also to the provisions of rules 4 and 5, in which certain exceptions are mentioned to the joinder of several causes of actions in one suit. The expression therefore refers to those rules.

Instances where Plaintiff was Allowed to Unite Several Causes of Action Against Same Defendants.—A suit brought against a number of alienees of a deceased member of an undivided family, or for recovery of the family property illegally alienated by him, is not such a suit as ought to be dismissed on the ground of multifariousness.—*Vasudeva* v. *Kuleadi*, 7 M. 290. *See* also *Samichetti* v. *Ammani Achy*, 7 M. 260.

In a suit for ejectment against several defendants who set up various titles to different parts of the land claimed, there is only one cause of action, *not* several distinct and separate causes of action.—*Ishna* v. *Rameswar*, 21 C. 831; approved in *Nundo* v. *Bonomali*, 29 C. 871. *See* also *Bandhu* v. *Nathui*, 7 C. L. J. 460. But see *Ram Prosad* v. *Sachi Dassi*, 6 C. W. N. 585.

Where property is transferred under separate deeds, at different times to different transferees, and the plaintiff brings one suit for possession against all the transferees, *held* that the suit is not bad for multifariousness.—*Parbati* v. *Mahmood Fatima*, 29 A. 287: 4 A. L. J. 121. *See* also, *Kubra Jan* v. *Ram Bali*, 30 A. 560, F. B. and *Umabhai* v. *Vithal*, 33 B. 293.

A suit by a purchaser of property for possession against a person who dispossessed him, as also against his vendor for the refund of the purchase-money, is not bad for misjoinder of causes of action.—*Serajul Huq* v. *Abdul*, 29 C. 257: 6 C. W. N. 300. *Ayathrumi* v. *Santhu*, 31 M. 252.

Certain properties were sold to *A* by private contract. Subsequently, the properties were attached in execution of a decree against *A*'s vendors and sold in execution to various purchasers. *A* instituted a suit against his vendors, the decree-holders and the purchasers, to set aside the execution sale. *Held* that the suit was not defective by reason of the misjoinder of causes of action.—*Haranund* v. *Prosonno* 9 C. 763. 12 C. L. R. 556.

A suit to recover possession against joint trespassers who set up various and distinct defences, some alleging one defence, and some another, and so on, is not bad for multifariousness.—*Omur Ali* v. *Wrylayet*, 4 C. L. R. 455.

The plaintiffs having obtained a decree for the possession of certain lands, and having received formal possession thereof, brought a suit against eighty-six persons holding distinct and separate tenures in those lands, alleging that they had combined together to keep the plaintiffs out of the enjoyment of the property. *Held* that there was but one cause of action and the suit was not multifarious.—*Loke Nath* v. *Keshav Ram*, 13 C. 147.

The plaintiff claimed from the defendants as joint decree-holders a fourth share of the sale-proceeds of certain houses situate on land subject

to a village custom whereby a proprietary due of the above amount was payable to the zemindar of the said land. *Held* that the claim was not bad for misjoinder.—*Nanku* v. *Board of Revenue*, 1 A. 44.

The defendants who have five separate decrees against some of the persons against whom the plaintiffs' decree was obtained, applied to have the sale proceeds rateably distributed, and accordingly the proceeds were distributed in proportion to the amount of the decrees In a suit by the plaintiffs against the defendants on the allegation that they were entitled to the whole of the proceeds, or, in the alternative, for distribution on a different principle. *Held* that there was no misjoinder by reason of all the defendants being included in one suit. *Gouri Prosad* v *Ram Ratan*, 13 C. 159.

A Hindu widow can join her claim for *stridhan* with a claim for maintenance; *Jankibai* v. *Srinivas*, 15 Bom. L. R. 684; 38 B. 120.

A purchaser of certain land, on demanding rent that accrued due after his purchase, was informed by the tenant that he had paid the whole rent in advance to the former landlord. He then sued the tenant and the former landlord praying a decree for rent against either. *Held*, that the frame of the suit was unobjectionable.—*Madan Mohun* v. *Holloway*, 12 C. 555. Followed in *Mowji Monje* v. *Kuverji*, 31 B. 516

A suit for both enhancement and arrears of rent at an enhanced rate is maintainable. The causes of action, although separate, may be combined.—*Gudar Tewary* v. *Brijnandan*, 5 C. W. N. 880

A suit for enhancement under s. 30, and for increase of rent under s. 52 of the B. T. Act (VIII of 1885), is maintainable The two causes of action may be joined in one suit —*Sarada Charan* v *Iswar Samli*, 11 C. W. N 1154.

In a suit instituted against six different parties, the plaintiff prayed for *khas* possession of a four-anna share in a certain lot, or, in the alternative, for a decree for arrears of rent against such of the defendants as should, on inquiry, appear to be respectively liable It appeared that the plaintiff had been kept out of possession by one only of the six defendants, and that another defendant was liable for a portion only of such arrears *Held* that the suit was not bad for misjoinder; *Janoki* v *Ramarunjan*, 4 C 949.

A plaintiff can sue to establish his own rights only and has no right to obtain an adjudication of the claims of any defendants unless such adjudication be necessary to give him the appropriate relief to which he is entitled.—*Woopendra Narain* v *Aghore Nath*, 9 C W N 498

A landlord can institute one suit for rent of several holdings or tenures, but the decree would be a money decree and not rent decree —*Rhidayanath* v. *Krishna*, 34 C. 298. 11 C. W. N 497 Followed in *Nanda* v. *Sadhu*, 7 C. L J. 96 *See* also *Mullick* v *Satis*, 13 C W. N. 650 · 11 C. L J. 56 But see *Jagannath* v. *Tare*, 29, A 18 3 A L J 610.

A suit to eject several ryots for failure to pay dues payable separately is not bad for misjoinder.—*Thiagraja* v. *Giyana*. 11 M. 77.

Suits by some of the junior members of a Malabar *tarwad* against the *karnavan* and the other members of the *tarwad*, and certain persons to

whom some of the *tarwad* property had been alienated by the *karnavan*, for a declaration that the alienations were not binding on the *tarwad*. *Held* that the suit was not bad for multifariousness.—*Abdul* v. *Ayaga*, 12 M. 234 (7 M. 290 *followed*). *See* also, *Mahomed* v. *Krishnan*, 11 M. 106.

Where it appeared that the title of defendant No. 2 was derived from defendant No. 1, and was to stand or to fall with the failure or success of the plaintiff's claim against the latter, there were not two causes of action, but one, namely, the infringement of the plaintiff's right by the defendant No 1; *Indra Kumar* v. *Gur Prasad*, 11 A. 33.

A suit to recover a mortgage-debt, together with arrears of rent due by the defendant upon a mortgage-deed and a lease, is not bad for misjoinder; *Gobinda* v. *Mana Vikraman*, 14 M. 284.

A suit to recover rent of agricultural holding and fishery rents is not bad for misjoinder.—*Shib Prasad* v. *Vokai Pali*, 33 C. 601.

Where the owner of two villages sold under a decree obtained upon a mortgage, claims contribution proportionately against the owners of the other properties included in the mortgage, and does not claim from them, all collectively, one lump sum as contribution, he may join all the contributors in one suit. He may also bring a single suit in respect of two sales; *Ibn Husain* v. *Ramdai*, 12 A. 110.

The transferee of the interests of a mortgagee by conditional sale, who was prevented from obtaining possession by persons who had purchased separate portions of the mortgaged property from the mortgagor on different dates subsequent to mortgage, brought a suit against these purchases, and also against the mortgagor for foreclosure and possession. *Held* that the suit was not objectionable on the ground of misjoinder.—*Srinath Das* v. *Khetter Mohun*, 16 C. 693 P. C.

Under s. 158, Bengal Tenancy Act, the landlord is authorized to include in one application two or more tenancies held by the same tenant.—*Dijendra Nath* v. *Soylendra Nath*, 24 C. 197, p. 292: 1 C. W. N. 266.

The plaintiff sued to enforce an agreement for the execution of a conveyance, and for possession of certain immovable property, making the executant of the agreement, and the subsequent execution-purchasers of the property, defendants in the suit, alleging that such purchasers had purchased in bad faith and with notice of the agreement. *Held* that there was not necessarily a misjoinder of causes of action.—*Gumari* v. *Ram Charan*. 1 A. 555.

Single Suit to Eject Different Tenants Holding Different Parcels of Land.—It is not permissible for a plaintiff to unite in the same litigation several suits against separate defendants. A single suit to eject different tenants holding different parcels of land is bad for misjoinder. Where, however, the plaintiff adopts the procedure, he cannot be heard to object to the use of evidence to which the irregularity of his procedure has given relevance to; *Seturatnam Iyer* v. *Venkatachalla Goundan*, 43 M. 567 P. C. : 38 M. L. J. 476: (1920) M. W. N. 61: 56 I. C. 117 · 47 I. A. 76 P. C.

Suit for Contribution—Joinder of Different Causes of Action Against Same Defendants.—There is nothing in law to prevent two causes of

action against the same defendants being joined in one suit. The superior landlord of the plaintiff and defendants, who were co-sharers in certain tenures, brought two suits for rent and obtained two decrees jointly against them. The decrees were executed and the tenures were put up to sale. The plaintiff paid the entire decretal amount and sued the defendants for contribution claiming, against each of them, a specific sum according to his share. *Held* that, though the plaintiffs satisfied two different claims separately and on two different occasions, the causes of action, which were different, could be joined in one suit for contribution; *Maharajah Birendra Kishore* v. *Padma Lochan*, 51 I. C. 826.

Instances where Plaintiff was Not Allowed to Unite Several Causes of Action Against Same Defendants.—It is illegal to join different causes of action in the same suit against different parties where each has a distinct and separate interest, *e.g.*, to a joint action for the price of timber against defendants who purchased each one pair of timber from the plaintiff separately from the other.—*Baroo Sircar* v. *Mossim Mundle*, 21 W. R. 206.

Under five different *pattahs*, *A* granted to *B putni* leases of different *mahals*. The rent falling into arrears, the *mahals* were sold on two different dates and purchased by three different persons. In a suit brought by *B* against all the three purchasers to set aside the sales, *held* that the suit was bad for multifariousness.—*Imrit* v *Dhunput*, 9 B. L. R 241: 18 W. R. 288.

Two co-parceners of a village sold their shares separately to the same person, upon which a third co-parcener sued them and the vendor jointly to enforce his right of pre-emption in respect of the sales. *Held*, that the suit was bad for misjoinder of defendants and causes of action.—*Bhagwati Prosad* v. *Bindeshri Gir*, 6 A. 106. *See* also *Kalian Singh* v. *Gur Doyal*, 4 A. 163. But see, *Hurbans Tewari* v. *Tota Sahu*, 32 A. 14.

The plaintiff, alleging that three causes of action had accrued to him sued four different persons, claiming possession of the land as against them all and mesne profits by way of damages against each defendant for different periods. *Held*, that the suit was bad for multifariousness.—*Narsingh Das* v. *Mangal Dubey*, 5 A. 163 Referred to in *Ganeshi Lal* v. *Khairati*, 16 A. 279.

A suit on foreign judgment against all the members of a firm against some of whom only the judgment was obtained was held bad for misjoinder.—*Lakshmanan Chetti* v *Karuppan Chetti*, 6 M. 273.

In a suit for partition, it was not disputed that the plaintiffs were entitled to the share they claimed; but they joined as defendants a number of ryots whom they sought to eject. *Held*, that the ryots were improperly joined as defendants in the suit.—*Saminada Pillai* v. *Subba Reddiar*, 1 M. 333.

Where the plaintiff claimed the ownership of the properties in suit through her late husband and alleged that her rights had been infringed at different times and by different sets of defendants, and it was found that they did not act in concert and did not combine together to dispossess the plaintiff. *Held*, that there were separate causes of action against separate

sets of persons and that the trial could not proceed as upon a single cause of action —*Ram Prosad* v *Sachi Dassi*, 6 C W. N 585 (14 C. 435 and 681 *approved;* 7 M 290, 11 M. 106, 21 C 831 *dissented from*, and 29 C. 257 *distinguished*.)

The plaintiffs sued for a declaration that the several alienations made by defendant No 1 (a Hindu widow) to the other defendants were void, and that they (plaintiffs) were entitled to the several properties after her death; also for an injunction restraining her from making similar unlawful alienations in the future *Held*, that the suit was bad for misjoinder of causes of action —*Kachar Bhog*, v *Bai Rathore*, 7 B 289. Referred to in *Ganesh Lal* v. *Khairati*, 16 A. 279. But see *Parbati* v. *Mahomed*, 29 A. 267.

Where it appeared that the titles relied on by the defendants were quite distinct from one another, and that there had been no collusion or combination amongst them to keep the plaintiff out of possession, *held*, that the suit was bad for misjoinder of causes of action —*Sudhendu Mohon* v. *Durga Dasi*, 14 C 435, *Ram Narain* v *Annoda Prosad*, 14 C 681.

Misjoinder of Plaintiffs and Causes of Action.—The first part of this rule authorizes a plaintiff to unite in the same suit several causes of action against the same defendant or defendants, the second part of the rule authorizes several plaintiffs having causes of action in which they are jointly interested against the same defendant or defendants jointly, to unite them in one suit the right of several plaintiffs having causes of action against the same defendant or defendants jointly, to unite them in one suit depends upon similar considerations as in the case of defendants, that is, several plaintiffs can jointly bring one suit against the same defendant or defendants when they have joint interest in the main question raised in the litigation, thus the second part of this rule is intended to make it clear that several plaintiffs can only join in suing several defendants in one suit for several causes of action, when the plaintiffs are jointly interested in each or all of such causes of action otherwise their suit will be objectionable on the ground of *misjoinder of plaintiffs* The latter part of this rule is to be read with Or 1, r 1 The following cases under the old Code are illustrations of misjoinder of plaintiffs

Where one of two widows of a deceased Hindu and her adopted son sued as co-plaintiffs, claiming in the alternative either to recover the whole family estate for the latter, if the adoption was valid, or if the adoption was invalid, one-half of the estate for the former *Held*, that the suit was bad for misjoinder —*Lingammal* v *Chinna Venkatammal*, 6 M. 239. But see *Fakirappa* v *Rudrapa*, 16 B 116, where it has been held that where persons are jointly interested in the subject-matter of a suit and their interests are identical, and where they do not advance antagonistic claims, the suit is not bad for misjoinder of plaintiffs This case has been followed in *Haramani* v *Hari Charn*, 22 C 833, and in *Ningama* v. *Ramappa*, 28 B. 94.

A Hindu widow with her two daughters as co-plaintiffs sued her stepson, alleging that he was in possession of his father's property, for maintenance, and for the marriage expenses of her daughters both of whom were of marriageable age. *Held*, that the suit was not bad for misjoinder.—*Tulsa* v. *Gopal Rai*, 6 A. 632.

In a suit to enforce a right of pre-emption, if it appears that one of the plaintiffs in the suit has no right of pre-emption, the whole suit should be dismissed for misjoinder.—*Karan Singh* v. *Muhammad Ismail*, 7 A. 860.

Where a joint suit was brought against the same defendant by five different persons, each of whom had contracted to apply a certain number of maunds of cotton to the defendant, *held*, that they cannot all join in one suit for damages for breach of the five contracts; *Chandulal* v. *Dagdu*, 27 Bom. L R. 72: A. I. R. 1925 B. 342· 87 I C. 435

Procedure to be Adopted in Cases of Misjoinder of Causes of Action.— In cases of misjoinder of causes of action, the parties may be allowed opportunity to amend their pleadings, under Or. VI, r. 17; *see* the cases noted under that rule.

Where there has been a misjoinder of parties and causes of action, the only course open to the Court is that of returning causes of action, the only course open to the Court is that of returning the plaint for amendment; *Alah Buksh* v. *Sadiq Ali*, 38 P. R 1903, *Ram Prasad* v. *Sachi Dasi*, 6 C. W. N. 585; *Ganesha* v *Khairati*, 16 A. 279; *Behari Lal* v. *Kadu Ram*, 15 A 380. It is not proper to dismiss the suit without giving the plaintiff an opportunity of amendment; *Behari Lal* v. *Kodu Ram*, 15 A. 380 If the suit was dismissed, and the plaintiff appealed, the Appellate Court might set aside the decree and remand the case to the lower Court with a direction to that Court to return the plaint for amendment; *Ramanuja* v. *Devi ıayaka*, 8 M. 361. Misjoinder of causes of action can be cured under s 99, if it does not affect the merits of the case or the jurisdiction of the Court; *see* s 99 *and the cases noted thereunder*. The effect of the provisions of s 99 is to preclude the Appellate Court from reversing a decree on the ground of misjoinder of plaintiffs and causes of action and remanding the case to the lower Court as was done under the old Code, unless the misjoinder has affected the merits of the case.

Misjoinder of Defendants and Causes of Action.—Where there are *two or more defendants* and *two or more causes of action*, the rule says that the plaintiff may unite in the same suit several causes of action against the same defendants jointly Joint interest in the questions raised by the litigation is a condition precedent to the joinder of several causes of action against several defendants, *Bhagwati* v. *Bindeshri*, 6 A 106; *Harbans* v. *Tota Sahu*, 32 A. 14: 3 I C 735. The plaintiff is not entitled to unite different causes of action in one suit against different defendants, who are not jointly liable in respect of each and all causes of action If the causes of action alleged are separate and the defendants are arrayed in different sets, the suit is bad for misjoinder of defendants and causes of action technically called multifariousness; *Narsingh* v *Mangal*, 5 A. 163, 171. There is no provision in the Code allowing distinct causes of action against distinct sets of defendants—that is to say, causes of action in which the defendants are not all jointly interested—to be united in one suit; *Umabai* v. *Bhau Balwant*, 34 B 358; *Mullick Kefait* v. *Sheo Pershad*, 23 C. 821. 826. The general rule that the plaintiff cannot unite, in the same suit, causes of action in which the defendants are not jointly interested, is, however, subject to this exception that, whether the right to the relief *claimed* arises from the same act or transaction, and there is a commc

question of law or fact against two or more persons, they may be joined in one suit; *Ramendra* v. *Brajendra*, 45 C. 111, 122-123

The following are some of the most important cases of multifariousness.—Where the plaintiff sought to obtain the specific performance of a contract to sell certain estate, against the second defendant, and also asked for a declaration that the third defendant was not entitled to a certain equitable charge claimed by him against the said estate. It was held that there was, a misjoinder of defendants and causes of action, because the two causes of action against the two defendants are entirely distinct. They do not form the same transaction nor would their trial involve any common question of law or fact; *Luckumsey* v. *Faizulla*, 5 B 177. It is different, however, when the plaintiff (purchaser) sues in the same suit both A (vendor) and B (vendor's *benamidar*) and claims a decree for specific performance against A and a declaration that he is a mere *benamidar* against B; *Mokund Lal* v. *Chotay Lal*, 10 C. 1061.

Where a plaintiff brings one suit against several persons as defendants, alleging that each of them had entered into a separate agreement with him for the delivery to him of certain goods to be manufactured by them and that they had failed to make the delivery according to the terms of their agreement, and praying for a decree for the delivery of the goods, the suit is bad for multifariousness, because the breach of each contract gives rise to a distinct cause of action and no one defendant is interested in any of the causes of action arising from the breach of contract with the other defendants; *Namasivaya* v. *Kadir Ammal*, 17 M. 168

A, a member of a joint Hindu family consisting of two other members, agrees to sell his share of the property to P. On his failure to execute the deed of conveyance, P brings a suit against A for specific performance and also prays for partition and possession against the other two members The suit is bad for misjoinder; *Rangayya* v. *Subramania*, 40 M. 365: 40 I. C. 429 F. B.

Revision.—A decision on the question whether a suit is bad for misjoinder of parties and causes of action is subject to revision; *Velappa* v. *Chidambara*, 43 M. L. J. 277. A. I. R. 1922 M. 174: *Shanmuka* v. *Arunachellam*, 45 M. 199. A. I. R. 1922 M. 332; *Arunachellam* v. *Arunachellam*, 43 M. L J. 218: 99 I. C. 966: A. I. R. 1922 M. 436.

Only certain claims to be joined for recovery of immoveable property.

4. No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, except—

(*a*) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;

(*b*) claims for damages for breach of any contract under which the property or any part thereof is held; and

(*c*) claims in which the relief sought is based on the same cause of action : [S. 44, rule (*a*).]

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property. [New.]

COMMENTARY.

Alterations Made and their Effect.—This rule corresponds to rule (a) of section 44 of the C P. Code of 1882, with several modifications The words " or to obtain a declaration of title to immoveable property " which occurred in the last sentence of section 44, rule (a), have been omitted. The effect of the omission of these words is to limit its operation to cases, where the suit is for *recovery* of immoveable property. The words " *or any part thereof* " have been added to clause (a); clause (c) of section 44 of the old Code has been omitted and a new clause has been substituted in its place. The proviso is new. The language of this rule was taken from Or. XVIII, r. 2 of the English Rules

Joinder of Claims.—This rule provides that in a suit for recovery of immoveable property, the claims specified in the three clauses (a), (b) and (c), may be joined with it without the leave of the Court. But where in a suit for recovery of immoveable property it is sought to join claims other than those mentioned in the three exceptions, leave of the Court must be obtained.

This rule does not forbid the joinder of several causes of action entitling the plaintiff to the recovery of immoveable property, but a joinder with such causes of action of other causes of action of a different character except in the cases therein specified —*Chidambara Pillai* v *Ramasami*, 5 M 161. Explained and distinguished in *Ambika Dat* v. *Ramudit*, 17 A. 274. See *Nisar Husain* v *Nisar Ali*, 3 A. L J. 123 A. W. N. (1906) 54.

This rule forbids the joinder with a suit for the recovery of immoveable property, or to obtain a declaration of title to such property of any claim other than the claims specified in the rule Therefore a plaintiff who sues to recover moveable property cannot add to such a suit a claim for possession of immoveable property.—*Hingu Lal* v *Baldeo Ram*, 24 A. 553.

This rule substantially follows Or XVIII, r 2 of the Supreme Court in England and was intended for the protection of the defendant He may by his conduct waive the benefit of that rule; *Satischandra* v *Asruffuddin*, 8 C L. J. 196.

The right to join in one suit two or more causes of action against the defendant cannot be exercised unless the Court has jurisdiction over all the causes of action; *Khimji Jivrajee* v *Purushotum*, 7 M 171

Suit for Recovery of Immoveable Property.—Suit to establish title to immoveable property not claiming possession is not a suit for the recovery of immoveable property; *Gledhill* v *Hunter*, 14 Ch D 492

A suit for recovery of mortgage debt, with an alternative prayer for sale of the mortgaged property, is not a suit for the recovery of immoveable property; *Govinda* v *Mana Vikraman*, 14 M 281.

A suit for a share in a mortgage decree with other properties is not one for recovery of immoveable property; *Gorachand* v. *Basanta*, 15 C. L. J. 238.

Immoveable property in this rule includes a right of way; *Bejoy Chandra* v. *Banku*, 13 C. W. N. 451; 9 C. L. J. 336.

The ordinary rule is that a plaintiff mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party who is in no way connected with the mortgage and who has set up a title paramount to that of the mortgagor and mortgagee Causes of action of this description cannot be joined in a suit to enforce a mortgage —*Joggesurar Dutt* v. *Bhuban Mohan*, 33 C. 425: 3 C L. J 205.

Leave to Join Separate Causes of Action.—Leave required by this rule is necessary, and it cannot be given afterwards *See* the judgment of TREVELYAN, J., dated 21st May, 1861, in the unreported case of *Soshi Bhusan Sreemani* v. *Kali Kristo Sreemani*, referred to by Mr. Hill in the case of *Nistarini* v *Nundo Lal*, 26 C 891 (905). 3 C. W. N. 670 (676).

Where claims in respect of moveable and immoveable property are united in one plaint without leave of the Court, the suit is liable to be dismissed.—*Venkiti Nayak* v *Murugappa Chetti*, 20 M. 48 (F B.) *See* also *Subbaran Nayudu* v. *Yagana Pantulu*, 19 M. 90

This rule is not applicable to a suit unless it is for the recovery of immoveable property Even in such case, defect of multifariousness is cured if leave of the Court is obtained previous to the bringing of the suit.—*Nistarini* v *Nundo Lal*, 30 C 369 7 C. W. N 353 Affirmed in 33 C. 180 P. C

A plaintiff *may*, with the leave of the Court, join causes of action; but he is nowhere *compelled to do so*.—*Sheo Ratan* v *Sheosahai*, 6 A. 358.

An objection that the plaintiff has joined together causes of action, which by this rule may not be joined together without leave first obtained, cannot be taken for the first time in appeal.—*Dhondiba Krishnaji* v. *Ram Chandra*, 5 B 554 Followed in *Maula* v *Gulzari Singh*, 16 A 130

Joinder of Claims for Mesne Profits or Arrears of Rent.—A suit for possession and rent of a house were held to be causes of action properly joined in one suit —*Jago Mohun Sahu* v *Mani*, 3 B L R. 77: 11 W. R. 542. *See* also, *Kashinath* v *Nathoo Keshar*, 38 B. 444.

A cause of action for the recovery of mesne profits accruing before the date of the institution of the suit arises at the time of the suit, and such a cause of action may or may not be joined with a suit *for the recovery* of the immoveable property under this rule; *Rameswar* v. *Dilu*, 21 C. 550, p. 552.

Claims for the recovery of possession of immoveable property and for mesne profits are distinct claims, and separate suits will lie in respect of each of them. This rule merely permits their joinder in one suit in regard to the same property.—*Lalessor* v. *Janki*, 19 C. 615. Followed in *Ponnamal* v. *Ramamirda*, 38 M. 829. But see, *Mewa Kuar* v. *Banarsi Prosad*, 17 A. 533; *Bhirrav* v. *Sitaram*, 19 B. 532.

There is nothing to prevent a claim for damages and a claim for establishment of title being joined with a claim for the relief provided by section 9 of the Specific Relief Act I of 1877.—*Ram Harakh* v. *Sheodihal*, 15 A. 384.

In a suit for possession of a portion of a property and to set aside deeds relating to another portion, *held* that the two causes of action were properly joined together.—*Amiran* v. *Asihun*, 3 B. L. R. 190: 12 W. R. 11.

Where a person sues for a decree declaratory of his right to a half share in a cultivatory holding, he is also entitled to ask for mesne profits and it is open to the Court in granting a declaratory decree to also decree mesne profits; *Gangashai* v. *Bansi*, 17 A. L J. 993. 42 A. 64, 52 I. C. 649.

Joinder of Claims for Damages for Breach of Any Contract.—In a suit for specific performance of a contract, the plaintiff can also sue for recovery of part of purchase-money advanced —*Cutts* v. *Brown*, 6 C 328. 5 C. L. R. 487 and 7 C. L. R. 171.

In a suit by a prior lessee for possession, for damages, for refusal to register and to enforce registration against the lessor and subsequent lessee, *held*, that three distinct causes of action were improperly joined.—*Prabhuram Hazra* v. *Robinson*, 3 B. L R 49 11 W. R. 398

Claims in which the Relief Sought is Based on the Same Cause of Action.—This clause should be read with r 2 of this order, which says that " every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action;" therefore, a plaintiff may join in a suit for recovery of immoveable property, other claims if the cause of action is the same in respect of all; otherwise those other claims will be barred by the provisions of rule 2.

The new clause (c) has been inserted in order to avoid the possibility of mistake and make it perfectly clear that there is nothing irregular in seeking to recover in one suit immoveable and moveable property, if the cause of action is the same in both; *Chhabil Das* v. *Massu*, 243 P L. R. 1913. 4 P R. 1914: 145 P. W R 1913 19 I C. 981 If the cause of action is not the same, a suit for the recovery of both moveable and immoveable property cannot be instituted without the leave of the Court; *Hingulal* v. *Baldeo*, 24 A 553

This clause substantially follows the rule laid down in *Gledhill* v. *Hunter*, 14 Ch D. 492, p. 495, see *Kashinath* v *Nathoo Keshav*, 38 v. 444, in which it has been held that a claim for possession and the claim for rent ought to be enforced in one suit, provided the cause of action is the same and that the suit is not open to objection on the ground of multifariousness.

There is nothing irregular in seeking to recover moveable and immoveable property in the same suit, if the cause of action is the same in respect of both; *Giyana* v. *Kandasami*, 10 M. 375; *Ganesh Dutt* v. *Jewach*, 31 C. 262, P. C ; *Banarsidas* v. *Municipal Committee, Delhi*, 28 P. L. R. 1907 *see* also *Nistarini* v. *Nundo*, 3 C. W. N. 670; *Mazhar Ali* v. *Sajjad Husain*, 24 A. 358, and *Kathan* v. *Sadayan*, 17 M. L. J. 135, where it has been

held that the observation of the Privy Council in 31 C. 262: 8 C. W. N. 146, must be limited to cases where a party sets up the *same* title to moveable and immoveable property, and it was not intended to apply to a case where a party claims a declaration of title and, in the same suit, sets up a claim for damages for tort.

Clauses (*a*) and (*c*) of Or II, r 4 are not exceptions but provisos added with a view to explain that the rule does not forbid the joinder of other claims to claim for immoveable property when they arise out of the same cause of action; *Hiromal* v *Farid Khan*, 9 S. L. R. 23: 29 I. C. 939.

Proviso to the Rule.—The proviso is intended to enable any party in a suit for foreclosure or redemption to ask to be put in possession of the mortgaged property. This rule has no application to the case of a plaintiff who, holding two mortgage-deeds over separate properties, joins both in one suit for sale or foreclosure.—*Raghbar* v *Jawala Singh*, 25 A. 229 (17 A. 274 *referred to*); *Khub Lal* v. *Jhapsi*, 3 Pat. 244 78 I. C. 88: A. I. R. 1924 Pat 613.

Appeal.—Order rejecting application under this section for leave to join two causes of action, is not appealable, but when the Judge refuses leave, and returns the plaint, with directions to file separate suits, such an order is a decree, and is therefore appealable.—*Bandhan Singh* v. *Solhu*, 6 A 191.

Claims by or against executor, administrator or heir

5. No claim by or against an executor, administrator or heir, as such, shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents. [S. 44, rule (*b*).]

COMMENTARY.

This rule corresponds exactly to rule (*b*) of s 44 of the old Code and is based upon English Or XVIII, r. 5.

Object and Scope of the Rule.—The first part of this rule prohibits a litigant from joining in one suit, a claim by or against an executor, administrator or heir as such, i.e., in his representative character, with claims by or against him *personally*, in other words, it makes a distinction between a suit brought by a plaintiff to enforce rights on his own account because he is an heir, and a suit in which he sues in a representative capacity alleging that he is an heir and suing as such. His legal capacity in the two cases is absolutely distinct; it is only on reference to his representative capacity that it can be said that a claim has been made by or against an heir as such. The latter part of this rule qualifies the first part by proving that, (1) unless the claims by or against him personally are alleged to arise with reference to the estate represented by him, or (2) unless the claims are such as he was entitled to or liable for jointly with

the deceased person whom he represents. In the cases mentioned in (1) and (2) the suit would not be bad for misjoinder of causes of action. The object of the rule is to prevent an executor or administrator from intermingling the assets of the testator with his own money; *Tredegar* v. *Roberts*, (1914) 1 K. B. 283, 287.

" Heir, as such."—The words " *heir as such* " have been the subject of discussion in several cases; there is divergence of judicial opinion with regard to the meaning of the words, between the Bombay and Allahabad High Courts. In *Ahmeduddin* v. *Sikandar Begun*, 18 A. 256, it was held by the Allahabad High Court, (dissenting from *Ashobai* v. *Haji Tyeb*, 6 B. 390) that the word "heir" referred to in s. 44 (*b*) of the C. P. Code, 1882 (now rule 5) is an heir, suing or being sued in his representative capacity, who like executor or administrator represents the estate of a deceased and that it is impossible to hold that the rule precludes a person from joining a claim for property acquired by himself, with a claim for property inherited by him from another, when he does not represent persons other than himself Both of such claims are advanced by him in his personal capacity seeing that, in the claim as an heir he claims it in his own right, and not on behalf of any one else In this case a Mahomedan widow sued the daughters (1) for her dower, and (2) for her share in the husband's estate. The Allahabad case was approved in *Hafizaboo* v. *Mahommed Kassim*, 31 B 105 · 8 Bom. L R. 734, noted below.

Claim Against Executor When Can be Combined with Claim Against Him Personally.—The word " estate " in Or II, r 5, C P Code means both the estate rightly and properly held as executor and the estate in its physical sense When the claims against the executor as such and against him personally arise in reference to the estate in respect of which the defendant is executor, the joinder of the two claims is permissible; *Nripendra Nath* v. *Birendra Nath*, 21 C W N 939 41 I C. 615

" Unless the last-mentioned claims are alleged to arise with reference to the estate."—Partnership between plaintiff's father and defendant—Subsequent partnership between plaintiff and defendant with old assets—Plaintiff obtaining letters of administration to his father's estate—Suit as plaintiff to recover father's share in the first partnership and his own share in the second—Such a suit does not offend the provisions of Or. II, 5, C P. Code and it comes within the exception specified in the rule as the plaintiff's personal claim in respect of the partnership with himself "arises with reference to the estate in respect of which he is suing as administrator." The words "arise with reference to" in the exception to Or II, r 5 are very general and cover a case where the plaintiff's personal claim can only be determined after calculating the amount due to him as administrator The expression "arises with reference to" should not be read as being equivalent only to arises against or on behalf of"; *Arunachellam* v *Arunachellam*, 43 M L J 218 16 L W. 175 · (1922) M W. N 453

Cases Illustrating Misjoinder of Claims Contemplated by This Rule.—On the death of a co-parcener of a joint Hindu family his share and interest in the family property is automatically absorbed and the surviving co-parceners become the full owners of the whole estate Such co-parcen-

ers are not the heirs of the deceased but inherit by survivorship and become the owners of the interest of the deceased in the family estate as co-owners in their own right and by the legal extinction of the interest of the deceased co-parcener by reason of his death The claim of the widow of such a deceased co-parcener for maintenance is clearly not against "the estate of the deceased" husband but is against the property of which he was a co-parcener at the time of his death Accordingly there is no misjoinder of causes of action if the widow in one suit sues the co-parceners of her deceased husband to recover her *stridhan* property improperly or illegally detained by them and also to enforce her right of maintenance out of the estate of the joint family of which during his lifetime her husband was a member, *Jankibai* v. *Shriniuas Ganesh*, 38 B. 120.

Those to whom this rule relates, have the common characteristic that they own their legal condition to the death of another But there are others of whom this can be predicated, as for instance, legatees or next of kin, who are not named in this rule Executors, administrators and heirs have this characteristic in common, not shared by legatees and next of kin, namely, that not only they acquire title from the deceased, but they may represent him In this is to be found the clue to the meaning of the rule —*Hafizaboo* v *Mahomed Cassum*, 31 B 105· 8 Bom L. R 734, (6 B 390 *not followed*, 18 A 256, *approved*;) referred to in *Jagattarini* v *Prafulla*, 35 I C 792

In a suit for administration and accounts of separate estates against executors of a will, the plaintiff cannot sue for recovery of jewels and ornaments, as the claim for ornaments had no reference to the estate and was personal to the plaintiff herself —*Ashabai* v *Tyeb*, 6 B. 390

Procedure.—Where two claims which this rule does not allow to be joined are joined in one suit, the practice is to amend the plaint by striking out one of them, and the suit may then be proceeded with; *Ashabai* v *Haji Tyeb*, 6 B 390

Power of Court to order separate trials.

6. Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the Court may order separate trials or make such other order as may be expedient [S. 45, para. 2.]

COMMENTARY.

This rule corresponds to para 2 of s. 45 of the C P Code, 1882 with some modifications and changes The words "*at any time before the first hearing, of its own motion, or on the application of any defendant, or at any subsequent stage of the suit, if the parties agree*," which occurred in the old section after the words "Court may," have been omitted; and the words "*for the separate disposal thereof*" which occurred in the last sentence of the old section, after the word "expedient," have also been omitted. *See* also s. 47 of the old Code.

"Court may order separate trials."—Where a suit was brought by a Hindu for partition of family property, against his father, brothers, and

fifteen others, to whom the father had improperly alienated numerous parcels of the said property at different times, *held* that the better course was for the Court to have ordered separate trials to be held in respect of each alienation.—*Subramanya* v. *Sadasiva*, 8 M. 75.

In a suit on title in which the recovery of immoveable property and mesne profits are claimed, the Court may order separate trials in respect of the claim for the recovery of the immoveable property and in respect of the claim for mesne profits.—*Fatima Bibi* v. *Abdul Majid*, 14 A. 531.

Where the parties concerned, though in different relation, in a particular litigation are all before the Court, and their cases have been stated, the Court if it finds the several causes as between plaintiff and the several defendants cannot properly or conveniently be tried together, should deal with them separately as sub-suits under the title and number of the principal suit from which they sprung —*Khadar Saheb* v. *Choti Bibi*, 8 B. 616.

A Court has no power to direct a suit to be dismissed by reason of the misjoinder of causes of action, but can take action under this rule; *Gur Prosad* v. *Gur Prosad*, 19 C. L. J 616.

The case that is contemplated by Or. II, r. 6, C P Code, is a case where the causes of action joined in the same suit are essentially of a different character. But where the facts alleged in the plaint arise out of facts that are common to both the causes of action joined in the suit, the Court is not justified in excluding one of them on the ground that it would be convenient to try those two causes of action together, *Nandarani* v. *Hari Charan* 36 I. C 29

" **Such other order as may be expedient.**—If the Court finds it inconvenient to order separate trials, then it should allow the plaintiff to amend his plaint or to order that the suit be confined to such other causes of action as may be conveniently disposed of in one suit

A decree-holder, in execution of a decree against the father, attached a house as belonging to him and his two sons, forming a joint Hindu family. The sons objected that the house had been previously partitioned, and was held by them and their father in separate shares, but their objection was disallowed. They then brought a joint-suit for a declaration that their respective portions of the house were not liable to attachment. The lower Appellate Court dismissed the suit entirely on the ground of misjoinder. *Held* that the plaintiffs should have been allowed to amend their plaint by striking out the name of one of them —*Behari* v. *Kodu Ram*, 15 A. 38.

Where a suit was instituted by six plaintiffs jointly, and five of them were held to be not entitled to proceed in the suit on the ground of misjoinder of causes of action, one plaintiff only was allowed to continue the suit.—*Barrow* v. *Hem Chunder*, 35 C. 495.

This rule applies when there are several causes of action against the same defendant or the same defendants jointly, and it empowers the Court to order that the suit be confined to such of the causes of action as may be conveniently disposed of in one suit.— *Muthappa Chetty* v. *Muthupalani*, 27 M. 80.

Powers of Appellate Court to Make an Order under this Rule.—In a case of a joinder of causes of action, where the trial Court does not think fit to act under Or. II, r. 6, the appellate Court ought not to interfere with the discretion; *Paiva Ram* v. *Kesho Nath*, 73 I. C. 892.

Any objection on the ground that contradictory causes of action ought not to have been tried together cannot be urged in second appeal if such objection as to the frame of the suit was not raised in the trial Court; *Dwarik Bala* v. *Nadhiram*, 40 I. C. 462

Consolidation of Suits.—This rule deals with the separate trials of causes of action joined in one suit on the ground of inconvenience But *there is no express provision in the C. P. Code for consolidation of seve*ral suits. In *Kali Churn* v. *Surja Kumar*, 17 C W N 526, it has been held that the Court has inherent power under s 151 of the Code to order consolidation of suits in a proper case Consolidation was ordered by the Court in some cases under the old Code on general principles of justice and equity and also on the ground of convenience, *see* 15 W R 110: 10 C. 58. In consolidated suits the defendants may prefer one appeal, 15 W. R. 395 As to Court's power of consolidation of appeals, see, *Janardan* v. *Shib Prosad*, 43 C 95 S 128 (*h*) empowers the High Courts to make rules for consolidation of suits, appeals and other proceedings.

7. All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived

Objections as to misjoinder.

[Ss. 46 & 47.]

COMMENTARY.

This rule embodies in a concise and modified form the substance of *the* provisions contained in sections 46 and 47 of the Code of 1882 It is analogous to Or. I, r. 13, which rule relates to objections as to non-joinder or misjoinder of parties, whereas this rule relates to misjoinder of causes of action. *See* notes to Or. 1, r. 13

Dismissal of a suit against one of the defendants without trial after first hearing and settlement of issues is illegal, *Singa Reddi* v *Modava*, 20 M. 360.

Even on second appeal, if a suit is found to be bad for misjoinder of causes of action, the proper procedure would be not to dismiss the suit, but to direct the Court below to return the plaint for amendment; *Sarala* v. *Sarada*, 2 C. L. J. 602, (20 W. R 240, 18 A 131, *followed*).

Waiver of Objections—See *Ahmedbhai* v *Sir Dinshaw*, 13 Bom. L R. 1061, where DAVAR & ROBERTSON, JJ, expressed contrary views on the question of waiver. *See also*, *Ghumanmal* v. *Papurbai*, 9 S. L. R. 11: 30 I. C. 24.

Where the plaintiff raised no objection of non-joinder when the party was taken out of the list of defendant. *Held* that the objection was waived; *Ghumanmal* v. *Papurbai*, 9 S. L. R. 11: 30 I. C. 24.

An objection as to joinder of causes of action, namely, whether the plaintiff could agitate the question as to the tenancy of the defendants in a suit for partition, if not taken in the Court of first instance is to be deemed to be waived; *Midnapore Zemindary Co., Ltd.* v. *Kumar Nurse Narain*, 33 C. L J. 317: 63 I. C. 161.

ORDER III.

RECOGNIZED AGENTS AND PLEADERS.

Appearances etc. may be in person, by recognized agent or by pleader.

1. Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader *appearing, applying or acting, as the case may be*, on his behalf.

Provided that any such appearance shall, if the Court so directs, be made by the party in person. [S. 36.]

COMMENTARY.

Changes in the Section.—The italicized words in this section have been substituted by the Amendment Act XXII of 1926 for the words " duly appointed to act " which occurred after the words " or by a pleader."

This rule corresponds to s. 36 of the C P. Code of 1882 with the following modifications The words "to a suit or appeal" before "in such Court" have been omitted; the word "where" has been substituted for the word *"when"*.

Appearance and Act.—These words have a well-defined and well-known meaning To appear for a client in Court is to be present and to represent him in the various stages of the litigation at which it is necessary that the client should be present in Court by himself or some representative. To act for a client in Court is to take on his behalf in the Court or in the offices of the Court, the necessary steps that must be taken in the course of the litigation in order that his case may be properly laid before the Court, *Kali Kumar* v. *Nobinchandra*, 6 C. 585 (590). As to what amounts to appearance, *see*, notes under Or. IX, rr 9 and 13.

Proviso.—This proviso is to be read with Or V, r. 3, under which the Court is authorized to order a plaintiff or defendant to appear in person. As to consequence of non-appearance of a party who has been ordered to appear in person, *see* Or IX, r. 12.

" Except where otherwise expressly provided."—Or. XXXIII, r. 3 expressly provides that application for leave to sue in *forma pauperis* is to be made by the applicant in person; so also for leave to appeal in *forma pauperis*, *see* Or. XLIV, r. 1

Party in Person.—A party to a suit or any proceeding can himself appear, act or make applications on his own behalf A barrister or pleader appearing before the Court, as a litigant in person, ought to address the Court from the same place and in the same way as any ordi-

nary member of the public, and not from the advocate's table or in robes; *In re West Hope Tea Co. Ltd.*, 9 A. 180: 7 A. W. N. 7.

Appearance by Recognized Agent.—A *karinda*, who holds neither general nor special power-of-attorney authorizing him to act for his employer, is not a recognized agent; *Badri Prosad* v. *Bhagwati*, 16 A. 240.

An agent holding a power-of-attorney authorizing him to act and appear for a party to a suit, cannot bring the suit to a close by offering to be bound by the oath of the opposite party in a particular form; nor can a pleader so bind his client —*Sadasiv Rayaji* v. *Maruti Vithal*, 14 B. 455.

A recognized agent under this section is competent to make a reference to arbitration, but a person authorized by a *muktarnama* to look after a case is not competent to make the application —*Bhugwan Dass* v. *Nund Lall*, 12 C 173 (78). *See* also, *Saturjit* v. *Dulhin Gulab Koer*, 24 C. 469.

An attorney who has acted for a party to a suit and has discharged himself, cannot afterwards act for the opposite party, and the Court will on application restrain him from doing so; *Ram Lall* v *Moonia*, 6 C. 79.

Appearance by Pleader.—The words " by a pleader duly appointed to act in his behalf" in this section do not simply mean a person duly appointed by the party in the suit, but a pleader duly appointed according to the law regarding pleaders in force in the particular Court.—*In re Pleaders of the Bombay High Court*, 8 B 105, *Veerappa* v. *Sundaresa*, 48 M. 676

An application by a pleader who is instructed only to apply for an adjournment, which is refused, is not an "appearance" within the meaning of the Code of Civil Procedure; *Satis* v. *Apara Pershad*, 34 C. 403 F. B.: 11 C W N. 329: 5 C. L J. 247; *Maung Pway* v. *Saya Pe*, A. I. R. 1927 Rang. 46.

The mere presence of a recognized agent or pleader in Court without any intention to conduct the case on behalf of his client, is not an appearance within the meaning of this section. Appearance by pleader means appearance by pleader duly instructed and able to answer all material questions relating to the suit —*Soonder Lal* v. *Goor Prosad*, 23 B. 414. *See* also *Venkatarama* v *Nataraja*, 24 M L J 235: 13 M. L. T. 140: (1913) M W N 165 In *Ram Chandra Pandurang* v. *Madhav*, 16 B. 23, it has been held that the mere fact the pleader was not prepared to proceed with the case will not enable the Court to deal with the case as if there was no appearance at all But see, *Shibendra Narain* v. *Kinoo Lam*, 12 C 605, in which it has been held that unpreparedness of a pleader amounts to non-appearance

The personal appearance of a plaintiff who has instructed a pleader to appear in his behalf for the purpose of conducting the suit is not necessary and if the suit is dismissed in the presence of the pleader, the decree of dismissal would not be subject to the procedure for setting it aside laid down in Or IX. r 9 of the C P Code; *Mowar Raghbar Singh* v. *Gowri Charan*, 46 I C 492

As to the meaning of the term " pleader " and the appointment, appearance and authority of pleaders see notes under section 2.

"Duly appointed."—A pleader duly appointed by an official liquidator, who has obtained the sanction of the Court to institute a suit is "duly appointed" within the meaning of this rule, though no sanction was obtained for the appointment of the pleader; *Kathiawar & Ahmedabad Banking Corporation* v. *Gurdas*, 5 Lah. 414: A. I. R. 1925 Lah. 222: 84 I. C. 510

Where a party to a suit authorizes an agent, by special power of attorney, to appoint a pleader to sign execution petitions, a pleader appointed by the agent to support a petition verified by the agent is "a pleader duly appointed to act on his (party's) behalf" within the meaning of this rule; *Thiruvenkata sami* v. *Pavadai*, 48 I. A. 534: 44 M. 736: A. I. R. 1922 P. C. 403.

Under the new C. P. Code a pleader duly appointed to act for a party has authority under Or. III, r. 1 to make any application, including one for reference to arbitration; *Sri Krishen Rochumal* v. *Relumal Penomal*, 9 S. L. R. 183: 34 I. C. 845

Recognised agents.

2. The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

(*a*) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;

(*b*) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such applications and acts. [S. 37.]

COMMENTARY.

Alterations and their Effect.—This rule corresponds to s. 37 of the Code of 1882 with some alterations. Clause (*a*) has been made wider and more comprehensive than the corresponding clause of the old Code, by the omission of the word "*general*" which preceded the words "*power of attorney*" and of the sentence "*from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done*" which followed it. These omissions have made the scope of the present clause (*a*) more comprehensive, as the present clause (*a*) authorizes any person holding a simple power of attorney to make appearance and application in Court, and hence clause (*b*) of the old section, in which there was specific mention of *certificated mooktears*, has been omitted, as unnecessary.

By the omission of the sentence above referred to, the rulings in 6 B. 100, 28 A. 135, 23 A. 99 and 26 A. 19 and 154 have been rendered

obsolete and inoperative, as those cases explained the meaning of the word "*non-resident*" which occurred in cl. (*a*) of s. 37 of the old section.

"The provisions of the existing Code which are represented by this clause are in somewhat different terms and are limited to persons holding general powers of attorney within certain local limits. The Committee think it unnecessary to preserve these limitations and have made the sub-clauses general. It follows that the present clause 37 (*b*) becomes unnecessary. It is included in sub-clause (*a*) The last paragraph of section 37 has been omitted as no longer necessary."—*Report of the Special Committee.*

Power of Attorney—Proof of Authority.—Where an act, purporting to be done under a power-of-attorney, is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair consideration of the whole instrument, the authority in question is to be found within its four corners, either in express terms or by necessary implication.—*Raj Radha Kissen* v. *Nauratan Lal* 6 C. L. J. 490, *Ghasiram* v. *Raja Mohan Bikram*, 6 C. L. J. 639.

Where the defendant in the Court below failed to take the objection that a power-of-attorney constituting a recognized agent was not valid, he must be deemed to have waived the same. The objection cannot be allowed to be raised for the first time in appeal; *Gopal Singh* v. *Bhaga*, 69 I. C. 365.

Cl. (a).—"Persons holding power-of-attorney.—A plaint signed by authorized agent is valid in law unless it is shown that the suit has not been instituted with plaintiff's approval; *Amirunnissa* v. *Ram Charan*, 31 I. C. 859.

A power-of-attorney which authorizes a person to do all things and take all necessary steps to compel the execution of a decree is a general power-of-attorney, *Venkataramana* v *Narasinga*, 38 M. 134; 24 M. L. J. 180

Where a recognized agent carried on the litigation on behalf of his principal up to the High Court and obtained a decree without objection, *held* that the debtor could not object to the agent's right to execute the decree obtained by him as agent.—*Parvatibai* v *Vinayek*, 12 B. 68

A recognized agent cannot prosecute or defend a suit in his own name.—*Mokha Harakraj* v *Biseswar*, 5 Bom. L. R. Ap 11: 13 W. R. 344.

Where a lower appellate Court threw out a case on the ground that the plaint had not been filed by recognized agent, *held*, that the case should not have been thrown out on such a technical objection not affecting the merits of the case.—*Mannoo Dassee* v. *Ishan Chander*, 15 W. R. 215.

Plaintiff instituted a suit for recovery of possession of land from defendants and the plaint was filed by a mukhtear holding a special power-of-attorney for the plaintiff and not a general power-of-attorney as required by Or. III, r. 2 (*a*), as amended by the rules made by High Court of Bombay. The defendants objected that the suit was not properly instituted, but the Courts below overruled the plea and decreed

that suit. *Held*, on second appeal, that the irregularity, if any, was cured by s. 99 C. P. Code, and that the decree of the Court below should be affirmed; *Ganapathy Nana Powar* v. *Jivanabai*, 24 Bom. L. R. 1302; *Achut Sitaram* v. *Tarachand*, 72 I. C. 1003.

Appellants, who held a decree for mesne profits and who were residents within the local limits of the jurisdiction of the Court within which limits an application for the execution of the decree was to be made, executed a special power-of-attorney in favour of *R* authorizing him, amongst other things, to execute necessary proceedings. *R* retained a pleader to present an execution petition verified by him (*R*), to examine witnesses, argue, etc An execution petition verfied by *R* and signed, not by any of the appellants, but by *R* and the pleader, and filed in the Court concerned, was held to have been duly presented though *R* was not a "recognized agent" within the meaning of s. 37, C. P. Code of 1882 (Or. III, r 1), *Thiruvenkatasuami* v *Pavadai Pillai*, 44 M 736: 41 M. L. J. 645

Special leave must be obtained from the Court in each case by a mukhtear desiring to conduct a contested civil suit Such leave should be given in exceptional cases; *Raj Mohan* v *Basiruddin*, 8 C W. N. 401.

A mukhtear filed an application for execution, but his name had been omitted by mistake from the mukhtearname *Held* that the Court has power to amend the mukhtearnama with retrospective effect; *Chhaymannissa* v *Kazi Basirar*, 11 C. L. J 285: 37 C 399. *See* also. *Ganga Ram* v *Dinanath*, 118 P R 1912, where the power-of-attorney was filed after filing the execution petition, and it was held that the subsequent filing of the power-of-attorney will have retrospective effect; but *see* 36 A 46

A mukhtear having presented an application for execution, the Court returned it upon the ground that it ought to have been presented through a pleader and not through a mukhtear The meanings of the words "act" and "plead" explained —*In the matter of Ishur Kant*, 24 W. R 233 But in *Gunnamayee Debi* v *Nobin Chander*, 1 C. W. N. 11, it has been held that a mukhtear is authorized to apply for execution.

A recognized agent as such has no power to plead and examine witnesses, *Hurchand* v B N *Ry Co*, 19 C W N 64

The mere fact that a person looks after an appeal, and gives instructions to pleaders in connection with such appeal, does not show that such person was practising as a mukhtear Distinction between mukhtear and private agent pointed out.—*Kali Kumar* v. *Nobin Chunder*, 6 C. 595. 7 C. L R 562.

A mukhtearnama under seal is as valid as a mukhtearnama under signature A Judge is not bound or authorized to require proof of the genuineness of the seal.—*In re the petition of the Maharaja of Burdwan*, 7 W. R 475

An outsider, other than a duly certificated mukhtear practising as a mukhtear and receiving monthly wages from his employers, is neither a private agent nor a recognized agent of any of the employers within the meaning of this rule; *Tussuduq Hussain* v. *Girbor Narain*, 14 C. 559.

A person who uses special power-of-attorney to evade the provisions of law relating to appointment of pleaders or advocates is liable to punishment; *Nga Nyun* v. *Nga Po*, 7 Bur. L. T. 206: 25 I. C. 163.

A mere power to sue does not authorize an agent to do more than employ a vakil on the terms of paying him a reasonable remuneration; *Keshav Bapuji* v. *Narayan*, 10 B. 18.

Naibs or *gumastas* of a landlord empowered by written authority are recognized agents; *see* sections 145 and 187 of the Bengal Tenancy Act.

Cl. (b).—" Persons carrying on trade or business."—The *munim* of a firm is not, for the purposes of presenting a plaint, the recognized agent of a partner who is present within the jurisdiction.—*Bisandas Valaid* v *Luckmichand*, 6 Bom. H. C. 150.

The *munim* of a firm which has ceased to carry on business, who is engaged in collecting the assets of such firm, is a recognized agent of the owner of such firm, and can, on behalf of his absent principal, maintain or defend a suit brought in respect of the business of the firm.—*Tukaji Maharaj Holkar* v. *Pitambar Das*, 9 Bom. H. C. 427.

The agent contemplated by this section is one who has an initiative and independent discretion, *albeit*, subject possibly to principles and general orders prescribed for his guidance. A mere servant employed to carry out orders, or to execute a particular commission, or a factor or common agent who is not identified with the firm for which he acts, is not such an agent as is contemplated by cl. (*c*) of this section.—*Gokul Das* v. *Ganesh Lall*, 4 B. 416.

Where a plaint is signed and presented by the plaintiff's clerk who has no authority from the plaintiff to carry on business in the plaintiff's name, the plaint cannot be said to have been signed by the plantiff's "recognised agent." In such a case the Court may rightly dismiss the suit; *Uttamram* v. *Thakurdas*, 46 B. 150. A. I. R 1922 B 113· 64 I. C. 55 .

The Political Agent appointed by Government to manage the estate of the Chief of Mudhal is not a " recognized agent " within the meaning of cl. (*b*) of this rule; *Venkatrav Raje* v. *Madharav*, 11 B 53.

S. 85 was not intended to limit the scope of this rule and does not prevent the institution of a suit by an independent Prince in his own name and through a recognized agent other than one appointed under s. 85 — *Maharaj of Bharatpur* v *Kacheru*, 19 A. 510 (10 C 136 *followed*).

Service of summons on one partner for his co-partner is a good service. See *cases noted under Or. XXX, r* 3

Certificated Mukhtears.—They are now included in clause (*d*), of which the scope has been extended.

Recognized Agent of Government.—*See Or. XXVII, rr. 2, 4.*

Recognized Agent of Princes.—*See s 85 and notes.*

Service of process on recognized agent.

3. (1) Processes served on the recognized agent of a party shall be as effectual as if the same had been served on the party in person, unless the Court otherwise directs.

(2) The provisions for the service of process on a party to a suit shall apply to the service of process on his recognized agent. [S. 38.]

COMMENTARY.

This rule corresponds to s. 38 of the Code of 1882. The words "*to a suit or appeal*" after the word "*party*" have been omitted.

A mere mukhtear, unless specially authorized, is not the recognized agent of the judgment-debtor on whom notice can be rightly served within the meaning of the Civil Procedure Code.—*Kristo* v. *Fazul Ali*, 17 W. R. 389.

A person holding a power-of-attorney, even if authorized by the power to appear and defend suits on behalf of his principal, is at liberty to refuse to accept service of summons, and to appear in a suit brought against his principal, but may either act upon the power or not as he may think proper. —*In the matter of the Petition of Luchmee Chand*, 2 C. 317.

Service upon an attorney's clerk of an order directed to be served upon an attorney is not good service —*Emrit Lall Saligram* v. *Kidd*, 2 Hyde 116.

When legal proceedings are conducted through a mukhtear, it follows from the general principle of law which underlies s 229 of the Indian Contract Act and s 3 of the Transfer of Property Act, that the agency of the mukhtear extends to receiving notice on behalf of his principal of whatever is material to be stated in the course of the proceedings. The knowledge of the agent is imputed to the principal, not on the ground of constructive notice nor as an inference of facts The rule is a rule of law of universal application, *Raja Rampal* v. *Balbhaddur*, 25 A. I. P. C.: 6 C. W. N. 849.

Appointment of pleader.

4. (1) *No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a power of attorney to make such appointment.*

(2) *Every such appointment shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client.*

(3) *For the purposes of sub-rule (2) an application for review of judgment, an application under section 144 or section 152 of this Code, any appeal from any decree or order in the suit and any application or act for the purpose of obtaining copies of documents or return of documents produced or filed in the suit or of obtaining refund of monies paid into the Court in connection with the suit shall be deemed to be proceedings in the suit.*

(4) *The High Court may, by general order, direct that, where the person by whom a pleader is appointed is unable to write his name, his mark upon the document appointing the pleader shall be attested by such person and in such manner as may be specified by the order.*

(5) *No pleader who has been engaged for the purpose of pleading only shall plead on behalf of any party, unless he has filed in Court a memorandum of appearance signed by himself and stating—*

(a) *the names of the parties to the suit,*

(b) *the name of the party for whom he appears, and*

(c) *the name of the person by whom he is authorised to appear:*

Provided that nothing in this sub-rule shall apply to any pleader engaged to plead on behalf of any party by any other pleader who has been duly appointed to act in Court on behalf of such party.

COMMENTARY.

Changes in the Rule.—The present Rule 4 is an entirely new rule. It has been substituted for the old rule by Amendment Act XXII of 1926. The effect of the amendment is to recognise the status of a practitioner who is empowered only to plead but not to act, in requiring from him a memorandum of appearance signed by himself and not by the party on whose behalf he is required to plead (sub-rule 5) The well-recognised practice of one practitioner appearing for another practitioner at his request, without any fresh writing, has now received statutory approval.

Sub-rule (1).—" Act."—Under s 2 (15), " pleader " includes advocate and therefore an advocate " acts " when he files a memorandum of appeal or cross-objections or any other document in a case other than a memorandum of appearance under sub-rule (5), and that in all such cases a power of attorney is necessary; *In re filing powers by an advocate or pleader;* 4 Rang. 219: A. I. R. 1926 Rang. 215.

" By a document in writing."—The " document in writing " is the *Vakalatnama,*

A telegram from the client asking the pleader to file the appeal and informing him that the power of attorney was being sent, does not amount to an authority in writing entitling the pleader to file an appeal or to act on behalf of his client; *Uram Baksh* v. *Mast Ram*, 101 I. C. 613: A. I. R. 1927 Lah. 398.

Sub-rule (2).—" Until all proceedings in the suit are ended so far as regards the client."—Applications for execution are "proceedings in the suit"; a fresh *Vakalatnama* is therefore not necessary to present an application for execution; *Sadasiva* v. *Vithaldas*, 20 B. 198; *Raghubar* v. *Jadunandan*, 16 C. W. N. 731, 736: 15 C. L J. 89; or to plead in a claim case under Or. XXI, r 58; *Gopal Joychand* v. *Haragobind*, 5 B. H. C. R. 83; or to appear in an application for new trial; *Sutto Churn* v. *Suroop;* 12 W. R. 465; *Raghunath* v. *Raghubir*, 15 A. 55.

The words " when accepted by a pleader," which occurred in the old rule after the words " every such appointment," have been omitted in this rule by the Amendment Act XII of 1926, and the word " deemed " has been substituted for the word " considered."

Sub-rule (3).—Sub-rule (3) now expressly provides that the following are to be considered *" proceedings in the suit "* within the meaning of sub-rule (2), *viz*:—

(1) An application for review of judgement under Or. XLVII, r. 1,

(2) An application for restitution under s. 144;

(3) An application for amendment of clerical or arithmetical mistakes in judgments, decrees or orders;

(4) Any appeal from any decree or order in a suit; and.

(5) Any application or act for the purpose of obtaining copies of documents or return of documents produced or filed in the suit or of obtaining refund of monies paid into the Court in connection with the suit.

As they are " proceedings in the suit," it is not necessary that any fresh *Vakalatnama* should be filed by a pleader in respect of any appearance or act in connection with the aforesaid matters.

Sub-rule (4).—In pursuance of the provisions of this new sub-rule, the High Court of Calcutta has now framed the following rule for the guidance of subordinate Courts:—

" No vakil or pleader shall receive a *Vakalatnama* from a person who is unable to write his name unless it bears an endorsement thereon in the following form: 'I, A. B., do hereby appoint C. D., pleader, to act for me in the above-named case, in token whereof I have affixed my mark, and attested the same in the presence of E. F. who is known to me.' "

Sub-rule (5).—This new sub-rule empowers a pleader to appear in any suit *for the purpose of pleading only*, provided that in such a case he files *a memorandum of appearance signed by himself* and stating—(*a*) the names of the parties to the suit, (*b*) the name of the party for whom he appears, and (*c*) the name of the person by whom he is authorized to appear.

Endorsement of Acceptance of Vakalatnama in Writing if Necessary.—An acceptance or act by a pleader named in a *vakalatnama* would, if allowed by Court, expressly or by implication, be valid and operative even without an endorsement in writing on the *vakalatnama* by the pleader; but r. 45, Ch. XI, p. 301, Vol. I of the General Rules and circular orders of the High Court requiring acceptance of a *vakalatnama* by endorsement in writing, ought to be complied with. Per *D. Chatterjee, J.*—The rule is a salutary rule prescribed for safeguarding the interests of litigants and should be followed in the mofussil in the manner indicated by the construction placed thereon by the High Court. Courts in the mofussil must be specially careful in enforcing this rule in cases of compromise and withdrawal of cases and withdrawal of money or documents; *Mohesh Chandra* v. *Panchu*, 43 C., 884; 20 C. W. N. 287: 23 C. L. J 297. *In the matter of two pleaders*, 2 Pat. L. J. 259; *Kunja Behari* v. *Sheo Dahin* 2 Pat. L. T. 447: 68 I C. 659; *Budhu Ram*, v. *Kalu Ram*, 6 Lah. 461.

Legality of Delegation of Duty by One Pleader to Another.—Where a pleader duly authorized to act in that behalf, delegates to another practitioner the doing or making of any act or appearance for which he is himself responsible, the delegate, if not exempted under Or. III, r. 4 (3), must himself obtain a power-of-attorney from the client or from the delegating pleader or other authorized agent; *Dhanoo Lal* v *Musst. Baij*, 12 N. L. R. 189: 37 I. C. 103.

Where a pleader cannot attend, he has no power to delegate his authority to another pleader; *Shiv Dayal* v *Khetu*, 20 B 293.

Vakalatnama Not Containing the Name of Pleader.—A *vakalatnama* not containing the name of the pleader is defective, and the pleader is not duly appointed by such defective *vakalatnama;* therefore, anything done under such *vakalatnama* is invalid; *Md. Ali Khan* v. *Jas Ram*, 36 A. 46. But see, *Chhayemannessa* v *Kazi Basuar*, 11 C. L J 285 37 C 399, where the *mukhtearnama* was allowed to be amended by inserting the name and this was held to have retrospective effect. *See* also *Maulvi Muhfoozal Huq* v. *Maulvi Muzhoral Huq*, 41 I. C. 685; *Musst. Masumbi* v *Dongar Singh*, 55 I. C. 415.

Where a *vakalatnama* executed without the pleader's name appearing on it is accepted by the particular pleader who was engaged by the party and a plaint was presented by that pleader, *held*, that the provisions of Or III, r. 4 were sufficiently complied with and that the presentation of the plaint was proper. Or III, r. 4 provides that the authorization must be in writing not that it must be in any particular form, or must show the pleader's name in the main body of the document; *Maharashtraya Jnan Kosh Mandal* v. *Bijju Lal*, 6 N. L J. 100. 19 N. L. R. 36 71 I. C. 436

Validity of Vakalatnama, Signed by Person Authorised to Instruct.—The rules as regards appointing pleaders are salutary and strict rules have been made to prevent fraud. But in a case where no fraud has been committed and one person signs for another with the full knowledge and acquiescence of the latter, the irregularity is a formal one not affecting the merits of the case and is cured by s. 99, C. P. Code; *Banwari Rai* v. *Chethru Lal*, 74 I. C. 1033.

Power-of-attorney Not Signed by Party or His Agent.—An appeal was presented by a pleader whose power-of-attorney was not thumb-marked or signed by the appellant or his agent *till* after limitation had expired. *Held*, that the omission to sign the power-of-attorney was obviously an oversight, and the consequent signing cured the defect and consequently the appeal was properly presented; *Khaira v. Nathu*, 2 U. P. L. R. 18: 55 I. C. 290 (22 A. 55, 40 A. 147, 36 A. 46 *refd. to*).

Presentation of Appeal by Pleader Without Vakalatnama Invalid.—The presentation of a memorandum of appeal by a vakil without any authority in the shape of *a vakalatnama* is not valid presentation; *Sheikh Palat* v. *Sarwan Sahu*, 55 I. C. 271.

Mode of Revocation.—The appointment of an attorney can be revoked only with the leave of the Court by a writing signed by the client and filed in Court as laid down in this rule; *Atul* v *Lakshman*, 36 C. 609

A counsel, unless his authority to act for his client is revoked and such revocation is notified to the opposite side, has by virtue of his retainer and without need of further authority, full power to compromise a case on behalf of his client; *Idug Bahadur* v. *Shankar Rai*, 13 A. 272.

When Employment of a Pleader Ceases.—Under Or. III, r. 4, C. P. Code, when a pleader has once been appointed by a party, his employment cannot be terminated except by a writing signed by the client or pleader and filed in Court with leave or by the termination of proceedings in suit. This rule should be strictly observed; *In re Two Pleaders*, 2 Pat. L. J. 259. 1 Pat L W 469 (1917) Pat. 217. 41 I C. 329.

Unless and until the conditions specified in Or. III, r. 4, C. P. Code, are complied with, the duties and obligations of the pleader will remain; *Emperor* v. *Rajani Kanta*, 49 C 732 26 C. W. N. 589: 35 C L. J. 356.

So far as the client is concerned, the appointment of a pleader is not determined until all proceedings in the suit are ended. The return of a plaint for presentation to the proper Court does not put an end to the authority of the pleader, and if the plaint is presented to the proper Court on the same day, the pleader can act in the case; *Debi Lal* v. *Krishnaji*, 5 N. L. J. 265. 67 I. C. 296.

Advocate.—An advocate on the roll of the High Court can perform on behalf of a suit all the duties that may be performed by a pleader, subject to his exemption in the matter of a *Vakalatnama* and to any rules which the High Court may make; *Bakhtawar v. Sant Lal*, 9 A. 617.

Service of process on pleader.

5. Any process served on the pleader of any party or left at the office or ordinary residence of such pleader, and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person. [S. 40.]

COMMENTARY.

This rule corresponds to old s. 40. The word "*any*" has been added in the beginning: and the words "*relative to a suit or appeal*" have been omitted.

Service of Process on Pleader.—The materiality of the service consists in the fact that the party is properly made aware of the matter contained in the notice, but if the party or his pleader, where notice is served on him, dispenses with the compliance of the correct formalities prescribed, he cannot afterwards object that, although he in fact had notice, the service was not directly in accordance with the formalities prescribed. The initialling of the order sheet by the pleader, when produced before him, amounts to a waiver of his right to any more formal notice; *Bhola Nath* v. *Bata Krishna*, 7 P. L. T. 189. A. I. R 1927 Pat. 135· 95 I. C. 321.

Where a notice of filing of an award is not given to the party, but the order filing the award is communicated to his pleader, and the pleader admits such communication, it is a sufficient compliance with the mandatory provisions of Sch. 2, Para 10, having regard to Or. III, r, 5; *Saroj Bala* v. *Jatindra*, 45 C. L. J. 458 A. I R. 1927 Cal 619.

Service on an Attorney's clerk of an order directed to be served upon an attorney is not good service.—*Emrit Lal Saligram* v. *Kidd*, 2 Hyde 116.

Service upon respondent's pleader is good service upon himself, so far as notice of the appeal is concerned.—*Ishur Dutt* v. *Shib Pershad*, 15 W. R. 290.

An appeal preferred to the High Court against a preliminary decree for accounts having been dismissed, the record was sent back to the lower Court which directed notices to be served on the pleaders of the parties for the further hearing of the case a week hence. Notice was served on the defendant's pleader, but he did not inform the defendant. *Held*, that the notice was not a good notice on the defendant and an *exparte decree* passed against him should be set aside.—*E. F. Sandys* v. *Upendra Chandra*, 13 C. W. N. 142.

Agent to accepts service.

6. (1) Besides the recognized agents described in Rule 2 any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process.

Appointment to be in writing and to be filed in court.

(2) Such appointment may be special or general and shall be made by an instrument in writing signed by the principal, and such instrument or, if the appointment is general, a certified copy thereof shall be filed in Court. [S. 41.]

This rule corresponds to old s. 41. No material change has been made. The word "*certified*" has been substituted for "*attested*" in sub-rule (2).

ORDER IV.

INSTITUTION OF SUITS.

Suit to be commenced by Plaint.

1. (1) Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf. [S. 48.]

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable. [New.]

COMMENTARY.

Sub-rule (1) corresponds exactly to old s 48. Sub-rule (2) is new Order VI contains rules relating to pleadings and Order VII gives the particulars to be contained in plaint. *See* also, s 26 of the present Code.

" By presenting a plaint to the Court."—A " plaint " in law means merely " a private memorial tendered to a Court in which the person sets forth his cause of action, the exhibition of an action in writing."—*Assan* v. *Pathumma*, 22 M. 494.

A suit must commence with a plaint, and a proceeding which is capable of terminating in a decree or an order having the force of a decree cannot on that ground alone be deemed to be a suit, if it has not commenced with a plaint.—*Venkata Chandrappa* v. *Venkatarama Reddi*, 22 M. 256.

A petition of appeal is not duly presented when having been signed by a pleader, it is handed in by a person who is not his clerk, and over whose conduct and actions he has no control.—*Queen-Empress*, v. *Rama*, 21 M. 114.

The word "presenting" does not mean sending by post; it means delivery to the Court or to its officer either personally or by a pleader.—*Queen-Empress* v. *Arlappa*, 15 M 137. *See* also, *Badri Prosad* v *Sheodhian*, 18 A. 354. But see *Sankaranarayana* v. *Kunjappa*, 9 M 411.

The placing of a petition on the table when the officer is not present is not a presentation to the proper Court.—*Tajuldeen* v *Ghafoorulnissa*, 3 N. W. 341.

The plaintiff filed a suit on 23rd October 1920, in which the plaint and *vakilpatra* were signed not by the plaintiff but by his servant who was not his recognised agent. On 3rd December 1920, when the fact came to the notice of the trial Judge, he dismissed the suit The plaintiff having appealed, *held*, that though the plaint was not duly presented nor duly signed, the plaintiff should have been allowed to sign the plaint on the 3rd December 1920. *Uttamram Vithal Das* v. *Thakordas*, 23 Bom. L. R. 911.

Where a plaintiff presented a plaint to the District Court, the Sub-Judge's Court in which it ought to have been presented being then tempo-

rarily closed, it was held that the District Court could not be considered a competent Court to receive the plaint.—*Ramaya Elapa* v. *Mahamadbhai*, 10 B. 495.

Validity of Presentation of Plaint to Judge Outside Court and Out of Office Hours.—A Judge may accept a plaint presented to him outside Court and after the usual office hours. In such a case, the suit must be deemed to have been instituted on the day on which the plaint was so presented; *Sattaya* v. *Soundarathachi*, 46 M. L J. 78: 47 M. 312: A. I. R. 1924. Mad. 448; *Thakurdin* v. *Haridas*, 34 A. 482: 14 I. C 714.

Presenting a plaint out of office hours to one authorized to receive it is not a valid presentation unless ratified by the Court on that very day; *Appa Vupillar* v. *Sheikh Amir*, 23 I. C. 362.

" Or its officers."—A plaint cannot be said to be validly presented if presented to the Head Clerk of the Collector unless the Collector has appointed him to receive it; *The Receiver of the Nidadavole* v. *Surapparazu*, 38 M 29 5 F. B.; nor a presentation to *Nazir* of a S. C. Court; *Raj Chunder* v. *Joogul*, 18 W. R. 172, or *Karkun Nandaballbh* v. *Alibhan* 6 B. H. C. 254.

Presentation of Plaint on Holiday.—A judicial act done by a Civil Court on a day specified in the list of holidays, shall not be invalid by reason only of its having been done on that day. *See* Bengal Civil Courts Act (XII of 1887), s. 15 (3).

A plaint may be received and admitted by a Court on a Sunday or other holiday.—*Anuntoram* v. *Protab Chunder*, 16 W. R. 231. *See* also, *Gobind Kuwar* v. *Haragopal*, 3 Bom. L R. Ap 72 .11 W. R. 537.

The disposal of a Civil suit on a Sunday is a mere irregularity, which is covered by s. 99 —*Sheo Ram* v. *Thakur Prasad*, 29 A. 562.

On a close holiday, a Judge may properly decline to proceed with any inquiry or trial; and any party can successfully object to any such inquiry being proceeded with, and, in the event of any such inquiry having been proceeded with in his absence and without his consent, would be entitled to have the proceeding set aside as irregular But a party who after waiving the right does attend on close holiday and without protest takes part in a judicial proceeding, cannot afterwards dispute the jurisdiction of the Judge to hear and determine the matter —*Ram Das* v. *Official Liquidator*, 9 A. 366.

A plaintiff was held to be right in stating that the fact of his plaint not having been accepted on the day on which it was actually presented, ought not to deprive him of his right of suit —*Young* v. *MacCorkindale*, 19 W R. 159.

Date of Presentation and Institution for the Purposes of Limitation.—The date of presentation of the plaint is to be taken as the date of institution, and not the date when the order appointing a guardian *ad litem* for a minor was made.—*Khem Karan* v. *Har Dayal*, 4 A. 37.

The date of the amendment of the plaint does not affect the question of limitation for the institution of the suit, and the return of the plaint for amendment and its subsequent presentation and acceptance by the Court

does not constitute a fresh institution of the suit.—*Ismail Saheb* v. *Arumuga Chetti*, 1 M. 427; *Ram Coomar* v. *Dwarka Nath*, 5 W. R. 207; *Husrutollah* v. *Aboo Mahomed*, 6 W. R. 89; *Greesh Chunder* v. *Pran Kishen*, 7 W. R. 157; *Mangur Mundur* v. *Huree Mohun*, 23 W. R. 447; *Begee Begum* v. *Yusuf Ali*, 6 N. W. 130; *Ram Lal* v. *Harrison*, 2 A. 832, and *Patel Mafat Lal Naran Dass* v. *Bai Parson*, 19 B. 320.

Presentation of plaint with insufficient court-fee is a valid presentation and for the purposes of limitation the suit is instituted on the day when the plaint is presented and not on the day on which the deficient court-fee is paid. There was a conflict of decisions on this point under the old Code, and s. 149 which gives power to the Court to allow deficient court-fee to be paid at any stage has been enacted to set at rest the conflicting rulings. See *notes, s.* 149. *As regards pauper suits,* see *cases noted under Or. XXXIII, r. 8.*

Expiry of the Period of Limitation on Holiday.—If the period of limitation expires on the day when the Court is closed, the plaint or application may be presented on the first re-opening day.—*Peary Mohun* v. *Ananda Charan*, 18 C. 631. *See also, Boyamma* v *Balajee Rau*, 20 M. 469.

See, *the provisions of s.* 5, *Limitation Act and s.* 10 (1) *of the General Clauses Act X of 1897.*

When parties are prevented from doing a thing in Court on a particular day, not by any act of their own, but by the act of the Court itself, *i. e.* on account of holiday, they are entitled to do it on the next opening day.—*Surendra Narain* v. *Sauravini Dasi*, 10 C. W N. 535; 3 C. L. J. 339.

Institution of Suit Against a Deceased Person.—Where the defendant died before the plaint against him was filed, the Court had no jurisdiction to decide the case.—*Mohan* v. *Azim*, 3 Bom. L R. 233; 12 W. R. 45.

Where a suit is instituted against a deceased person, Courts have no jurisdiction to allow the plaint to be amended by substituting the names of the representatives of the deceased.—*Veerappa* v. *Tindal*, 31 M. 86.

Register of suits.

2. The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted. [S. 58, last Para.]

COMMENTARY.

Where two suits are filed on the same day, it must be presumed until the contrary is proved that they were presented and admitted in the order in which their numbers appear in the Register of Civil suits, prescribed by this rule.—*Murti* v. *Bhola Ram*, 16 A 165.

ORDER V.

ISSUE AND SERVICE OF SUMMONS.

Issue of Summons.

1. (1) When a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified :

Summons.

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim.

(2) A defendant to whom a summons has been issued under sub-rule (1) may appear—

(*a*) in person, or

(*b*) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(*c*) by a pleader accompanied by some person able to answer all such questions.

(3) Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court. [S. 64.]

COMMENTARY.

This rule corresponds to old section 64 which has been re-arranged no change seems to have been made in the meaning. The present rule is rather elaborate and clear:

What the Summons should Contain.—*See* Appendix B, form 1.

Appearance of Defendant.—The Judge has discretion, when the defendant has confessed judgment, to decide the suit at once in accordance with such confession. He is not bound to wait till the time fixed for the regular hearing of the suit; but he cannot exercise that discretion where there is any doubt as to the good faith or identity of the parties.—*Bank of Bengal* v. *Currie*, 8 Bom. L. R. 396: 12 W. R. 432.

Where no date has yet been fixed for the appearance of the defendant within Or. V, r. 1, C. P. Code, the Court has no power to dismiss the suit for default under Or. IX, r. 3. Failure of plaintiff on the date fixed for him to attend and find out what date is fixed for appearance of the defendant does not empower the Court to dismiss the suit for default. The Court must fix a date for the appearance of the defendant and if on the

date so fixed, plaintiff does not appear, the Court can dismiss the suit; *Indar Singh* v. *Shom*, 22 P. W. R. 1921 · 60 I. C. 475.

Decree Without Issue of Summons.—The proviso to sub-rule (1) contemplates cases where a decree may be passed against a defendant without issue of service of summons upon him; *Bank of Bengal* v. *Currie & Co.*, 3 Bom. L. R. 396.

Fresh Summons.—Where there is no return of service to a summons, the law gives a Court full discretion either to issue a second summons or to take or not take stronger measures. It is not imperative on one Court to take measures to expedite the service in another Court but it is the business of the party interested to move the Court to do what is necessary.—*Dowlut Mundur* v. *Omrao Singh*, 14 W R. 336 *See* Or. IX, r. 5.

Appear.—The appearance referred to in s 100, C P Code, 1882, (Or. IX, r. 6) is an appearance in answer to a summons, to appear and answer the claim on a day specified, issued under this section.—*Hira Dai* v. *Hira Lal*, 7 A 538

Appearance by pleader, who was instructed only to apply for an adjournment and not duly instructed and able to answer all material questions is not an appearance under Or. V, r 1; *Venkata Rama Iyer* v. *Nataraja Aiyar*, 24 M L J 235. 18 I C. 360; *Maung Pway* v. *Saya Pe*, A. I. R. 1927 Rang. 46.

All processes are to be filled up by the parties or their pleaders. See Calcutta High Court's General Rules 7 and 7-A of 1907, published in the Calcutta Gazette, Part I, Page 1100 of 26th June 1907

Copy of statement annexed to summons.

2. Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement. [S. 65.]

The words "if so permitted" are new A copy therefore must now accompany every summons unless the Court permits a concise statement.

Court may order defendant or plaintiff to appear in person.

3. (1) Where *the Court* sees reason to require *the personal* appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified.

(2) Where the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance. [S. 66.]

COMMENTARY.

Where an order is made under this rule for the personal appearance of a party on a specified day, he is not bound to appear personally on any adjourned date, unless a fresh order is made requiring his presence on that date. Where no fresh order is made, and the Court disposes of the suit under Or. IX, r. 12, the order is one made without jurisdiction; *Sundarnath* v. *Mallu*, 39 A. 476: 39 I. C. 634.

No party to be ordered to appear in person unless resident within certain limits.

4. No party shall be ordered to appear in person unless he resides—

(*a*) within the local limits of the Court's ordinary original jurisdiction, or

(*b*) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate), less than two hundred miles distance from the court-house. [S. 67.]

COMMENTARY.

The words, "*or steamer communication or other established public conveyance*," have been added after the word "railway" in cl (*b*).

Summons to be either to settle issues or for final disposal.

5. The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly:

Provided that, in every suit heard by a Court of Small Causes the summons shall be for the final disposal of the suit. [S. 68.]

COMMENTARY.

Summons for Final Disposal.—It is for the Court to determine at the time of issuing summons, whether it should be for the settlement of issues or for final disposal In a suit on mortgage, the first summons should be for settlement of issues and not for final disposal As a general rule summons for final disposal should be issued only in simple cases, *Tuljaram* v *Sitaram*, 38 B. 377, 16 Bom. L. R 39

Fixing day for appearance of defendant.

6. The day for the appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day. [S. 69.]

COMMENTARY.

Para. 2 of the old section "*what shall be deemed sufficient time must be determined with reference to the circumstances of the case*," has been omitted, as superfluous.

date so fixed, plaintiff does not appear, the Court can dismiss the suit, *Indar Singh* v. *Shom*, 22 P. W. R. 1921: 60 I. C. 475.

Decree Without Issue of Summons.—The proviso to sub-rule (1) contemplates cases where a decree may be passed against a defendant without issue of service of summons upon him; *Bank of Bengal* v. *Carne & Co.*, 3 Bom. L. R. 396.

Fresh Summons.—Where there is no return of service to a summons, the law gives a Court full discretion either to issue a second summons or to take or not take stronger measures. It is not imperative on one Court to take measures to expedite the service in another Court but it is the business of the party interested to move the Court to do what is necessary.—*Dowlut Mundur* v. *Omrao Singh*, 14 W R 336. *See* Or. IX, r. 5.

Appear.—The appearance referred to in s 100, C. P. Code, 1882, (Or. IX, r. 6) is an appearance in answer to a summons, to appear and answer the claim on a day specified, issued under this section.—*Hira Dai* v. *Hira Lal*, 7 A. 538.

Appearance by pleader, who was instructed only to apply for an adjournment and not duly instructed and able to answer all material questions is not an appearance under Or. V, r 1; *Venkata Rama Iyer* v. *Nataraja Aiyar*, 24 M L J 235: 18 I C. 360; *Maung Pway* v. *Saya Pe*, A I. R. 1927 Rang. 46.

All processes are to be filled up by the parties or their pleaders See Calcutta High Court's General Rules 7 and 7-A of 1907, published in the Calcutta Gazette, Part I, Page 1100 of 26th June 1907

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COMMENTARY.

Where an order is made under this rule for the personal appearance of a party on a specified day, he is not bound to appear personally on any adjourned date, unless a fresh order is made requiring his presence on that date. Where no fresh order is made, and the Court disposes of the suit under Or. IX, r. 12, the order is one made without jurisdiction; *Sundarnath* v. *Mallu*, 39 A. 476: 39 I. C. 634.

"**Sufficient time.**"—Under this rule, a defendant is entitled to sufficient time to enable him to appear in person or by pleader. What may be "sufficient time" in a particular case can only be determined by considering the peculiar circumstances of the case.—*Khadar Bhi* v. *Rahiman Bhi*, 5 Mad. H. C. 167.

Where a summons was not served on the defendant in sufficient time to enable him to appear and answer, and an *ex parte* decree was passed, the decree was reversed in appeal on the ground that the summons had not been served in sufficient time.—*Chanbasappa* v. *Mainba*, 7 Bom. H. C. 138.

Reasonable time should be given to a defendant to appear and file his written answer.—Attention of the subordinate Courts drawn to the necessity of carefully seeing themselves that reasonable time is allowed to the defendants in all cases.—*Lokenath* v. *Sobanath*, 5 W. R. (Act X 1859) 89.

Summons to order defendant to produce documents relied on by him.

7. The summons to appear and answer shall order the defendant to produce all documents in his possession or power upon which he intends to rely in support of his case. [S. 70.]

COMMENTARY.

This rule corresponds to old s. 70 The words "*containing evidence relating to the merits of the plaintiff's case*" after the word "power" have been omitted.

On issue of summons for final disposal, defendant to be directed to produce his witnesses.

8. Where the summons is for the final disposal of the suit, it shall also direct the defendant to produce, on the day fixed for his appearance, all witnesses upon whose evidence he intends to rely in support of his case. [S. 71.]

COMMENTARY.

The word "*also*" has been added after the word "*shall*" and "*all*" has been substituted for the word "*the*" before "witnesses."

SERVICE OF SUMMONS.

Delivery or transmission of summons for service.

9. (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct. [S. 72.]

COMMENTARY.

" Unless the Court otherwise directs "—Service by Post—The words " *unless the Court otherwise directs*," have been added to give the Court power to order the service of summons in any other way the Court thinks proper; *e.g.*, by post. This is clear from the following: " Increased facilities have been given for the service of process to which further reference has been made in the *Notes on Clauses* It is hoped that by the gradual introduction of service by post may be found a solution of one of the principal defects in our legal system."—*Report of the Special Committee*. The observations of MOOKERJEE, J., in *Khiroda* v. *Nabin*, 21 C L. J. 653 p. 655: 19 C. W. N. 1231 (1234), also show that Court may direct service of summons by registered post. Delivery of summons by post to one who was not shown to be the defendant is not good service; *Jagannath* v. *Sassoon*, 18 B. 606.

" Resides."—The word ' resides ' in this rule refers to the place where a person eats, drinks and sleeps, or where his family or servants eat, drink and sleep; *Kumud* v. *Jotindra*, 38 C. 394 13 C. L. J. 221.

A summons cannot be sent by post to any place to which letters are not registered by a post office. A special bailiff cannot be sent to serve a civil process in a foreign territory.—*Kasim Ajim Duplay* v. *Kasim Mohammed*, 2 Bom. L. R. 59· 10 W. R. 349.

" Proper officer."—The *Nazir* is the proper officer of the Court to whom the summons is delivered for service, and who is to return it to the Court if unserved.— *Parshotam* v. *Abdul*, 18 B 500. *See* also, *Dharam* v. *Queen*, 22 C. 596.

10. Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court. [S. 73.]

Mode of service.

COMMENTARY.

Mode of Service.—Mere showing of summons is not a tendering of it; *R.* v. *Karsan Lal*, 5 B. H. C. R. 20 Service of summons must be effected in some of the ways mentined in the follwing rules (*see*, r. 12 *et seq*). For service on Corporations or Companies, *see*, Or. XXIX, r. 2, *post;* and as regards rent suits, *see*, s. 148 (*d*), B. T. Act (VIII of 1885).

Or. V, r. 10 of the C. P. Code lays down the main rule that service shall be made by delivering or tendering copy of the summons signed and sealed as prescribed. Whenever such delivery or tender has been made to the defendant personally, the service is complete and no subsequent irregularity by the process-server or other ministerial officer of the Court such as the omission of the process server to obtain the signature of the defendant can undo it. Such a case is particularly of a kind to which the maxim of *factum valet* seems applicable. But where the service is not personal, there is necessity for a strict compliance with the rules of procedure laid down in the C. P. Code; *Gopal Das* v. *Islu*, 46 I. C. 217.

11. Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant. [S. 74.]

Service on several defendants.

COMMENTARY.

This rule corresponds to the first para of old s 74, the words "*save as otherwise prescribed*" have been added in the beginning The proviso to the old section relating to the mode of service of summons upon partners, has been omitted. The reason for the omission is the addition of a separate Order in the present Code relating to suits by or against partner in which provisions have been made for service of summonses upon partners *See* Or. XXX, r. 3.

Where it was shown that there had been only one summons, against three brothers and that the serving-officer had merely posted it on the door of one of them without attempting to serve it personally on him, *held* that the service was insufficient —*Shiboo Ray* v *Kashee Roy*, 25 W. R. 394.

12. Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.

Service to be on defendant in person when practicable or on his agent.

COMMENTARY.

Where it is practicable, the service of summons must be in person, *Abraham Pillai* v *Donald Smith*, 29 M. 324 See, *Madurathachi* v. *Chokalinga*, (1914) M W. N 314 23 I C 324.

If a defendant is going from place to place it is not the duty of the plaintiff to go about seeking him in all the places through which he is travelling. If however, he had any other place of business or residence, the plaintiff is bound to take out summons to that place; *Madurathachi* v. *Chokalingam Pillai*, (1914) M. W. N 314: 23 I C 324

Agent Empowered to Accept Service.—A person holding a power-of-attorney, even if authorized by the power to appear and defend suits on behalf of his principal, is at liberty to refuse to accept service of summons and appear in a suit against his principal; or, in other words, he may either act upon the power or not as he may think proper —*In the matter of the petition of Luchmee Chand*, 8 C. 317.

Persons merely looking after the affairs of the defendant are not agents on whom service of summons will be sufficient under this rule; *Ram Soonduree* v. *Surut Soonduree*, 17 W. R. 33.

Minor Defendant.—Where the defendant is a minor, service of summons on a guardian *ad litem* is not a good service. Under the Code, the summons should be served on the minor.—*Suresh* v. *Jugat*, 14 C. 204 (215). *See also*, *Jotindra* v. *Srinath*, 26 C. 267: 3 C. W. N. 261.

Service of Summons on Pardanashin Lady.—As it is not always practicable to effect personal service on a *pardanashin* lady, the affixing of a summons at the lady's residence may be taken to be sufficient service; *Khunam*, v. *Musst. Husnara Begam*, 57 I. C. 594.

A *pardanashin* lady executed a power-of-attorney in favour of her husband, but there was no power given to accept service of summons on her behalf. The summons was served on the defendant. *Held*, that there was no proper service under Or. V, r. 12 as the husband was not an agent duly authorized to accept service of summons As a *pardanashin* lady is not able to accept service personally, she comes under the expression " cannot be found " under Or. V, rr. 15 and 17 and service of summons can be effected by serving it on any adult male member of the family, or affixing it on the outer door of the house in which the lady ordinarily resides.—*Musst. Najimunnissa* v. *Jagmohan Lal*, 4 Pat. L. T. 89 72 I C. 910

Service on agent by whom defendant carries on business.

13. (1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service.

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or charterer. [S. 76.]

COMMENTARY.

Service on Agent, When Valid.—A foreign corporation carrying on business through an agent in India can only be served through its agent. In order that such service should be treated as service on the foreign corportion, the agent must have power to enter into contracts on behalf of the corporation; *Mohomed Omar* v *Reliance Marine Insurance Co , Ltd.*; 43 C. L. J. 576: A. I. R. 1926 Cal. 1030. 97 I. C 286

A mere servant employed to carry out orders or to execute a particular commission, or a factor, or a commission agent who is not identified with the firm for which he acts, is not such an agent as is contemplated by this rule; *Gokuldas* v. *Ganesh Lal*, 4 B. 416

To satisfy the conditions of this rule as to the service of summons on an agent, there must be a person residing without the local jurisdiction, but carrying on business or work within those limits by a manager or agent, and sued on account of such work Service duly effected under this rule is effectual without reference to the circumstance of its being or not being communicated to the real defendants.—*Gokul Das* v *Ganesh Lal*, 4 B. 416.

Service of summons on an agent to whom a ship is consigned is good service on the owner in respect of matters connected with such ship.—*Rajaram* v. *Brown*, 7 B. H. C. 97.

14. Where in a suit to obtain relief respecting, or compensation for wrong to, immoveable property, service cannot be made on the defendant in person, and the defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property. [S. 77.]

Service on agent in charge in suits for immoveable property.

A suit for foreclosure or sale of immovable property, is one to obtain "relief respecting immoveable property"—*Michael* v *Ameena*, 9 C 733.

15. Where in any suit, the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.

Where service may be on male member of defendant's family.

Explanation.—A servant is not a member of the family within the meaning of this rule. [S. 78.]

COMMENTARY.

"**Adult male member of the family.**"—A *munim* is not a member of the family of his employer within the meaning of Or. V, r 15, C. P. Code. In a suit for recovery of money, the Court directed the notice to be issued to the parties and their pleaders that they should attend on a certain date. It appeared that no notice was served on the plaintiff's pleader, but one was served on the *munim* of the plaintiff's firm *Held*, that service on the *munim*, even if he was the person having the control or management of the plaintiff's business, was not sufficient and that the Court had no power to dismiss the suit for default, *Firm Ram Gopal Kanhia Lal* v *Naraindas*, 105 P. W. R 1918 45 I C. 932.

Where no attempt is made to find the defendant and the summons is served on his son, the summons cannot be said to be duly served. The enquiry as to the whereabouts of the defendants must not be perfunctory; *Bharam Chand* v *Kanak*, 26 C W N. 359 68 I C 991.

A notice served under Or V, r 15 on the members of the family of a person in marine service, who was, both before and after such service, in communication with the family, is good service sufficient to authorize the Court to pass an *ex parte* decree against him, *Intu Miah* v *Darbush Bhuiyan*, 42 C. 67: 25 I C 380.

Service of summons on the paternal uncle of the defendant, who was a member of the joint family and dining in the same house, is not sufficient in the absence of evidence that the defendant himself could not be found; *Makhan Das* v. *Mannu Lall*, 35 A. 556· 11 A. L J 875.

A person above the age of 16 years at the date of the service of the notice is an "adult."—*Haricharan* v *Chandra Kumar*, 35 C. 286.

The date of service of summons, as shown in the sheriff's return, is to be taken as the date of service.—*Madhub Lall* v. *Upendranarain*, 23 C. 573.

amily, and does not ... to inform the defendant of what takes place in his absence.—... Tinappashetti v. Umabai, 21 B. 223 See *Ram Hurukh* v. *Saruj Prasad*, 16 O. C. 83: 16 I. C. 600.

Person served to sign acknowledgment.

16. Where the serving-officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons. [S. 79.]

COMMENTARY.

This rule contemplates three distinct classes of service: (1) on the

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Cancel Rule 17, Order V, and *substitute* therefor the following:—

"17. Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person upon whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed." (P. 979.)

person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed. [S. 80.]

COMMENTARY.

The Old Section.—The first important change is the addition of the words "*after using all due and reasonable diligence,*" before "cannot find" in accordance with the principles laid down in 26 C. 101, 19 C. 201, 24 A. 302, 21 M 419 and 324, 21 B 223, 30 B 623, and 5 C. L. J 12-n. The second important change is the addition of the words "*or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or works for gain,*" and the third important change is the addition of the words "*and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed*" The addition of these last words shows that the name of the identifier, if there is any, should also be inserted in the peon's return. The words "*if any*" are inserted for the purpose of showing that the service of process, without an identifier will be valid; for instance, where the person to be served is known to the process server

Where the Defendant or his Agent Refuses to Sign the Acknowledgment.—Under rule 17, no question of refusal arises, till the serving officer has delivered or tendered a copy of the summons under rule 16 to the defendant personally or to his agent or to other person competent to accept service on his behalf When a *pardanashin* lady is not able to accept service personally, has no agent empowered to accept service on her behalf, and, has also no adult male member in her family upon whom service can be effected, a valid service is effected under the provisions of this rule, if the serving officer affixes a copy of the summons on the out-door or some other conspicuous part of the house in which the lady ordinarily resides It is open to the Court, even when there has been a technical compliance with the provisions of rule 17, to order service in another mode, by directing the issue of summons to a *pardanashin* lady by means of notice sent by registered post, *Khiroda Sundari* v. *Nabin Chandra*, 21 C. L. J. 653: 19 C. W. N. 1231.

Where a notice was tendered to the party to be served, and he refused to sign the receipt, and it was posted on the outer-door of his house, it was a good service; *Baishnab* v. *Bank of Bengal*, 19 C L. J. 581 p. 587; *Radhakishen* v. *Tirath Ram*, 41 P. L R. 1918· 43 I. C. 718.

On respondent's refusal to sign the acknowledgment, the serving officer, instead of affixing a copy on the outer-door of his house, returned the notice to Court with an affidavit, stating the respondent's refusal to

sign the acknowledgment and the Court passed an *ex parte* decree against the respondent. *Held*, that there was no due service; *Marutha* v. *Vithu*, 16 B. 117.

Where the summons was served by delivering a copy of the summons together with a copy of the plaint to the defendant personally and the defendant refused to grant a receipt therefor but retained the summons and the copy of the plaint—and the peon not having any other copy of the summons to affix upon the outer-door of the house could not affix it, *held* that the defendant having by his own conduct rendered it impossible to have the copies affixed on the house, the requirements of Or. V, r. 17 were complied with; *Nageshwar Bux* v *Biseswar Dayal*, 2 Pat. L. R. 58.

Where a notice was ordered to two ladies and it was tendered to an adult male resident of their house who was closely related to them and he refused to take the notice. Whereupon it was affixed to their door, *held*, that service was sufficient; *Musst Bashiran* v *Bishambar Nath*, 9 O. L J. 439: A. I. R. 1922 Oudh 268

Where a defendant, to whom tender of a copy of the summons is made under r. 10 of Or. V of the C P. Code, does not accept it, and by concealing himself, deliberately prevents the process-server from complying with r. 16 of the order, he may be deemed to have refused to sign the acknowledgment required by that rule and a copy of the summons may be affixed to his house under r 17, *Imdad Hussain* v. *Parashwar*, 13 N. L. R. 46: 38 I. C. 545.

A mere refusal to sign a receipt for a summons is not an offence under section 173 or section 180 of the Indian Penal Code.—*Queen-Empress* v *Krishna Gobinda*, 20 C 358. *See* also, *In re Bhubuneswar Dutt*, 3 C. 621 2 C. L. R 80; *Reg* v. *Kalaya Bin*, 5 Bom H. C Cr. 34; *Queen* v. *Panamalai*, 5 M. 199 and 200-*note;* 31 A. 608.

"After using all due and reasonable diligence."—Service under this rule can be effected only when the defendant cannot be found after the serving officer has used all due and reasonable diligence Proper efforts must therefore be made before such service, to find out the defendant, for instance, going to the place or places and at the times at which it is reasonable to expect that the defendant would be found.

An affidavit in support of service of a writ of summons under this rule should show (1) that proper efforts have been made to find out when and where the defendant is likely to be found, and (2) that the copy of the summons was affixed on the outer door of the house in which the defendant ordinarily resided at the time of the service —*Rajendro* v *Jan Meah*, 26 C. 101: 2 C. W. N. 574; *Cohen* v. *Nursing*, 19 C. 201; *Sakharam* v. *Padmakar*, 30 B. 623: 8 Bom L R 757, and *Patiruddin* v *Kali Prosonno* 5 C L. J. 12. This rule has been amended to give effect to these decisions *See* also, *Kumud* v *Jatindra*, 13 C L J. 221 38 C 891: 15 C. W. N. 399; *Lonhar Tiwari* v *Jagtoo*, 29 I C 564, *Maung Maung Than* v. *Soma Sundram*, (1918) 3 U B R 123, 50 I C 566 *Baldeodas* v. *Subkarandas*, 52 C 179 A I R 1926 Cal 327 91 I C. 965; *Dinanath* v *Upendra*, 40 C. L J 151 A I R 1924 Cal 1001 82 I. C. 703. In *Cohen* v *Nursing*, PETHERAM, C J said "It is true that you may go to a man's house and not find him, but that is not attempting

to find him; you should go to his house, make enquiries, and, if necessary follow him. You should make inquiries to find out when he is likely to be at home, and go to his house at a time when he can be found."

Mere temporary absence of a person to be served does not justify the process-server in affixing the summons to a door. It is the duty of the process-server to take pains to find out the person to be served, in order that, if possible, personal service may be effected —*Subramania Pillai* v. *Subramania Ayyar*, 21 M. 419; see *Vellayappa* v. *Veerappa*, (1914) M. W. N. 79: 22 I. C. 498: 16 O. C. 83: 19 I C. 600 and *Sakina* v *Gauri Sahai*, 24 A. 302; followed in *Kunj Behari* v. *Sarju Prasad*, 32 I. C. 826. *See* also, *Bhoonshetti Jinnappashetti* v. *Umabai*, 21 B 223, where it has been further held that the summons should be again sent to the defendant's house to be served upon him when the inquiries made show that he is likely to be at house and to be found there. The same view has also been taken in *Cohen* v. *Nursing Das*, 19 C. 201; folld in *Kassim Ebrahim* v. *Johurmull*, 23 C. L. J. 183; 20 C W N. 173.

A peon is not justified in affixing a copy of summons, because he could not find the defendant The only condition under which he can affix copy of summons on the outer door of the defendant's house is if he cannot find the defendant, and there is no agent empowered to accept service of summons on his behalf, or any other person on whom service can be made.—*Kali Narain* v. *Shaikh Bajoo*, 3 C W. N. 307

Before a service can be effected by posting a notice on the residence of the party on whom it is wished to serve it, it must be shown that some attempt has been made to effect personal service, and that such personal service, for reasons stated, could not be made When the fact of service is denied, the *onus* is on the party alleging service to prove it.—*Rakhal Chandra* v. *Secretary of State*, 12 C. 603. A notice is not duly served when it is merely affixed on the defendant's residence without any attempt being made to effect personal service—*Rash Behari* v *Khettro Nath*, 1 C. L. R 418, and *Buroda Kant* v. *Ray Churn*, 24 W R. ; *Anandram* v. *Nityananda*, 32 I. C 744.

Service of notice upon a defendant by affixing the same upon the outer door of his house is not sufficient, unless the condition exists which alone renders substituted service good, namely, that the person to be served is keeping out of the way —*Rama Rai* v *Sridhur Pershad*, 4 C. L. R. 397 (12 Bom L. R P. C., 229: 19 W. R., P C , 353, *followed*). *See* also, 22 W. R. 482.

Where it is impossible for the serving officer to obtain access to the person to be served, either by reason of the custom of the country, or for any other reason, the case is covered by the description in rule 17, " where the defendant cannot be found by the serving officer."—*Khiroda Sundari* v. *Nabin Chandra*, 21 C. L. J. 653. 19 C W N 1213.

Where summons was not served personally on a defendant as in the opinion of the serving officer the defendant was evading service or was away at some other place but the affidavit filed by him did not show what action he took in the way of serving summons it was held that the service was not sufficient. The serving officer must set out in full in his affidavit what steps he took in serving the summons; *Bilu Ram* v. *Chhajjer Mal*, II A. L. J. 540.

The amount of due and reasonable diligence required must of course depend on the peculiar circumstances of each case.

Affixing a copy on the door is not good service if the defendant is away from home and the serving officer knows where he is and can be found; *Sakina* v. *Gauri*, 24 A. 302. A process server is not entitled to post a summons at the house of a person, when he knows or has reason to believe that the person has gone to a particular place and will return to his house; *Pir Baksh* v. *Dy. Commissioner*, 13 O. C. 54: 5 I. C. 804.

A peon went to serve the defendant with a summons, but could not find him at his place of residence; upon enquiry he was told by the defendant's wife that her husband had gone to a place in the Madras Presidency. He thereupon affixed a copy of the summons to the outer door of the defendant's house. The defendant returned to his house three months after. *Held* that the peon had used all due and reasonable diligence within the meaning of this rule, and that the service of summons had been properly effected; *Sitaram* v. *Kalandi*, 17 C. W. N. 999: 13 I C 127 *See* also, *Basavayya* v. *Kistna*, 23 I. C 219: 1 L. W 351, where it has been held that the process-server is not bound to follow the defendant to the place where he had gone or to wait for him indefinitely, when the date of his return was uncertain and not known

In *Sankaralinga Mudali* v. *Ratnasabhapati Mudali*, 21 M 324, it has been held that, if it appears from the serving-officer's return that, according to the information given to him, there is no prospect of his being able to serve the defendant personally within a reasonable time, then he is justified in affixing the summons to the outer door of his house. *See* also, *Gontala* v. *Sawdagar*, 26 M. L. J. 368: 15 M L. T. 217 (1914) N. W. N. 253.

Temporary Absence of Defendant.—Mere temporary absence of the defendant does not justify the serving officer in affixing a copy of the summons on the door of his house Before that can be done all due and reasonable diligence to find him must be used, and where it cannot be said that this was done service by affixture is improper, *Nihala* v *Khazan Singh*, 73 I C. 34.

Service by affixture should not be made the very first time notice is sought to be served If it is done and a decree is passed *ex parte*, it is sufficient case within the meaning of Or IX, r 13 to set aside the decree. Temporary absence at the time of the process server's call does not mean he cannot be found within the meaning of Or V, r 17, *Mathura Singh* v. *Sheo Mohan* 10 O. L. J. 337· 74 I. C 792

Service by affixture during the temporary absence of the party to be served with a notice, on the outer door of his house where his wife was living is sufficient service within the meaning of Or V, r 17, *Kasiviswanathan Chetty* v. *Somasudaram Chetty*, 42 M L J. 422. (1922) M. W. N. 173.

Where a serving officer found that the respondent on whom he had to serve a summons was away from his house but was expected back in two or three days, and affixed the summons to the door of his house *Held* that it was not a sufficient service within Or. V, r 17 of the C. P. Code; *Nathu* v. *Sarup Singh*, 80 I. C. 541.

Shall Affix a Copy of Summons on the Residence of the Defendant.—The word "residence" means the place, where a person eats, drinks and sleeps, or where his family or servants, eat, drink and sleep; *Kumudnath* v. *Jotindranath*, 38 C. 394 (399): 18 C. L. J. 221 (224): 15 C. W. N. 399.

If a person leaves *his* place of residence only temporarily, it cannot be said that the house he occupied is not where he ordinarily, resided; *Sitaram v. Kalandi*, 17 C. W. N. 909: 13 I C. 127.

Summons is to be affixed to the outer door of the house where the defendant ordinarily resides, and not where he actually resides—*Hari Dass* v. *Fulkumari*, 9 C W. N. cviii (108 n). *See* also *Annanda v. Jogendra*, 8 C. L. J. 294; *Braja Nath* v *Surendra*, 41 I C. 181.

It *is* necessary that the defendants should be residing in the house in such a manner as *to* make it probable that the knowledge of the service will reach him. There may be a dwelling sufficient to give jurisdiction, and yet not the kind of dwelling necessary to make a good service.—*Anantha Narayan* v. *Penyona Kone*, 5 M H C. 101. *It* should be shown that he was dwelling in the house and that he could not after diligent search, be found.—*Khudeerun* v *Chutterdaree*, 21 W. R 242

The affixing of a summons to the outer door of the place of business of a defendant is not a good service upon him—*Chanbasappa Bin* v. *Mainabha Bin*, 7 Bom H C 138

Every summons not actually served on a defendant or respondent, or his recognized agent, must be stuck up on the house in which he is residing; if the defendant or the respondent cannot be found, the summons should be returned to the Court, and an order obtained from the Court as to the mode of service—*Gopaul* v. *Greedharee*, 6 W. R. 13.

Where the service of summons has been effected on the defendant by affixing a copy, the Court must decide whether the service is sufficient or not and if it decides in the negative, a new summons must be issued, or a substituted summons directed—*Nusur Mahomed* v. *Kasbai*, 10 B. 202.

"Ordinarily resides etc."—For the meaning of the expression, *see* s. 20, *ante*. Where a person moves from place to place, service on the last place of residence is good, *Madhunithachi* v *Chokalinga*, (1914) M. W. N. 314.

For the purposes of summons, a Railway Company must be deemed to dwell at its principal office—*Hanlon* v. *India Branch Railway Co.*, 1 Hyde 197.

Return.—The return must contain the particulars mentioned in the last part of the rule.

Endorsement of time and manner of service.

18. The serving officer shall, in all cases in which the summons has been served under Rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when *and* the manner in which the sum-

mons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons. [S. 81.]

COMMENTARY.

This corresponds to s. 81 of the Code of 1882 with some alterations. The sentence, "*and the name and the address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons,*" has been added after the words "was served" as in rule 17.

Identifier If should be Supplied by Party.—It is not incumbent on a party to provide an identifier for the purpose of Or. V, r. 18, C. P. Code. The identifier may be a person in the village knowing the defendant. *Nagendra* v. *Sambu Nath*, 3 Pat. L. T. 498; 65 I. C. 49.

Return is Not Evidence of Service.—A *nazir's* report of service of summons or of issue of proclamation is not legal evidence on which to punish a witness failing to attend a Court when duly summoned.—*In the matter of the petition of Nil Kant*, W. R. (1864), Mis. 9; *Okhoy Chandra* v. *Erskine*, 3 W. R. Mis. 11; *Sree Nath* v. *Watson*, 4 W. R., Mis 4; *Ram Soonder* v. *Kalee Komul*, 6 W. R , Act X, 92; *Koondoon* v. *Noor Ali*, 10 W. R. 3; *Meah Khan* v. *Narain*, 18 W. R 365; *Raj Kishore* v. *Bydonath*, 12 W. R. 365.

Form of Return.—*As to form of affidavit of process-servers, see Appendix B, from A-11.*

Examination of

19. Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer

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IV. *Cancel* Rule 19, Order V, and *substitute* therefor the following:—

"19. Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the declaration of the serving officer, and may, if it has been so verified, examine the serving officer, on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit, and shall either declare that the summons has been duly served or order such service as it thinks fit" (P 985.)

able to serve ... is perfectly legal evidence, if believed.—*Ram* v. *Ram*, 17 W. R. 362.

The petitioner, at the hearing of an application to set aside an *ex parte* decree, alleged that the summons had not been affixed on the outer door of his house as stated in the return, but the Court refused to enquire into

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V. *Insert* the following after Rule 19, Order V:—

"19A A declaration made and subscribed by a serving officer shall be received as evidence of the facts as to the service or attempted service of the summons" (P 986)

The Provisions of s 82, C P Code, 1882 (Or V, r 19) should be complied with before issuing a warrant under s 174, C P Code, 1882 (Or. XVI, rr. 10-13, 17, 18)—*Emperor* v *Narbadeshwar* 27 A. 491. (1905) A. W. N. 66.

"Order such service as it thinks fit."—These words mean that the Court may order service by means of registered post, see *Khiroda Sundari* v. *Nabin Chandra*, 21 C L J 653 19 C. W N. 1231 30 I C. 64.

Examine on Oath.—Before an *ex parte* decree can be passed, the process server should be examined on oath as laid down in this rule. The omission to do so is a material irregularity, *Kanahia* v *Durga Prasad*, 31 I C. 479; *Md. Meera* v *Kadir Meera*, (1914) M. W N. 63: 22 I. C. 302.

"Declare."—Omission to declare that service was sufficient does not invalidate an order under Or XVI, rr 10-13, *Sree Krishna Das*, 19 M. L. J. 31: 4 M. L. T 288

The law requires that the Court should declare the proper service of a notice or process and the omission to make such a declaration is not a mere irregularity, *Sundararajulu* v *Narayanaswami* 39 M. L. T. 34: A. I. R. 1927 M. 813

Where a Small Cause Court without recording any order under Or. V, r. 19, C. P. Code, and without finding that the service was sufficient decreed the suit *ex parte*, *held* that the *ex parte* decree must be set aside; *Peringadi Abdu Rahimanhaji v. Karuvanta Kath*, 15 L. W. 17

"Duly served."—Where a summons is fixed to the outer door of a defendant under Or V, r 17 of the C P Code, it cannot be said to be "duly served" until an order under r. 19 is made by the Court declaring that the summons had been duly served, and such order ought to be obtained as soon as possible after the return is made by the serving officer; *Champat Singh* v. *Mahabir Prasad*, 43 I C. 263.

Substituted service.

20. (1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous

part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks it.

[S. 82, para. 2.]

Effect of substituted service.

(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally. [S. 83.]

Where service substituted, time for appearance to be fixed.

(3) Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require. [S. 84.]

COMMENTARY.

Substituted Service, When should be Ordered.—It is only when reasonable grounds exist for believing that the defendant is keeping out of the way to avoid service or that for other reasons it cannot be served in the ordinary way, that substituted service should be ordered.—*Abraham Pillai* v. *Donald Smith*, 29 M. 324 (21 M 419 *followed*). *See* also, *Gangadhur* v. *Ramachandra*, 7 Bom L R 159, where it has been further held that when copy of the summons is tendered to the defendant, personally, and he refuses to sign the acknowledgment, the Court should proceed in the manner directed by Or V, rr 17, 19 and 20

The advisability of effecting service by substituted service is, under Or. V, r. 20, a matter primarily for the trial Court alone. If the trial Court is satisfied on the matters set out in that rule, it shall order the summons to be served by substituted service, and such service by order of Court is as effectual as if it had been made on a defendant personally; *Doraisami* v. *Balasundaram*, 52 M L. J 477 A. I R 1927 M 507

Service of notice by affixing is not sufficient, unless the person upon whom it is sought to effect is keeping out of the way —*Rama Rai* v. *Sridhur*, 4 C. L. R. 397. *See* also *Ram* v. *Jogesh*, 12 Bom. L R (P C.) 229· 19 W. R. (P. C.) 353.

Before the Court can decide in favour of the sufficiency of this mode of service, it must be satisfied that the defendant is keeping out of the way. for the purpose of avoiding service.—*Nusur Mahomed* v. *Kazbai*, 10 B. 202; *See* also *Ram Krishna* v. *Mula*, 69 I C 467.

Where substituted service is ordered under this section, a copy of the summons should be affixed on the notice-board of the Court-house, another copy should be affixed on the outer door of the house and premises in which the defendant was known to have last resided, and the said summons should also be advertised in some newspapers.—*Rajnarain* v *Tek Lal*, 1 C. W. N. 104.

A party cannot be fixed with notice of suit merely because somebody unconnected with the suit makes officious enquiries about its result Affixture to outer door is good only where the plaintiff makes an attempt to

serve the defendant in the place, where he has gone by taking fresh summons to that place; *Kattampudi* v. *Walji*, 29 I. C. 26. *See also notes to rule* 17, *ante*.

Provided the tree to which the copy of summons is attached was reasonably near the hut, that would probably be sufficient; *Panjab Rao* v. *Baliram*, 69 I. C. 549: A. I. R. 1923 Nag. 13.

For Any Other Reason.—There is no special provision in the present Code, for service of summonses, on *pardanashin* ladies and where it is impossible for the process server to obtain access to the person to be served, by reason of the custom of the country, then the substituted service should be ordered; *Clark* v. *Mallick*, 2 M I. A. 263 *Referred to* in *Khiroda Sundari* v. *Nabin Chandra*, 21 C. L. J. 653: 19 C. W. N. 1231.

Sub-rule (2).—When by the operation of sub-section (2), a defendant is merely deemed to have been served with the summons, he may show that the summons was not duly served upon him The words "*as effectual*" in sub-section (2) mean as effectual for the purpose of enabling the Court to proceed with the suit The defendant is entitled to show that the circumstances in which a substituted service having the effect of a personal service could be legally made, did not exist. He is also entitled to show that the substituted service was not a due service, that is to say, that he was not keeping out of the way for the purposes of avoiding service; *Habibullah* v. *Karnajee*, 9 N. L. R. 35. 19 I. C. 425.

Substituted service, if duly effected under the provisions of the law, is as valid as personal service, and therefore, when substituted service had been effected, an *ex parte* decree would not be set aside on an allegation of no notice, and of good defence on the merits.—*Kisur Chund* v. *Bhoobunessur*, *Bourke* O. C 25. Cor. 151

In the case of substituted service, the summons is " duly served " on the defendant within the meaning of Art 164 of the Limitation Act, even though it does not in fact come to the defendant's knowledge, and time for an application to set aside the decree runs from the date of the decree; *Narasimha Chettiar* v *Balakrishna*, A. I. R 1927 M 487.

Sub-rule (3).—Where substituted service has been ordered under this section, sufficient time ought to be given for notice of the fact to reach the defendant wherever he may be, and if an *ex parte* decree be obtained by the plaintiff, the Court, on being satisfied that the time fixed was insufficient will set aside the decree.—*Ally Bebanee* v. *Hyder Hossein*, 2 B. 449.

Service of Process upon Unknown Person.—The C. P. Code is not exhaustive. Service of process upon persons who have not been heard of for a long time and whose whereabouts are unknown, should be made under this rule; *Srinath* v. *Probodh*, 11 C L. J. 580 p. 586.

Appellate Court's Power to Question Propriety of Substituted Service.—It is not within the jurisdiction of the appeallate Court to consider whether the trial Court's order for substituted service was on insufficient ground ; *Doraiswami* v. *Balasundaram*, 52 M. L J. 477: A. I. R. 1927 M. 507.

21. A summons may be sent by the Court by which it is issued, whether within or without the province, either by one of its officers or by post to any Court (not being the High Court) having jurisdiction in the place where the defendant resides. [S. 85, para. 1.]

Service of summons where defendant resides within jurisdiction of another Court.

COMMENTARY.

This rule lays down in a concise form the provisions contained in the first para. of the old s. 85. *See s. 28 and notes*

Service by Registered Post.—It was held in some cases decided under the old Code that when a postal packet was returned endorsed "refused," the service was insufficient and that further evidence was necessary before the Court could act upon such endorsement; *Jogendra* v. *Dwarka*, 15 C. 681; *Jagannath* v *Sassoon*, 18 B. 606; *Aga Ghulam* v. *Sassoon*, 21 B. 412; *Fakhruddin* v. *Ghafuruddin*, 23 A. 99.

Where the postal packet containing the summons was properly addressed to the defendant, and was duly stamped, registered and posted, but the packet was returned endorsed "refused," it was held that there was sufficient service; *Baluram* v *Bai Pannabai*, 35 B 213 · 11 I. C. 351; *Roop Chand* v. *Haji Hussain*, 16 Bom. L R. 204: 24 I. C 437.

The service of summons by post is allowed to litigants as a matter of convenience. The Court should allow the defendant a retrial, if after the decree has been passed against him on evidence that the summons was sent by registered post and returned refused, he appears and denies that the packet had ever been delivered to him by the postal authorities; *Sundar Spinner* v *Makan Bhula*, 46 B. 130. 64 I C. 386: A. I R. 1922 Bom. 377.

22. Where a summons issued by any Court established beyond the limits of the towns of Calcutta, Madras, Bombay and Rangoon is to be served within any such limits, it shall be sent to the Court of Small Causes within whose jurisdiction it is to be served. [S. 86, para. 1.]

Service within Presidency towns and Rangoon, of summons issued by Courts outside.

23. The Court to which a summons is sent under rule 21 or rule 22 shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue, together with the record (if any) of its proceedings with regard thereto. [S. 85, para. 2.]

Duty of Court to which summons is sent.

COMMENTARY.

"Sufficiency of service."—Where a summons has been transmitted by one Court to another for service, the transmitting Court is not bound,

in every case, to satisfy itself that the law as to service has been strictly followed As a rule, on a return from a competent Court it may be presumed that either direct or substituted service has been duly effected — *Nusur Mahomed* v. *Kazbai*, 10 B. 202 (1 B. 214, *referred to*). But in *Romanath Bural* v. *Juggodanandan Sen*, 22 C. 889, it has been held that the Court from which the summons originally issued should not proceed upon any presumption either way but must determine for itself whether the service of summons by the Court to which it has been sent for service is sufficient or not. The same view seems to have been taken by the Allahabad High Court in *Raj Kumar* v. *Jugal*, 18 A. 241 But see *Dwarka* v. *Brij Mohan*, 33 A 649: 8 A L. J. 715: 11 I. C 39, where dissenting from 22 C. 889, it has been held that it is for the Court to which such summons is sent for service to determine whether the service is sufficient or not The view of the Calcutta High Court has been taken on grounds of expediency as also on the ground that it ignores the last sentence of Or. V. rule 19, which applies not only to the Courts issuing the summons, but also to the Court to which it is sent for service

Service on defendant in prison.

24. Where the defendant is confined in a prison, the summons shall be delivered or sent by post or otherwise to the officer in charge of the prison for service on the defendant. [S. 87. para 1 & S. 88.]

COMMENTARY.

The Court shall take judicial notice of the signature of the jailor under s. 16, Act XV, of 1869, the Prisoners Testimony Act —*Tamar Sing* v. *Kali Das Roy*, 4 Bom L R O C. 51.

When a defendant or a witness is in jail, summons should be served upon him, according to the procedure laid down in the Prisoners Act (III of 1900, Part IX, ss 34-48), by which the Prisoners Testimony Act (XV of 1869) has been repealed.

See r. 29 below as to return of service and the duty of the officer to whom process is sent under this rule

Service where defendant resides out of British India and has no agent.

25. Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate. [S. 89.]

COMMENTARY.

Where a summons is sent by post to a defendant residing out of British India, it is not, in the absence of evidence, that the person to be served was not at the time residing at the place to which the summons was sent, sufficient proof of service to show that the summons was posted; but there must be some evidence of its having been received by the defendant.—*Fakhruddin* v. *Khafuruddin*, 23 A. 99.

Mode of service of notice in England pointed out; *Satish Chandra* v. *Porter*, 9 C. L. J. 244.

Where a respondent resides in Chandernagore (out of British territory), the summons or notice should be sent to him by post under registered cover, and if he does not appear, a verified statement should be put in to show that he is at present residing there.—*Sonatun* v. *Gopal*, 15 W. R. 31.

Service of summons by registered post upon a person who was not shown to be the defendant is not a good service under the C. P. Code; *Jagannath* v. *Sassoon*, 18 B. 606. Distinguished in *Baluram* v. *Pannabai*, 35 B. 213: 13 Bom. L R 323, where it has been held that there was sufficient service, even where the envelope was returned with the endorsement " refused to take."

A summons cannot be sent by post to any place to which letters are not registered by a post office. A special bailiff cannot be sent to serve civil process in a foreign territory.—*Kasim Ajim Duplay* v. *Kasim Mohammed*, 2 B. L R. 59: 10 W. R. 349.

A person refusing a registered letter sent by post cannot afterwards plead ignorance of its contents.—*Lootf Ali* v. *Pearee Mohun*, 16 W. R. 223. Followed in *Jogendra* v. *Dwarka*, 15 C. 681; *see* also 17 C. W N. 1073; 20 C. L. J. 455; 19 C W. N. 489; 21 B. 412 (418), and 23 A. 99.

On proof of posting a registered cover, a presumption that the cover reached the addressee in due course arises under ss 16 and 114 (*b*) of the Evidence Act; *see* the cases noted under these sections in the author's Evidence Act.

Service in foreign territory through Political Agent or Court.

26. Where—

(*a*) in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor-General in Council, a Political Agent has been appointed, or a Court has been established of continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

(*b*) the Governor General in Council has, by notification in the Gazette of India, declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be a valid service,

the summons may be sent to such Political Agent or Court, by post or otherwise, for the purpose of being served upon the defendant; and, if the Political Agent or Court returns the sum-

mons with an endorsement signed by such Political Agent or by the Judge or other officer of the Court that the summons has been served on the defendant in the manner hereinbefore directed, such endorsement shall be deemed to be evidence of service. [S. 90.]

COMMENTARY.

This rule corresponds to s 90 of the C P Code, 1882, with some change of words. The words "in respect of any Court, etc., etc. . . valid service," in sub-rule (*b*) were added by the Second Repealing and Amending Act XVII of 1914.

Section 90 (this rule) provides for the service of summons upon a defendant in a foreign territory, where there is a British Resident, Agent, Superintendent or Court. Such summons need not be sent through the District Judge.—*Fakruddin* v *Ghafuruddin*, 23 A. 90.

Service on civil public officer or on servant of Railway company or local authority.

27. Where the defendant is a public officer (not belonging to His Majesty's military or naval forces or His Majesty's Indian Marine Service), or is the servant of a railway company or local authority, the Court may, if it appears to it that the summons may be most conveniently so served, send it for service on the defendant, to the head of the office in which he is employed, together with a copy to be retained by the defendant. [S. 422.]

COMMENTARY.

This rule embodies the provisions of s 422 of the C. P. Code, 1882, with some alterations and additions The provisions regarding service of summons on servants of Railway Company and local authority are new. This rule is to be read with r 8 of Or XVI, which prescribes the mode of service of summons on witnesses Service of summons on a person belonging to Indian Marine Service is to be made under rr 15 and 17 of this Order, as such person is excluded by this rule; *Intu Meah* v. *Darbuksh*, 42 C. 67.

"The Court may send it for service on the defendant, to the head of the office."—The provisions of Or. V, r. 27 are permissive and a non-compliance with them is no ground for getting an *ex parte* decree set aside by a separate suit, although it may be a ground for an application under Or 9, r. 13, C. P. Code; *Musst. Megh Koer* v *Deo Narain Rai*, 1 Pat. L. W. 246: 38 I. C. 207.

"Public officer."—*See* s. 2 (17)

Service on soldiers.

28. Where the defendant is a soldier, the Court shall send the summons for service to his commanding officer together with a copy to be retained by the defendant. [S. 468.]

COMMENTARY.

Service of summons on a military officer was effected by transmitting a copy by post to the commanding officer at Secunderabad, where the defendant was stationed, and it was returned with the defendant's acknowledgment endorsed on it, and with a certificate that it had been duly served, but there was no affidavit of service: service was held to be sufficiently proved.—*Harrison* v. *Hope*, 9 Bom. L. R. App. 43. *See also Santu* v. *Arjun*, 131 P. W R. 1912.

In a suit against a soldier to recover a debt not amounting to £30 the commanding officer of the defendant is bound to cause the summons of the S. C. Court to be served on him.—*Mahomed* v. *Aggas*, 10 M. 319.

In a suit against a soldier to recover Rs. 183-7, a summons having been sent by the Court to the Commissionary of Ordinance to be served on the defendant, his subordinate, the Commissary of Ordinance returned the summons unserved, and referred to s. 144 of the Army Act, 1882, as his reason for such action. *Held*, that the Commissary of Ordinance was [illegible] 168 of the C. P. Code, 1882, although [illegible] he privilege given by s. 144 of the [illegible], 11 M. 475.

An officer or mechanic in the Indian Marine Service is subject to exactly the same rules with regard to service of summons as any other person as provided in rr 27, 28; *Intu* v *Darbaksh*, 42 C. 67.

29. (1) Where a summons is delivered or sent to any person for service under rule 24, rule 27 or rule 28, such person shall be bound to serve it, if possible, and to return it under his signature, with the written acknowledgement of the defendant and such signature shall be deemed to be evidence of service.

Duty of person to whom summons is delivered or sent for service.

[Ss. 87 & 468.]

(2) Where from any cause service is impossible, the summons shall be returned to the Court with a full statement of such cause and of the steps taken to procure service, and such statement shall be deemed to be evidence of non-service.

A return under this rule is deemed evidence of service, though not supported by affidavit; *Harrison* v. *Hope*, 9 Bom. L. R. App 43 *See notes to* r. 28 *ante*.

30. (1) The Court may, notwithstanding anything hereinbefore contained, substitute for a summons, a letter signed by the Judge or such officer as he may appoint in this behalf, where the defendant is, in the opinion of the Court, of a rank entitling him to such mark of consideration.

Substitution of letter for summons

(2) A letter substituted under sub-rule (1) shall contain all the particulars required to be stated in a summons, and, subject to the provisions of sub-rule (3), shall be treated in all respects as a summons.

(3) A letter so substituted may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit; and, where the defendant has an agent empowered to accept service, the letter may be delivered or sent to such agent. [Ss. 91 and 92.]

ORDER VI.

PLEADINGS GENERALLY.

Pleading. **1.** "Pleading" shall mean plaint or written statement. [New.]

COMMENTARY.

This order relating to pleadings is entirely new. Rules 1 to 13 and 16 to 18 have been taken from the English rules. Rules 14 and 15 correspond to ss. 51 and 52 of the Code of 1882. Courts in India should always insist on a strict adherence to the rules in this order, which are intended to diminish expense and delay, and to narrow the parties to definite issues. But the system of pleadings in this country, has not attained that state of perfection as in England, and as has been pointed out in *Arabar* v. *Ismail*, 27 I. C. 373, the High Court when dealing with pleadings in the *mofussil* should not be so strict as it would be in cases from the Original Side of the High Court. In addition to plaint and written statement, the particulars required by rr. 4 and 5, the answer to a set off, the additional written statement from any party are also parts of pleading. They are called "subsequent pleadings." *See* Or. VIII, r. 9.

Object of Introducing English Rules of Pleading.—"The Committee have added a few rules relating to pleadings based upon the system of pleading introduced by the Judicature Acts in England, which is generally admitted to be the best form of pleading in civil suits. In this country, outside the Presidency towns, the pleadings are seldom artistically drawn. They are neither concise, nor precise, but contain vague and general statements from which it is difficult to ascertain definitely the real question in controversy. The sole object of pleadings is thus frequently defeated; the issue is enlarged; the trial is delayed and much unnecessary expense incurred by the parties, who are also liable to be taken by surprise. They have further provided that the forms in the Schedule shall, when applicable, be used for all pleadings, and when they are not applicable, forms of the like character shall be used. The rules prescribed will not prevent the pleader from exercising his discretion for the amount of detail must necessarily vary with the nature of each suit; it is however, made clear, that there must be particularity sufficient to apprise the Court and the other party of the exact nature of the questions to be tried. The Committee have also given a party, who considers that his opponent's pleading, does not give him the information to which he is entitled, the right to apply for further particulars so as to enable him to know what case he has to meet at the trial. They have however endeavoured to modify the rigour of the rules by providing in accordance with s. 58 of the Indian Evidence Act (*vide* Or. VIII, r. 5), that the Court may, notwithstanding the absence of any specific denial, require any fact to be proved by the party who relies upon it."—*Report of the Special Committee.*

The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules (relating to pleadings) was to prevent the issue being enlarged, which would prevent either party from knowing, when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.—*Per* JESSEL M. R. in *Thorp* v. *Holdsworth*, 3 Ch. D. 637, 639

Summary of English Rules of Pleadings.—The pleadings, it may be explained, are the written allegations of the parties terminating in propositions distinctly affirmed on one side, and denied on the other, called the issues. The pleadings being intended to apprise the parties of the specific questions to be tried, this object would be defeated if either party were at liberty to prove facts essentially different from those stated on the record, as constituting the claim or charge, on the one hand, or defence on the other. Every material disagreement, between the allegation and the proof, constitutes what is called a *variance*, which, in strictness, is as fatal to the party on whom the proof lies as a total failure of evidence.

The present rules relating to pleadings are intended to effect three material objects: (1) to make each party acquainted with the intended case of his opponent, and thus to save the expense of collecting unnecessary evidence, and to prevent either side from being taken by surprise at the trial, (2) to bring legal defences more prominently forward on the face of the record; and (3) to do away altogether with pleadings in cases where they are unnecessary, and to curtail them in all cases.

Or. VI deals with pleadings in general, order VII deals with plaints, and Or. VIII with written statements.

Pleadings to state material facts and not evidence.

2. Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures. [New.]

COMMENTARY.

The rule is new and it follows the English Order XIX, r. 4.

What Pleadings shall Contain.—Rule 2 embodies the fundamental rules of pleadings. Every pleading must state: (1) *Facts* and not law; (2) It must state material facts only; (3) It must state only those facts on which the party pleading relies for his claim or defence, and *not the evidence* by which they are to be proved; (4) It must state such facts in a concise form

Every Pleading must State Material Facts and Not Law.— What are and what are not material facts depend on the peculiar circumstances of

each case. For example, if an agreement be alleged in any pleading, it is not sufficient to aver generally its existence, and to state its effect, but the party relying on it should state whether it be in writing or by parole, or the result of a series of documents. COTTON, L. J., said in *Phillips* v. *Phillips*, 4 Q. B. D. 127, that it is absolutely essential that the pleading, not to be embarrassing to the defendants should state those facts which will put the defendants on their guard and tell them what they will have to meet when the case comes on for trial (Followed and quoted with approval in *Matilal* v. *Judhistir*, 20 C. W. N. 810: 22 C. L. J. 254, 255). In other words, the parties should state those material facts only on which they base their claim or defence, for, as BRETT, L J. said in *Phillipps* v. *Phillipps*, *ante*, the parties should be held strictly to their pleadings and should not be allowed to prove at the trial any fact which is not stated in the pleading. Pleadings however may be amended with the leave of the Court at any stage of the proceedings (*see* rule 17, *post* and notes). The words of the rule are not " the facts which will be necessary to support the case of action ": they are " the material facts on which the party relies for his claim."—*Per* BRETT, L. J , in *Phillips* v. *Phillips*, *ante*. These same principles apply to the case of a defendant.

Pleadings must be confined to facts, and a point of law need not and should not be raised in pleadings. Points of law can be urged by the parties up to the stage of judgment, and the Judge can take them up *suo motu* at the time of writing judgment; *Gaura Telin* v. *Shriram*, 92 I. C. 926: A. I. R. 1926 Nag. 256.

Where a claim is put forward by virtue of a right of inheritance, he must state the facts constituting his heirship, *viz.*, the claim of relationship, and not simply that he is the heir-at-law; *Palmer* v. *Palmer*, (1892) 1 Q. B. 319.

The plaintiff is bound to state the nature of the deeds on which he relies in deducting his title from the person under whom he claims and to show the devotion of the estate to himself.—*Per* MOOKERJEE, J., in *Matilal* v. *Judhistir*, 22 C. L. J. 254, 255.

The bare statement that " under and by virtue of a certain deed I am entitled ", is not sufficient. The plaintiff must state the facts which go to show his title; *Riddell* v. *Earl of Strathmore*, 3 Times L R. 329.

Where a cause of action or a defence is based upon an enactment, all facts necessary to bring the party within the terms of that enactment must be set out; *Scar* v. *Dawson*, 16 Ch. D. 121; *Read* v. *Brown*, 22 Q. B. D. 128.

An offer without prejudice should be omitted from the pleadings. In a suit where the written statement of the plaintiff contained letters relative to an offer made by the defendants without prejudice, the Court ordered, on the application of the defendant, that the paragraphs relating to the offer should be struck out.—*Halford* v. *East Indian Railway Company*, 12 Bom. L. R. Ap. 19.

Rules of Pleading in Matters Affecting Damages.—The phrase "*material facts*" will include any fact which the party pleading is entitled to prove at the trial. Thus in an action for breach of promise of marriage, the plaintiff may allege in her statement of claim her consequent

seduction or infection, these matters being important by way of aggravation (*Taylor on Evidence*, 10th Ed., Vol. I, p. 240). This was decided in *Millington* v. *Loring*, 6 Q B. D. 190. *See* also *Whitney* v. *Moignard*, 21 Q. B. D. 630. But in *Wood* v. *Durham*, 21 Q. B. D. 501, it has been held that a defendant is not in general entitled to plead in his defence matters in mitigation of damages. It should be remembered that Or. XXI, r. 4 of the English Order which says that no denial or defence shall be necessary as to damages claimed or their amount but they shall be deemed to be put in issue in all cases unless expressly admitted, *has not* been embodied in the C. P. Code. Whatever may be the rule in England, r. 2 of this order says that the pleading shall contain material *facts on which the party relies* for his claim or defence, but does this include the facts which the plaintiff *is entitled to prove at the hearing?* It seems *not*. Or. VII, r. 1 (*e*) says that the plaint should contain the facts constituting the cause of action. The plaint therefore need not state matters in aggravation of damages, nor need the written statement contain matters in mitigation of damages (Or VIII, r. 3)

Pleading should Not Contain Allegations in Anticipation of the Opponent's Answer.—It is no part of the statement of claim to anticipate the defence and to state what the defendant would have to say in answer to it That would be a return to the old inconvenient system of pleading in Chancery which ought certainly not to be encouraged when the plaintiff used to allege in his bill imaginary defences of the defendant, and make charges in reply to them —*Per* JAMES, L J. in *Hall* v *Eve*, 4 C. D. 341, 345; that is, parties should only plead what is material at the *present* stage of the suit; *Rassam* v *Budge*, (1893) 1 Q B 571

Pleadings shall Contain Statement of Facts but Not the Evidence.—That is, pleadings shall state the material facts on which a party relies for his claim or defence, but not how or in what way he is going to prove those facts. This much the plaintiff is bound to do, though he need not set out the evidence whereby he proposes to prove the facts which give him the title—*per* MOOKERJI, J in *Matilal* v. *Judhistir*, 22 C. L. J. 254, 255 It is wrong to set out in the pleadings admissions made by the opponent, for admissions are only evidence; *Davey* v. *Garrett*, 7 Ch. D. 473. As to what should be pleaded when it is material to allege malice, *see* r. 10, notice, *see* r. 11; contract or relation, *see* r. 12.

In a Concise Form.—Material facts should be stated in the pleadings as briefly as possible Conciseness does not do away with the necessity of preciseness. A plaint ought to be drafted with sufficient definiteness to enable the opposite party to understand the case he is called upon to meet; *Indur Chunder* v. *Radha*, 19 C. 507. Rule 4 lays down that where particulars are required they should be given (*see* notes, *post*).

Alternative and Inconsistent Pleadings.—are permitted under certain conditions. A plaintiff " may rely upon several different rights, alternatively though they [illegible] "—*Per* BRETT, L. J., in *Phillipps* v. *Phillips*, 4 Q [illegible] dant " may raise as many distinct and [illegible] defences as he may think proper."—*Per* [illegible] *reenwood*, 3 Ex. D. 251, 255. " A person may rely upon one set of facts if he can succeed in proving them, and he may rely upon another set of facts if he can succeed

in proving them; and it appears to me to be far too strict a construction of this order to say that he must make up his mind on which particular line he will put his case, when perhaps he is very much in the dark."—*Per* LINDLEY, L. J., in *re Morgan Owen* v. *Morgan*, 35 C. D. 492, 499. "If alternate cases are alleged, the facts ought not to be mixed up, leaving the opponent to pick out the facts applicable to each case; but facts ought to be distinctly stated, so as to show on what facts each alternative of the relief is founded."—*Per* THESINGER, L J., *Ibid* (*see* Or. VIII, r. 7, a new rule in the Code). The rule is not different in India. A plaintiff may in certain cases rely upon several different rights alternatively though they may be inconsistent. This was recognised by the Full Bench in *Narendra* v. *Abhoy*, 34 C. 51: 4 C. L. J. 437. But as pointed out by the Judicial Committee in *Mahomed Baksh* v. *Hosseini Bibi*, 15 C. 684, the plaintiff cannot be permitted to allege two absolutely inconsistent state of *facts*, each of which is destructive of the other *See* also, *Moti Lal* v. *Judhistir*, 22 C. L. J. 254, 257; *Nripendra* v. *Birendra* 21 C W. N. 939, p. 944. A plaintiff cannot be allowed to abandon his own case, adopt that of the defendant and claim relief on that footing; *Nagendra* v. *Pyari*, 20 C. W. N. 819: 21 C. L. J. 605; nor can he turn round at the stage of the suit and put forward a case inconsistent with the allegations in the plaint; *Kali Mohan* v. *Birendra Kishore*, 22 C. L. J. 309. There is no rule of law which prevents a defendant from raising inconsistent pleas, at any rate when the facts to which the pleas relate are not within his personal knowledges; *Sri Janaganti* v. *Kappojee*, 15 I. C. 382: 1912 M W. N. 413.

Falsification of Pleadings.—Pleadings are required by law to be true and therefore a wilful falsification is punishable by criminal law; *Br India S. N. Co. Ld.* v. *Fakir*, 25 I. C 805: 7 L. B R. 257.

Forms of Pleadings.

3. The forms in Appendix A when applicable and where they are not applicable forms of the like character, as nearly as may be, shall be used for all pleadings. [New.]

The rule is new and follows the English Order XIX, r 5.

Particulars to be given where necessary.

4. In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading. [New.]

COMMENTARY.

This rule is new and follows the English Order XIX, r. 6 and embodies the principles already laid down in several cases in India.

Fraud, Misrepresentation, Undue Influence, etc.—The following observations of LORD SHAW in the case of *Bal Gangadhar Tilak* v. *Shriniras Pandit* 39 B. 441 P. C.: 19 C. W. N. 729: 22 C. L. J. 1: 13 A. L. J. 570: 17 Bom. L. R. 527; 29 M. L. J. 34, are very important and instructive

and every reader should carefully go through that judgment. His Lordship observed: " Under the contract law of India, as well as by ordinary principles, coercion, undue influence, fraud and misrepresentation are all separate and separable categories in law. It is true that they may overlap or may be combined. But in the present case it is impossible to discover what ground or grounds are really taken up. There is a well-known rule of pleadings expressed in the frequently quoted language of LORD SELBORNE, see *Wallingford* v. *Mutual Society*, (1880) 5 App. Cas. 685 (697), that with regard to fraud, if there be any principle, which is perfectly well-settled, it is that general allegations, however strong the words in which they are [illegible] to amount to an averment of fraud of which any [illegible] law of India is in no way different from this, [illegible] and over again, *e.g.*, in *Ganga Narain Gupta* v. [illegible] 533 P. C. It is, in their Lordships' opinion, much to be regretted, that the rule is not much strictly observed, and their Lordships are of opinion that in the present case much confusion and contention have been caused, together with much expense to the parties in consequence of its neglect. No definite issue upon any one of the well-known categories of attack was settled for trial, the only issue on the subject being whether the plaintiff No. 4 is a validly adopted son of Baba Mahraj. From time to time, in the course of this case, it is clear that specific pleadings in Indian procedure have been abandoned altogether. In short, several of the careful prescriptions of the law and of the Legislature, all of which were intended to bring litigation within definite compass and to make articulate and clear the points of difference between the parties, have been lost sight of " *See* 39 B. 441 (467, 468).

Allegation of Fraud.—Where a party seeks to avoid the statute of Limitation on the ground of fraud, the statement of claim should set forth specifically the particular acts which constitute the fraud as well as the time when it was discovered in order to enable the defendant to meet the fraud and the alleged time of its discovery, so that the Court may see whether by the exercise of ordinary diligence, the discovery might not have been made before; *Bansiram* v *Panchami Dasi*, 20 C. W. N. 638. 35 I. C. 284.

Where a case is based on fraud, the fraud must be proved, and no relief can be given in the suit on any different ground, *Satis* v. *Kalidasi*, 34 C. L. J. 531.

Where fraud is alleged and relied upon, it must before it can be proved, be clearly stated in accordance with the provisions of Or. VI, r. 4, C. P. Code, but the rule does not apply where the party aggrieved raises no objection and fights the case at the original hearing as though the pleadings were in proper form; *Beni Madho* v. *Basanto*, 35 I. C. 252.

A charge of fraud must be substantially proved as laid, so that when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it; *Satis* v. *Kalidasi*, 34 C. L. J. 531. (14 I. A. 111: 11 B. 620 *refd. to*).

Where defendants challenged the contract of sale by plaintiffs on the grounds of forgery and fraud, but these points were not pointedly put in the defendants' written statement, and, though perhaps open under the general words of the defence and on the issues, it was put without detail or

our, was not raised in the cross-examination of the plaintiffs or their nesses, and was only disclosed when defendants' witnesses, after an rval of several months, came into the witness-box; *held*, that these ences should not be easily accepted; *Nasiruddin* v. *Ahmed Hossain*, . W. N. 731: 97 I. C. 543: A. I. R. 1926 P. C. 109.

Allegation of Undue Influence.—Undue influence being a species of d must be pleaded with precision and unless a case of undue influence ade in the pleadings such a case cannot be investigated by the Courts; *er Chand* v. *Bidyadhar*, 2 Pat. L. T. 111: 5 Pat. L. J. 744. (1921) . 107.

Each Party is Entitled to Have Any and Every Particular of Mate- Facts.—The object of this rule is to furnish the opposite party with particulars regarding the suit as are necessary to enable him to find what case he has to meet. It is but right and proper that each party ild have *any and every particular* that will enable him to know his onent's case and prepare himself accordingly, but he is not entitled ave any information as to the *evidence* by which they are intended to roved. What particulars are to be stated must depend on the peculiar umstances of each case, but generally "as much certainty and parti- rity must be insisted on as is reasonable, having regard to the circum- ices and to the nature of the acts themselves To insist upon less ld be to relax old and intelligible principles. To insist upon more ld be the vainest pedantry "—*Per* BOWEN, L. J. in *Radcliffe* v *Evans*, 92) 2 Q. B. 524, 532 Again, " the Courts have uniformly endeavoured revent the plaintiff, or the defendant, as the case may be, from prying the brief of his opponent or finding out what is to be the evidence ch is to be produced at the trial. On the other hand the Courts have ormly said that the plaintiff or the defendant is entitled to be told and every particular which will enable him to prepare his case the trial, so that he may not be taken by surprise."—*Humphries & Co.*, *The Taylor Drug Co.*, 39 Ch. D. 693, 695. If the particulars required material facts, a party cannot refuse to furnish them only because he ld thereby disclose the names of his witnesses; *Zierenberg* v *Labou- re*, (1893) 2 Q. B. 183; and if such names constitute material facts he is nd to state them; *Marriott* v. *Chamberlain*, 17 Q. B. D. 154. If the iculars stated are insufficient, vague and general, a party can ask for her particulars under r. 5.

Where transfers of property are challenged on the ground of unsound- of mind of the transferor, but no case of undue influence was raised he pleadings and evidence was given with reference to the question of oundness of mind only, *Held*, that the question of undue influence ld not properly be discussed and considered upon such evidence — *tail Mussajee* v. *Hafiza Boo*, 33 C. 773, P. C.: 3 A. L. J 353: 10 M. J. 166: 8 Bom. L. R. 370.

It is an elementary rule of law that where fraud is set up, particulars t must be given and it must be based upon a specification of the acts ed is a matter of supreme importance and ess d not be the subject of a mere vague gat itement; but that it shall be supported particulars, and that if that condition is not complied with; the party

COMMENTARY.

This rule is new, and follows the English Or. XIX, r. 7.

If the pleadings of either party be too vague, the Court may require him to file a further and fuller statement under this section —*Ali Kader* v. *Gobind Dass*, 17 C. 840 p. 848.

Object of This Rule.—The object of the pleadings being to make each party acquainted with the intended case of his opponent, and thus to save the expense of collecting unnecessary evidence, and to prevent either side from being taken by surprise at the trial and also to bring legal defences more prominently forward on the face of the record, this rule directs, that if the allegations in the pleadings of any of the parties, are too vague and do not contain all particulars required by rule 4, the other party may apply for further and better particulars of any matter stated in any pleading; and upon such application being made, the Court may in all cases, upon such terms as to costs and otherwise, as may be just, require the other party, to file a further and better particulars. The object of particulars is to fix a party to definite statements on all points, to limit the matters in question and the points on which the party giving them is entitled to give evidence; *Yorkshire Provident Co.* v. *Gilbert*, (1895) 2 Q. B. 148.

"Upon such terms as to costs, etc."—The words "upon such terms as to costs and otherwise" *seem to authorize the Court to impose upon* a party, such terms, as may be just, that is, in case of non-compliance with the Court's order, it may impose penalty, such as, the striking out the vague allegations complained of, and according to English practice, may even order the dismissal of the suit, see, *Davey* v. *Bentinck*, (1893) 1 Q. B. 185.

Court may ask for an affidavit in support of the application for particulars, or dispense with it if it thinks proper to do so. Affidavits are not as a general rule asked for in England, except in special cases.

As to filing of subsequent pleadings, see Or VIII, r. 9.

Time for Application.—Particulars may be applied for under this rule at any time (*Thomson* v. *Berkley*, 47 L. T. 700), but as a general rule they should be asked for at the earliest opportunity, *e.g*, before putting in the defence (*Mackie* v. *Osmoston*, 28 Ch. D. 125), but the right to ask for particulars is not waived by putting in defence. (*Sachs* v. *Sheilman*, 37 Ch. D. 295).

Discovery Before Particulars.—Any strict and uniform rule as to whether discovery should precede particulars and *vice versa* seems impossible. Everything depends on the peculiar circumstances of the particular case. There is no hard and fast rule as to the class of cases in which particulars should precede discovery, or discovery be ordered before particulars; but the Judge must exercise a reasonable discretion in every case after carefully looking at all the facts and taking into account special circumstances; *Waynes Merthyr Co.* v. *Radford & Co.*, (1896) 1 Ch. 29, 35. For instance, when the defendant knows the facts and the plaintiff does not, defendant should be asked to give discovery before plaintiff delivers particulars; *Millar* v. *Harper*, 38 Ch. D. 112.

Amendment on Delivery of Further Particulars.—A party who de to give further particulars after discovery of new facts or amend partic already given should first obtain leave of the Court; *Spedding* v. *Fitzpat* 38 Ch. D. 410; *Yorkshire Provident Co.* v. *Gilbert*, (1895) 2 Q. B. 148, and such leave may be granted and costs allowed if the opposite p does not suffer any injury thereby; *Clarapede* v. *Commercial Union A ciation*, 32 W. R. 262. Such application is generally refused if mad the trial; *Moss* v. *Malings*, 33 Ch D. 603.

Effect of Omission to Apply for Particulars.—Where the averm in a plaint are not sufficiently precise, it is open to the defendant to a for particulars under Or. VI, r. 5, C. P. Code, and if such applicatio not made, he cannot in second appeal be permitted to refer to the mat *Premsukh Das* v. *Ram Bujhawan*, (1919) Pat. 451; 1 Pat L. T. 34 I. C. 964.

Condition precedent.

6. Any condition precedent, the performance or occurre of which is intended to be contested, shall distinctly specified in his pleading by the pla tiff or defendant, as the case may be; a subject thereto, an averment of the performance or occurrence all conditions precedent necessary for the case of the plaintiff defendant shall be implied in his pleading. [New

COMMENTARY.

This rule is new; it follows the English Or. XIX, r. 14. For *illus tions*, *see* Forms No 13, para 2, No 20, para 2; No 37, para. 2, No. para. 3; No. 48, para 5, etc., etc., in *Appendix A*.

Introduction of the Rule as to Non-pleading of Condition Precedent In some cases right to sue does not accrue till a certain thing has been d or some event has happened; in other words, something more is necess than the mere common law right of action to entitle a person to come Court. This something is called a condition precedent. Though not cause of action itself, the ordinary right of action is suspended until condition has been performed. Previously in England, the rule was specify every such condition precedent, and to aver its due performan The Common Law Procedure Act, 1852, s. 57, did away with this pract by providing that " it shall be lawful for the plaintiff or defendant in a action to aver performance of condition precedent generally and, opposite party shall not deny such averment generally, but shall specify his pleading the condition or conditions precedent, the performance of wh he intends to contest." This was followed by English Or. XIX, r. (present rule) which provides that condition precedent need not be plead or alleged even *generally*.

the terms, the name of the parties, whether oral or written and must state condition and its non-performance; *Abbs* v. *Matheson & Co.*, 104 L. T J. 268.

Departure.

7. No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same. [New.]

COMMENTARY.

This rule is new, it follows the English Order XIX, r.16.

Principle and Meaning.—This rule means that after a party has once pleaded, he shall not in his subsequent pleading be allowed to plead or allege anything *contradictory* to what he has first pleaded. If, however, he wishes to add to his claim or to alter it in any way, he may apply for *amendment* of pleading under Or. VI, r. 17, or the plaintiff or defendant may file an additional statement or additional written statement (Or. VIII, r. 9).

Illustration.—A person once claiming *rent* for lease cannot in his reply claim the same sum as *damages*; *Duckworth* v *MacClcland*, 2 L R. Ir. 527. A defendant alleging a certain gift to her as *stridhan* cannot afterwards say that it was for her *maintenance*; *Acharath* v. *Mathummal*, 4 M. L. T. 327; see also, *Lakshmi* v. *Ramchandra*, 16 M. L J 5 New ground of attack cannot be allowed in appeal; *Nathu* v. *Manji*, 18 I C. 608 · 136 P L R. 1913.

Where the pleadings contravene Or. VI, r. 7, C. P. Code, the Court would be justified in ignoring them; *Govind Singh* v. *Murgaji*, 57 I. C. 684.

Alternative and Inconsistent Pleadings.—*See under this head in notes to Or. VI, r. 2.*

Denial of contract.

8. Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract. [New.]

COMMENTARY.

This rule is new; it has been borrowed from English Order XIX, r. 20. It is an application of the general rule stated in Or. VIII, r. 2.

Object and Effect of the Rule.—The effect of this rule is, whenever a party intends to rely on the illegality or insufficiency in law of any contract whether with reference to the Statute of Frauds or otherwise, he must *specially* plead such illegality or insufficiency, and it will not be sufficient to traverse allegations made by his opponent in anticipation of objections to the contract upon such grounds. Neither can a defendant avail himself of

Amendment on Delivery of Further Particulars.—A party who desires to give further particulars after discovery of new facts or amend particulars already given should first obtain leave of the Court; *Spedding* v. *Fitzpatrick*, 38 Ch. D. 410; *Yorkshire Provident Co.* v. *Gilbert*, (1895) 2 Q. B. 148, 153, and such leave may be granted and costs allowed if the opposite party does not suffer any injury thereby; *Clarapede* v. *Commercial Union Association*, 32 W. R. 262. Such application is generally refused if made at the trial; *Moss* v. *Malings*, 33 Ch. D. 603.

Effect of Omission to Apply for Particulars.—Where the averments in a plaint are not sufficiently precise, it is open to the defendant to apply for particulars under Or. VI, r. 5, C. P. Code, and if such application is *not made*, he cannot in second appeal be permitted to refer to the matter; *Premsukh Das* v. *Ram Bujhawan*, (1919) Pat. 451: 1 Pat. L. T. 34: 52 I. C. 964.

Condition precedent.

6. Any condition precedent, the performance or occurrence of which is intended to be contested, shall be *distinctly specified* in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading. [New.]

COMMENTARY.

This rule is new; it follows the English Or. XIX, r. 14. For *illustrations, see* Forms No. 13, para. 2, No. 20, para. 2; No. 37, para. 2; No. 47, para. 3; No. 48, para. 5, etc., etc., in *Appendix A.*

Introduction of the Rule as to Non-pleading of Condition Precedent.—In some cases right to sue does not accrue till a certain thing has been done or some event has happened; in other words, something more is necessary than the mere common law right of action to entitle a person to come to Court. This something is called a condition precedent. Though not the cause of action itself, the ordinary right of action is suspended until the condition has been performed. Previously in England, the rule was to specify every such condition precedent, and to aver its due performance. The Common Law Procedure Act, 1852, s. 57, did away with this practice by providing that "it shall be lawful for the plaintiff or defendant in any action to aver performance of condition precedent generally, and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition or conditions precedent, the performance of which he intends to contest." This was followed by English Or. XIX, r. 14 (present rule) which provides that condition precedent need not be pleaded or alleged even *generally*.

Distinctly Specified.—The due performance of all conditions precedent is implied in every pleading, and the opposite party must specify distinctly the conditions the performance or occurrence of which he intends to contest; *Bradly* v. *Chamberlyn*, (1893) 1 Q. B. 439. A defendant relying on the non-fulfilment of a condition precedent, must give every particular regarding

in Or. VI, r. 2. The meaning is that if reliance is placed on malice, [illegible], as grounds of attack or defence, [illegible] facts. But the circumstances from [illegible] be stated as they constitute evidence of those facts. For *illustrations*, *see* Forms No. 21, para. (3); No. 22, para. (3); No. 31, para. (4) and No. 33, para. (3), etc., etc., in *Appendix A*.

Malice.—In suits for slander of title and for malicious prosecution, the plaintiff must allege malice in his plaint because it forms a necessary part of the cause of action in such suits.

Fraudulent Intention.—See notes under Or. VI, r. 4.

Notice.

11. Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material. [New.]

COMMENTARY.

This rule is new, and it follows English Or. XIX, r. 23. The meaning is that when the cause of action depends on notice, it must be pleaded as a fact, *e.g.*, notice of suit against the Secretary of State, Railway Co., etc., In ordinary cases a mere allegation in the pleadings that notice has been given to the opposite party will be sufficient. *See*, Form No. 12, para. 4, in *Appendix A*. But in suits against Government or Public Officer, there must be statement in the pleadings as to the precise terms of such notice. *See*, s. 80 of this Code and the cases noted thereunder.

Implied contract or relation.

12. Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative. [New.]

COMMENTARY.

The rule is new and it follows the English Order XIX, r. 20.

When a contract is to be found out from a series of letters, the whole of the correspondence must be taken into consideration; *Hussey* v. *Horne Payne*, 4 App. Cas. 311. Contract may be implied from conduct of parties; *Brogden* v. *Metropolitan Ry. Co.*, 2 App. Cas. 666.

13. Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied (*i.e.*, consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim). [New.]

Presumptions of law.

COMMENTARY.

This rule is new and it follows the English Or. XIX, r. 25. The meaning is that a person suing on a bill of exchange need not allege consideration, for the law presumes that the bill was for consideration (s. 118, Negotiable Instruments Act). But if he sues for consideration as a *substantive ground of claim*, he must specifically allege it (material fact).

The presumptions of law, referred to in this rule, are to be found in sections 79 to 90 of the Indian Evidence Act I of 1872; the reader may consult the notes and cases noted under those sections in the author's Indian Evidence Act

14. Every pleading shall be signed by the party and his pleader (if any):

Pleading to be signed.

Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf. [Ss. 51 & 52.]

15. (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case

Verification of pleadings

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own *knowledge and what he verifies upon information received and* believed to be true. [New.]

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed. [Ss. 51, 52 & 115.]

COMMENTARY.

Alterations in the Rule.—The provisions contained in ss. 51, 52 and 115 of the C. P. Code of 1882 have been summarised in the above two

rules. To meet the cases on points on which there is a conflict of authority, several alterations and additions have been introduced in these rules.

Sub-rule (2) have been added in accordance with the principles laid own in 6 C. 675; 7 C. L. R. 413; 15 A. 59; 4 C. L. R. 366, and 18 A. 396.

The last sentence in clause (3) of rule 15 has been inserted according to the Calcutta High Court's Circular Order No. 5, 22nd February 1870, to be found in High Court Circular Orders, Vol. I, p. 3.

The contents of verification contained in para 1 of s. 52 of the old Code have not been given in these rules.

Signed.—*For meaning see* s. 2 (20), *ante.*

" Pleading shall be signed by the party and his pleader, if any."—A plaint must be in existence before it is signed Signing a sheet of paper before the plaint is written is not sufficient.—*Girdhari* v. *Kanhaiya Lal*, 15 A. 59. *See* also, *Fateh Chand* v. *Mansab Rai*, 20 A. 442. *See*, however, *Charn* v. *Gorachand*, 19 C. W. N. 220 *notes.*

The pleader appointed by the mother and guardian of a minor can sign and verify a plaint filed in a Mamlatdar's Court.—*Sayad Saifulla* v. *Sayad Haji Miya*, 24 B. 238.

It is not necessary that all the persons named in the plaint as co-plaintiffs should sign and verify the plaint, there being no rule that a person named as a co-plaintiff is not to be treated as plaintiff unless he signs and verifies the plaint.—*Mohini Mohun* v. *Bungsi Buddan*, 17 C. 580. *See* also, *Roy Mohun Lall* v. *Bishnu Chandra*, 1 B. L. R. 100: 10 W. R. 145.

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XIII. *Insert* the following after Rule 14, Order VI.—

" 14A. Every pleading when filed shall be accompanied by a statement in a prescribed form, signed as provided in rule 14 of this Order of the party's address for service. Such address may from time to time be changed by lodging in Court a form duly filled up and stating the new address of the party and accompanied by a verified petition The address so given shall be called the registered address of the party and shall, until duly changed as aforesaid, be deemed to be the address of the party for the purpose of service of all processes in the suit or in any appeal from any decree or order therein made and for the purposes of execution, and shall hold good subject as aforesaid for a period of two years, after the final determination of the cause or matter. Service of any process may be effected upon a party at his registered address in like manner in all respects as though such party resided thereat." (P. 1008.)

knowledge or by the authority of the plaintiff, may be waived by the defendant, or, if necessary, cured by amendment at any stage of the suit and having regard to s. 99 of the Code, is not a ground for interference in appeal.—*Basdeo* v. *Smidt*, 22 A. 55; *Syed Mohiuddin* v. *Pirthichand*, 19 C. W. N. 1159 (1163); *Sashi Bhusan* v. *Rasik*, 17 C. W. N. 989; *Palaneappa* v. *Arunachellam*, 7 Bur. L. T. 202: 25 I. C. 140; *Ramgopal* v. *Dhirendra*, 31 C. W. N. 397: A. I. R. 1927 C. 376; *Ma Ngwe* v. *Ma Hme*, 1 Rang. 42: I. C 100: A. I. R 1924 Rang. 206. But see, *Baroda Prosad* v. *Girija Nath Roy*, 2 C. L. J 11, where a plaint which was not duly signed and verified, was ordered to be removed from the file (discussed in 17 C. W. N. 989, 990).

Amendment was allowed with regard to the verification of an incomplete plaint; *Fateh* v. *Mansab*, 20 A. 442; or a defective plaint; *Rajitram* v. *Katesar*, 18 A. 396 *See* also, *Port Canning & Land Improvement Co.* v. *Dharanidhar*, 9 C. W. N. 608.

Proviso—Signature by Persons Duly Authorized.—A plaint signed by the authorized agent of the plaintiff is valid in law unless it is shown that the suit has not been instituted with the approval of the plaintiff; *Amirunnissa* v. *Ramcharan*, 31 I. C. 859.

A plaint signed by a person holding a general power-of-attorney to sue on behalf of the plaintiff is properly signed within the meaning of the proviso but the Court must be satisfied that person other than the plaintiff verifying the plaint is acquainted with the facts of the case.—*Kastalino* v. *Rustomji*, 4 B. 468. *See* also, *Manohar Das* v *Ram Autar*, 25 A. 431 (435).

Section 36, read with section 51, C. P. Code, 1882, shows that a plaint which may be presented by an authorized agent may also be subscribed by him; *Dhunput Singh* v. *Jhoomuk Khawas*, 3 C. L. R. 579

Under section 51, C. P. Code, 1882 (Or. VI, rr. 14, 15), the Court may, in its discretion, admit a plaint which has been subscribed by an authorized agent of the plaintiff —*Surnomoyee* v *Pulin Behary*, 3 C. L. R. 15.

An agent authorized to enter appearance can sign amended plaint where once the suit has been instituted with the approval of plaintiff; *Palaniappa* v *Aruna Chellam*, 7 Bur. L. T. 199: 25 I. C 136

A person in jail who is unable to sign a plaint may authorize some other persons under Or. VI, r. 14 to sign it for him and the plaint so signed will be a valid plaint (22 A *refd. to*), *Bisheshar Nath* v. *Emperor*, 40 A. 147: 16 A. L. J. 64: 44 I. C 28

Where a plaint is signed by a third person on instructions from the real and ostensible plaintiff, it must be deemed to be signed by a duly authorized person; *Ali Ahmed* v. *Abdul Ghani*, 75 I. C 889

Absence and Inability to Sign.—Mere absence is no good cause for not signing. It is only absence of such a kind as makes signature impossible that would justify the applicability of the proviso. The words "other good cause" are of wide significance and leave the matter in the discretion of the Court; *Chandra* v. *Ganpat*, 4 .N L. R. 117.

Admission in Pleadings Signed by Pardanashin Women When Binding.—Where a party to a suit relies on admissions by an ignorant pardanashin woman in the pleadings purporting to be signed and verified by her in the manner required by Or VI, rr. 4 & 5, which are subsequently disproved by evidence of her conduct during trial; strict proof must be given of her having signed the document and of the same having been read out and explained to her. In the absence of such evidence, the pleadings will not be accepted as satisfactory proof that the purport and effect of such admissions were brought to her knowledge; *Sadie Husain Khan* v. *Hashim Ali Khan*, 14 A. L. J. 1248 P. C.: 38 A. 627: 21 C. W N. 130.

Objection to Verification—Should be taken before the settlement of issues, and after that the case should be tried on its merits and not dismissed for insufficient verification; *Shama Soonduree* v. *Rohimuddin*, 24 W. R. 71

Procedure Where Verification is Challenged.—The proper procedure in cases where the verification is challenged is not to frame any issue but to decide the preliminary question as to the validity of the plaint first. But if issues have been as a matter of fact framed, this does not stand in the way of the return of the plaint by the Court for amendment under s. 53 (Or. VI, r. 17); *Sasi Bhusan* v. *Rasik*, 17 C W N. 989 (*Ganga Sahai* v. *Mahomed Ali*, 22 A. 444-n. *followed*).

Omission to Sign or Verify—Procedure.—Where a plaintiff omits to sign the plaint but signs only the verification, the plaint ought to be returned for amendment or it should be amended in open Court, but cannot be rejected; *Nand Lal* v *Shankru*, 165 P W. R 1911 (22 A 55 *followed*). Want of signature or verification does not entail the rejection of plaint, as they can be supplied at any stage; *Arunachellam* v *Prabhayya*, 1912 M. W N 1207

Object of Verification—Is to fix upon the plaintiff the responsibility for the statements made in the plaint, and to affirm a guarantee of its good faith, *Basdeo* v *Smidt*, 22 A 55, *Ross* v *Scriven*, 43 C 1001.

Verification of Pleadings.—A Court ought never to allow a person other than the plaintiff to verify the plaint, save strictly under the exception which the law permits, namely, where the plaintiff, by reason of absence or other good cause, is unable to subscribe it —*Keenoo Singh* v. *Eshan Chunder*, 6 W R 213, *Ram Mohun* v *Nursing Deb*, W. R. F. B. 54; *In re Mohessur Buksh*, 5 W R Mis 33, *Mohessur Buksh* v. *Sheo Narain*, 6 W. R Mis 59.

In a suit brought by a firm, one partner can, without having obtained special leave, verify the plaint, on his own behalf, and also on behalf of his co-partners.—*Ram Chunder* v. *Choonee Lall*, 12 B L R 35.

A written statement, filed by the defendant, should be verified, but if admitted on the record without verification, its allegations should be noticed and issues framed accordingly.—*Radha Churn* v. *Moran and Company*, 13 W. R. 312. *See* also, *Rustum Gazi* v. *Tara Prosanna*, 11 C. W. N. 871.

Verification by Agent or Other Person.—Where a plaint or an execution petition is verified by an agent, he must satisfy the Court, by an

affidavit, that he is acquainted with the facts of the case.—*Bakar Sajjad* v. *Udit Narain*, 26 A 154.

The verification should be made by some person acquainted with the facts of the case.—*Mussoori Bank* v. *Barlow*, 9 A. 188.

S. 52, C. P. Code, 1882 (Or. VI, rr 14, 15), does not require the verification of a plaint to be made in the presence of an officer of the Court; but when a plaint is verified by any person other than the plaintiff, it is desirable that a verification by such person should be made in the presence of the Court, unless the Court be satisfied that there is sufficient ground for dispensing with his attendance.—*Kastalino* v. *Rustomji*, 4 B. 468.

The verification of an application under Or XXI, r. 66, C P Code, by the *Karpardar* of the decree-holder who is acquainted with the facts verified is sufficient and valid under Or VI, r. 15; *Raja Braja Sundar* v. *Sivaranjan*, 1 Pat. L. T 647. 59 I C 282.

Where Plaintiff should Himself Verify.—Where a plaint contains statements of a scandalous nature, the plaintiff should himself subscribe and verify the plaint.—*Brajeshwari* v. *Budhanuddi*, 6 C. 268, p. 270: 7 C L. R. 6. In a case where the plaintiffs set up gross fraud, and where the case depends mainly upon the personal knowledge of the plaintiffs, it is imperative on the plaintiffs or one of them to verify the plaint.—*Protap Chunder* v. *Kriste Kishore*, 8 C 885 *See* also, *Jardine, Skinner & Co.* v. *Shurnomoyee*, 24 W R. 215, and *Rajah of Tomkuhi* v *Braidwood*, 9 A 505.

As to subscription and verification of pleadings in suits by or against corporation or company, see cases noted under Or XXIX, r 1

Mode of Verification.—In all cases, the person verifying should state shortly what paragraphs he verifies of his own knowledge, and what paragraphs he believes to be true from the information of others.—*In the matter of Upendra Lall Bose*, 6 C 675. 7 C. L. R. 413 Referred to in *Girdhari* v. *Kanhaiya Lal*, 15 A 59, where it has been further held that a verification in the form " to the limit or extent of my knowledge, the purport of this is true," does not satisfy the requirements of law. *See* also, *Solomon* v. *Abdul Aziz*, 4 C. L. R. 366, and *Rajit Ram* v. *Katesar Nath*, 18 A. 396.

Section 52, C. P. Code, 1882, says about actual personal knowledge on the part of the verifier; but Or. XXIX, r. 1 *does not* say so.—*The Port Canning and Land Improvement Co.* v. *Dharanidhar*, 9 C. W N 608 (609).

Omission to Verify Pleading.—A pleading which is not verified in the manner required by this rule, may be verified at a later stage of the suit even after the expiry of the limitation period The omission to verify a pleading is a mere irregularity within the meaning of s 99 of the Code; *Rajit Ram* v. *Katesar*, 18 A 396; *Fateh Chand* v *Mansab Rai*, 20 A. 412; *Shiv Deo* v. *Ram Prasad*, 46 A. 637, 640: A. I R. 1925 All. 79: 87 I. C. 938.

False Verification.—A person filing a written statement is bound to state the truth, and if he makes a statement which he knows or believes

to be false, he is guilty of giving false evidence within the meaning of s. 191 of the Penal Code; *Queen-Empress* v. *Mehrban Singh*, 6 A. 626.

A petition filed in the Civil Court not requiring verification cannot, from the fact of its being verified unnecessarily, be made the subject of a prosecution for giving false evidence.—*Juggut Chunder* v. *Kasi Chunder*, 6 C. 440: 7 C. L R. 330; and *Queen* v. *Kartick Chunder*, 9 W. R. Cr. 58.

Striking out pleadings.

16. The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit. [New.]

COMMENTARY.

This rule is taken from Or. XIX, r. 27 of the English rules

"At any stage of the proceedings."—Although the words "at any stage of the proceedings" show that the power given under this rule may be exercised by the Court at any time during the pendency of the suit, the application to take action under this rule, should be made with reasonable promptitude, and as a rule, before the pleadings are closed, as the Court has discretionary power either to grant or refuse the prayer, and if the application under this rule is made at the last stage of the proceeding, the Court may in its discretion refuse to exercise its power See *Cross* v *Howe*, (1893) 62 L J. Ch 342. An application to remove a written statement from the file should be made at the earliest opportunity. —*New Fleming Spinning and Weaving Company* v. *Kessowji*, 9 B. 373 (381)

Striking Out or Amending Pleadings.—"The parties must not offend against the rules of pleading which have been laid down by the law, and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass or delay the trial of the action, it then becomes a pleading which is beyond his right," *per* BOWEN, L. J., in *Knowles* v. *Roberts*, 38 Ch D. 270, 271 "The defendant may claim *ex debito justitiae* to have the plaintiff's case presented in an intelligible form, so that he may not be embarrassed in meeting it;" *per* JAMES, L J., in *Davey* v. *Garrett*, 7 Ch D. 473, 486. The Court has jurisdiction to take a written statement off the file for irrelevancy until it is "tendered," which is when it is produced at the hearing of the suit "Relevancy" is to be judged by what the defendant believed to be material to his case, and not whether it did, in fact, disclose a good defence to the action —*Kesharji Naik* v. *Nasarvanji*, 10 Bom. H. C. 425.

"Unnecessary."—Where the statement in the pleadings are inordinately prolix and contain matters which are quite unnecessary and wholly immaterial and are calculated to raise irrelevant issues, the Court may order that such portions of the statements which are quite immaterial, be struck out, as the introduction of unnecessary matters in opponent's pleadings makes it incumbent on the petitioner to plead to it and colle unnecessary evidence, which will involve trouble, expense and delay.

affidavit, that he is acquainted with the facts of the case.—*Bakar Sajjad v. Udit Narain*, 26 A. 154.

The verification should be made by some person acquainted with the facts of the case.—*Mussoori Bank v. Barlow*, 9 A. 188.

S. 52, C. P. Code, 1882 (Or VI, rr 14, 15), does not require the verification of a plaint to be made in the presence of an officer of the Court; but when a plaint is verified by any person other than the plaintiff, it is desirable that a verification by such person should be made in the presence of the Court, unless the Court be satisfied that there is sufficient ground for dispensing with his attendance —*Kastalino v Rustomji*, 4 B. 468.

The verification of an application under Or. XXI, r 66, C P. Code, by the *Karpardar* of the decree-holder who is acquainted with the facts verified is sufficient and valid under Or VI, r 15, *Raja Braja Sundar v. Sivaranjan*, 1 Pat L T 647· 59 I C 282.

Where Plaintiff should Himself Verify.—Where a plaint contains statements of a scandalous nature, the plaintiff should himself subscribe and verify the plaint —*Brajeshwari v. Budhanuddi*, 6 C 268, p. 270: 7 C. L. R. 6 In a case where the plaintiffs set up gross fraud, and where the case depends mainly upon the personal knowledge of the plaintiffs, it is imperative on the plaintiffs or one of them to verify the plaint.—*Protap Chunder v Kriste Kishore*, 8 C 885 *See* also, *Jardine, Skinner & Co. v. Shurnomoyee*, 24 W R 215, and *Rajah of Tomkuhi v. Braidwood*, 9 A. 505.

As to subscription and verification of pleadings in suits by or against corporation or company, see cases noted under Or XXIX, r 1

Mode of Verification.—In all cases, the person verifying should state shortly what paragraphs he verifies of his own knowledge, and what paragraphs he believes to be true from the information of others —*In the matter of Upendra Lall Bose*, 6 C 675 7 C L R 413 Referred to in *Girdhari v. Kanhaiya Lal*, 15 A 59, where it has been further held that a verification in the form " to the limit or extent of my knowledge, the purport of this is true," does not satisfy the requirements of law. *See* also, *Solomon v. Abdul Aziz*, 4 C L R 366, and *Rajit Ram v. Katesar Nath*, 18 A. 396.

Section 52, C P. Code, 1882, says about actual personal knowledge on the part of the verifier, but Or. XXIX, r. 1 does not say so —*The Port Canning and Land Improvement Co. v Dharanidhar*, 9 C W N. 608 (609).

Omission to Verify Pleading.—A pleading which is not verified in the manner required by this rule, may be verified at a later stage of the suit even after the expiry of the limitation period The omission to verify a pleading is a mere irregularity within the meaning of s 99 of the Code; *Rajit Ram v. Katesar*, 18 A. 396; *Fateh Chand v. Mansab Rai*, 20 A. 442; *Shiv Deo v. Ram Prasad*, 46 A. 637, 640 A I R 1925 All. 79: 87 I. C. 938.

False Verification.—A person filing a written statement is bound to state the truth, and if he makes a statement which he knows or believes

Appellate Court's Power to Expunge Remarks Made in the Judgment of the Lower Court.—The power of the High Court to expunge remarks appearing in the judgment of a lower Court will only be exercised in extraordinary circumstances, such as, when the observations are pointedly seditious, blasphemous, or irrelevantly scandalous or indecent, *Ramabadra Naidu* v. *Subramania*, 3 L W. 283 · 33 I. C. 608.

Who may Apply.—Any person affected by the scandalous allegations, be he a party or not to the suit, may apply to have them struck out; *Cracknell* v. *Janson*, 11 C. D. 1, 13.

As to inconsistent statements in plaint, *see* the cases noted under Or. VII, r. 7; and in written statement, *see* the cases noted under Or. VIII, r. 2.

Amendment of pleadings.

17. The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. [Ss. 53 & 116.]

COMMENTARY.

Alterations in the Rule and their Effect.—This rule is substantially identical with Or. XXVIII, r 1. of the English rules, and it briefly lays down the provisions contained in ss 53 and 116 of the C P. Code of 1882, relating to the amendment of pleadings. The language and the wording of this rule are quite different from those of the above two sections; but they are intended to take their place. The most important change is the omission of cl (*b*) of s 53 of the old Code, which provided that a plaint can be returned for amendment *only at or before the first hearing* of the suit. Under the present Code, the Court may at *any stage* of the proceedings allow either party to alter or amend his pleadings, as may be necessary for determining the real questions in controversy Therefore, cases decided before the enactment of the Code of 1908, ruling that it is not desirable to allow amendments at a very late stage, or so as to oust the jurisdiction of the Court in which the suit was instituted, are no longer of much value on the amendment of plaints; *Parameswara* v *Sankara*, 16 M. L. T. 241: 1914 M. W. N. 689.

Besides the provisions of this rule, the Court, under s 153 of the present Code may, at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit. *See* notes, *post*. This rule, coupled with s. 153, has considerably enlarged the power of Courts to allow amendments.

Section 53 of the old Code expressly provided that a plaint should not be amended so as to convert a suit of one character into a suit of another and inconsistent character. That limitation on the Court's power has been omitted from this rule; *Kastur Chand* v. *Mg. Ba*, 11 I. C. 856.

The general rule that amendment shall be made as may be necessary for the determination of the real question in controversy is subject to the

limitation that the case tried must be consistent with the case as originally laid and that the state of facts and equities and grounds of relief originally alleged and pleaded by the plaintiffs should not be departed from; *Kluaram* v. *Chattomal*, 7 S. L. R. 23: 20 I. C. 570. The only limitation to the Court's duty of making such amendments appears to be that suggested by s. 151; the legal rights of no party should be violated and the process of Court must not be abused; *Syud Thrababchah* v *Bibi Nagu*, 8 S. L R 28.

Different Kinds of Amendment.—(1) *Voluntary* amendment, *i e.*, those amendments which a party seeks to make in his own pleading [Or. VI, r. 17]; (2) *Compulsory* amendment, *i e*, those amendments which a party desires to be made in his opponents' pleading, as for instance, in cases where the pleading contains irrelevant or scandalous matters [Or. VI, r. 16]; (3) Striking out or adding parties [Or. I, r 10 (2)]; (4) Amendment of proceedings in a suit by the Court for the purpose of determining the real question or issue between the parties [s 153]; (5) Amendment of clerical and arithmetical mistakes in judgments, decrees and orders [S. 152].

The present rule deals with *voluntary* amendments

"The real question in controversy"—is a matter not of law but of fact, and it means the question which *both* the parties really intended to have tried and not any question, which, during the course of the trial, may for the first time be brought into controversy by one of the litigants, *Roles* v. *Davis*, (1859) 28 L. J, Ex 287.

It is the manifest duty of a Judge to try to put an end, once for all, to all questions that can arise in relation to a particular transaction. Where an amendment is necessary for the purposes of settling all matters in controversy and works no injustice, nor takes by surprise the opposite party, the Judge should make such amendment, *Nur Mahomed* v. *Natwar Lal*, 45 A 220. 71 I C 452; *Hamid Mirza Beg* v *Ahmed Mirza Beg*, 9 O. L. J. 359 A I R 1922 Oudh 266· 68 I C 986

General Principles Governing the Rule of Amendment—When to be Allowed and When Not.—This rule has been stated in terms very general and wide, and the Court's power to allow amendment is very comprehensive under the new Code. It authorizes the Courts to permit amendments, whenever, in the opinion of the Judges, it is just that they should be done. The discretion is judicial and not arbitrary; and an erroneous exercise of it is capable of correction by a Court of appeal See *Kishandas* v. *Rachappa*, 33 B. 644, *Rang Behari* v *Rachhaya Lal*, 15 C L. J 430. 16 C. W. N. 128; *Ramji* v *Saligram*, 14 C L J 188· 11 I C. 481 Courts in England have uniformly held that amendment should always be allowed even though it be at a late stage of the suit, if it is necessary for determining the real controversy between the parties, on the principle that multiplicity of suits should, if possible, be cautiously avoided. The only limitation which they have in view is that a suit of one character should not, by amendment, be allowed to be converted into a suit of another character which can and ought to be tried by a separate action. There was an express provision to this effect in the Code of 1882, which has been abandoned now, adopting the English order. This naturally follows from the rule of amendment broadly stated in the section. The only object

and justification for amendment being the determination of the real question in issue, an amendment which introduces a totally different or inconsistent case, or completely changes the character of the suit should never be permitted. This would on the contrary lead to confusion and involve departure from the real points in suit. See *Laird* v. *Briggs*, 16 C. D 440. This rule merely gives effect to what has been the recognized practice, because, as was stated by the Judicial Committee in *Australian Navigation & Co.* v. *Smith*, (1889) 14 App. Cas. 318, " their Lordships are strong advocates for amendments, whenever it can be done without injustice to the other side, and when they have been put to certain expense and delay, yet if they can be compensated for that in any way, an amendment ought to be allowed for the purpose of raising the real question between the parties " The two cardinal elements to be borne in mind are: (1) whether the application for amendment is made in *good faith*, and (2) whether the application is made at such a late stage of the case that if the defendant's prayer be *granted*, the plaintiff would be injured because the defendant would without notice raise totally different and inconsistent case, which the plaintiff has not sufficient opportunity to meet; *Tildesley* v. *Harper*, 10 Ch. D 393; *Clarapede* v. *Commercial Union*, 32 W. R. Eng. 262. *Weldon* v. *Neal, 19 Q. B. D. 394; Laird* v. *Briggs*, 16 Ch. D 440 (446); *Steward* v. *North Metropolitan Rly. Co.*, 16 Q. B D 178. " There is one panacea which heals every sore in litigation and that is costs "; *per* BOWEN, L J., in *Cropper* v *Smith*, 26 C. D 711. " My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fides* or that by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise "; *per* BRAMWELL, J., *Tildesley* v. *Harper*, 10 Ch. D. 393. An admission made inadvertently may be withdrawn and the pleading amended; *Hollis* v. *Burton*, (1892) 3 Ch 226, 236.

Under this rule all amendments ought to be allowed *at any stage of the proceedings* which satisfied the two conditions (1) of not working injustice to the other side; and (2) of being necessary for the purpose of determining the real question in controversy between the parties Amendments should be refused only where the other party cannot be placed in the same position as if the pleading has been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which, since the institution of the suit, had become barred by limitation, the amendment must be refused (see *post*, " Amendment and Limitation "); to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim. In the English cases noted above the same doctrine has been laid down; see *Kishan Das* v. *Rachappa*, 33 B 641 p. 649. If the amendment altered the nature of the suit it should be refused no matter at what stage it was sought to be made: *Steel Bros. Ld.* v *Cassump*, 11 I. C. 827 (see *post*, " Alteration of Nature of Suit "). The test for amendment is, whether the evidence to be offered will not in any substantial respect be different from what it would have been, if the suit had proceeded as at present constituted; *Gopal* v. *Budree*, 10 C. W. N. 662 (665): 33 C. 657: The wide power of amendment under this rule should not be exercised where the plaintiff has not availed himself of other remedies

open to him; *Ramdhan* v. *Annamalai*, 29 I. C. 132. Where a party i allowed to amend, the opposite party must be given an opportunity o meeting it by amendment or by calling fresh evidence to rebut the nev case.

The Courts, being desirous of getting at the true facts, will allov amendment subject to the three chief general conditions· *Bona fides* on th part of the applicant, possibility of amendment without such prejudic to the other party, as cannot be compensated by costs (such as prejudic to rights accrued) and subject to this that the amendment is not such a to turn a suit one character into a suit of another character; *Upendra Narain* v. *Rai Janoki Nath Roy*, 45 C 305. 22 C. W. N. 611: 47 I. C. 129 (8 C. 871; 18 B. 144; 16 W. R. 123, 9 C. 695, 5 B. 496; 21 W. R. 208; 5 B. 613 *refd. to*). *See* also, *Gyanendra Nath* v. *Paresh Nath*, 26 C. W. N. 73; *Ma E Gywe* v. *Ma Lewa*, 13 Bur L T. 201.

Order VI, r. 17, gives ample power to the Court to give leave to the parties to amend the pleadings, but such leave should not be given when the amendment would prejudice the opposite party, *Rebati Raman* v. *Harish*, 24 C. W. N. 749.

Before deciding whether an amendment should be allowed, the Court will look into its substance or materiality (*Wood* v. *Earl of Durham*, 21 Q. B. D. 501), and leave for amendment will be refused if it is sought only to avail oneself of a technical rule of law (*Edevain* v. *Cohen*, 43 C. D. 189; *Dillon* v. *Balfour*, 20 L R. Ir. 609) Leave to amend ought to be refused where the amendment is merely *technical* or is *immaterial*; *Nagendra Bala* v *Secy. of State*, 14 C. L J. 83. This rule has been carried so far that in *James* v. *Smith*, (1891) 1 Ch. 384, where a defendant had pleaded section 4 of the Statute of Frauds, he was not allowed to amend the pleading with a view to avail himself of s. 7. The defendant was bound to plead the statute and was not obliged to plead the particular section; but, as he had relied on a particular section of the statute, it was ruled that he could not renounce the position taken up and avail himself of some other section

See also the following cases in which " Principles governing amendment of pleadings " have been discussed; *Ramaswami* v. *Ganga Reddi*, 34 M. L. J. 177: 23 M. L. T. 280; *Darbarilal* v. *Waser Malik*, 56 I. C. 115; *Ghulam Haidar Khan* v. *Sardar Ali Khan*, 73 I. C. 748; *Jharia Coal Company* v. *Diwan Chand*, 67 I. C. 335; *Iraganti Venkatarama Row* v. *Venkatalingana Nayanim*, 42 M. L J. 43: (1922) M. W. N. 42: 30 M. L. T. 204: 68 I. C. 703.

As to amendment of application for execution, see Or. XXI, r. 17, and notes thereto.

Amendment by Putting Forward Plea of Fraud.—" It is the universal practice, except in the most exceptional cases, not to allow an amendment for the purpose of adding a plea of fraud where fraud has not been pleaded in the first instance; " *per* Lord Esher, M. R. in *Bentley* v. *Black*, 9 T. R. 580. Thus in *Riding* v. *Hawkins*, 14 P. D. 56, leave to add a charge of fraud was given to the plaintiff after the defendant had been cross-examined and his case closed, as particulars of fraud came out during the cross-examination of the defendant. As to the mode of pleading where a party relies on fraud, *see*, r. 4, and notes *ante*.

Amendment may be Allowed at Any Stage.—The words of the rule are very wide and empower the Court to permit either party to alter or amend the pleadings at any stage of the suit. However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injury to the other side. There is no injustice if the other side can be compensated by costs"; *per* Brett, M. R., in *Clarapede* v. *Commercial Union Ass*, 32 W. R. 267, 263; *Weldon* v. *Neal*, 19 Q. B. 394, 596. Amendment may be allowed in appeal or even in second appeal.

Tests for Allowing or Refusing Amendments.—Upon a careful analysis of the leading English and Indian cases, we get the following results:—

(1) Whether the original omission is due to negligence, carelessness or accidental error, amendments of pleadings will always be allowed unless allowing the amendment will place the other party at a disadvantage for which he cannot be adequately compensated by costs.

(2) Amendment should not be allowed when a claim or relief was deliberately omitted.

(3) An amendment of pleadings must be allowed where it is necessary for the purpose of determining the real questions in controversy between the parties.

(4) Amendments should be refused where the application for amendment is not made in good faith and the application is made at such a late stage of the case that if granted, the plaintiff may be injured, because the defendant would without notice raise a totally different and inconsistent case which the plaintiff has not sufficient opportunity to meet.

(5) An amendment should be refused, where it is such as will materially alter or transform the nature of the suit

(6) Leave to amend pleadings should be refused where the amendment is merely technical or is immaterial.

Extent of Amendment.—Plaints can be amended only to the extent allowed by Court. So where a plaint is returned to add parties, a prayer for relief asked therein cannot be altered; *Husaina* v *Nurand Muhammadji*, 86 P. W. R. 1910: 7 I. C. 505

Substitution of New Plaint by way of Amendment can Not be Allowed.—A plaintiff cannot by amendment be allowed to substitute one plaint for another; *Kokamal* v. *Gulab Singh*, 27 Bom. L R. 277 87 I. C 481: A. I. R. 1925 Bom. 248.

Amendment of Plaint should be Attended with Opportunity to Defendant to Amend Written Statement, and Vice Versa.—When a plaint is allowed to be amended, defendant should be given an opportunity to amend his written statement and produce evidence to rebut the new claim; *Manji* v. *Kalanand*, 16 I. C. 785 (12 C. L. J. 556 *referred to*). Where defendant asks for amendment of written statement after the close of the plaintiff's case it should be refused unless the latter also is given an opportunity to call further evidence to rebut the new case; *Tadipatri* v. *Madduhuri*, 21 I. C. 822; *see also*, *Poosapathi* v. *Raja Vacharayi*, 29

M. L. J. 53. After plaint has been allowed to be amended by addition of new parties, the added as well as the original defendants have a right to file fresh written statements and to have the whole case re-opened. In such circumstances the appellate Court has powers to remand the case for trial, independently of rr. 23 and 25 of Or. XLI, *Uzir* v. *Savai*, 20 C W. N. 547.

When Court can Not Return Plaint under this Rule.—Where in a suit for a declaratory decree, the Court was of opinion that the plaintiff could seek further relief, but the plaintiff was unwilling to amend, *held* that the Court had no jurisdiction to return the plaint under this rule, *Venkata Chala* v. *Narayana*, 24 M L J. 455 19 I C 672.

Amendment must be by the Proper Court.—When the High Court directed an amendment to be made by the first Court, an amendment by the lower appellate Court was bad, *Madan* v *Maharaja of Chotanagpur*, 19 C .W. N 200 22 I C. 778

Instances where Amendments were Allowed.—Omission to ask for proper reliefs, *Abdul* v *Bangaruswami*, 9 M L T 429 10 I. C. 260, *Tukaram* v *Govinda*, 95 I C. 294 A I R. 1926 Nag. 385; erroneous description of the plaintiff and defective verification; *Md. Yusuf* v. *Himalayan Bank*, 18 A 198 (17 A 292 *overruled*), omission to make averment as to ownership, *Mukti Gopaludu* v *Krishna*, 8 M L T 245; 6 I C 876, changing form of the suit where cause of action is not altered; *Pulamada* v. *Ravuthu*, 11 M 94, alteration of a suit for partition into one partly for partition and partly for recovery of certain property as plaintiff's own or in the alternative for partition, *In re Jothy Mahalinga*, 10 M. L T. 188; in a suit for recovery of account books by addition of a prayer for recovery of moneys on the same facts, *Sevugan Chetty* v. *Krishna*, 10 M. L T 557.

Where in a suit on a pro-note, which was on the face of it barred by limitation, defendant produced a document which was discovered to save limitation and the lower appellate Court allowed the plaintiff to amend the plaint, *held* that the amendment was rightly allowed as there was no change in the cause of action; *Vasudeva* v *Venkalakshmi*, (192 M. W N 175. 38 M L T 221 A I R 1927 Mad 501.

In a suit which was bad for misjoinder of the plaintiffs, the plaint was allowed to be amended by permitting one of the plaintiffs to proceed with the suit by striking out the other plaintiffs —*Aldridge* v. *Barrow* 34 C. 662: 11 C. W. N. 680.

An error in the number of the plot from which ejectment is sought is a clerical error liable to amendment under Or VI, r 17, *Sheoraj Singh* v. *Koulhan Singh*, 32 I. C. 512.

A sued for an injunction to restrain interference with his right to graze cattle on the bed of a tank. The other ryots of the village, in whom the same right vested, were originally joined as plaintiffs' but the plaint was amended by striking out their names —*Venkatachala* v *Kuppusami*, 11 M. 42. In a claim for injunction plaintiff was allowed an amendment which enabled him to urge an alternative ground in support; *Manilal* v. *Harendra* 8 I. C. 79.

If it can be said, in the interests of justice, that there has been a misdescription of a party in the title of a plaint, the necessary amendment ought to be allowed; if otherwise, the rights of the parties would be prejudiced.—*The Saraspur Manufg. Co.* v. *B. B. C. I. Ry. Co.*, 47 B. 785: 25 Bom. L. R. 513: 73 I. C. 1027.

Where a mortgage-debt was payable on demand, the suit ought to have been brought not for interest only, but for an account and payment of what remains due on the mortgage for principal and interest up to the filing of the plaint. This amendment was allowed in this case.—*Annapa* v. *Ganpati*, 5 B. 181.

A suit to enforce exchange of *pottah* and *muchalka* should not be dismissed as not maintainable, but the plaint should be allowed to be amended by a prayer for a declaration of the plaintiff's title.—*Narasimma* v. *Suryanarayana*, 12 M. 481.

Where at the hearing of a mortgage suit, an objection was taken by the defendant that some of the mortgaged properties being situated outside the jurisdiction of the Court, it had no jurisdiction to entertain the suit, and the plaintiffs then made an application for the amendment of the plaint by withdrawing their claim against the properties outside the jurisdiction: *held* that by permitting the amendment the Court did not exercise its jurisdiction improperly; *Ramasaran* v. *Ramprasanna*, 29 C. L. J. 206: 50 I. C. 49.

This rule does not prevent a plaintiff, who has been ousted after suit brought for declaration of title, from amending his plaint by adding a prayer for possession.—*Mellus* v. *Vicar-Apostolic of Malabar*, 2 M. 295; *Subba Naicken* v. *Rami*, 16 I. C. 734. Suit for rent can be amended into suit for use and occupation; *Mg Po* v. *Md. Thumbi*, 8 Bur. L. T. 234.

In a suit by a purchaser against vendor for specific performance of contract: *held* that amendment of the plaint so as to make it include a claim for the refund of the earnest-money ought to have been allowed, although not asked for until a late stage of the case.—*Ibrahimbhai* v. *Fletcher*, 21 B. 827.

In a suit on a mortgage for sale or any other relief to which the plaintiff might be entitled, the plaintiff can amend the plaint by [illegible] quishing his claim for sale of the mortgaged property and asking [illegible] or a simple money decree.—*Sukdeo Prasad* v. *Lachman Singh*, 24 A. [illegible]

The lower Court allowed the plaintiff, a mortgagee, to [illegible] plaint to raise an alternative case that the money was advanced [illegible] fraudulent representation of the defendant that he had [illegible] majority at the time.—*Saral Chand* v. *Mohun Bibi*, 25 C. [illegible] W. N. 201.

In a suit for possession by reversioners against widow suit was dismissed as premature in presence of widow, *held* should allow amendment of plaint for declaration of [illegible] succeed after the widow's death; *Gurdit* v. *Parmeshri*, [illegible] 38 P. L. R. 1913.

A suit against a dead man may be amended into one as against h legal representative; *In re Arunachelam*, 2 L. W. 829. But see, *Ra Goundan* v. *Pichamuthu Pillai*, 42 I. C. 530

Amendments regarding Verification of Plaint.—*See* Or. VI, r. 15.

When Leave to Amend should be Refused.—Leave to amend shoul be refused in the following cases —

(1) *When the proposed amendment is not necessary for the purpos of determining the real questions in controversy between the parties*—Leave to amend should be refused where the amendment is merely *tech nical* or is immaterial; *Collete* v. *Goode*, (1878) 7 C D 842, 847; *Nagendr Bala* v. *Secy. of State*, 14 C L. J. 83, or where it is sought only t avail oneself of a *technical rule of law* *Edevain* v. *Cohen*, 43 C. D 189; or where the proposed amendment is *useless and of no substance Morel Brothers & Co Ld.* v *Westmoreland*, 1 K B. 64, 77; *Machado* v *Fontes*, 2 Q. B 231.

(2) *Where the effect of the proposed amendment would be to tak away from the defendant a legal right which has accrued to him by laps of time.*—In *Charan Das* v. *Amir Khan*, 47 I A. 255: 48 C. 110 P. C. thei Lordships of the Privy Council said "Though the power of a Court to amend the plaint should not as a rule be exercised where its effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases where such considerations are out weighed by the special circumstances of a case." *See* also, *Kisandas* v *Rachappa*, 33 B 644; *Janardhan* v *Shib Pershad*, 43 C 95; *Balkaran* v *Gaya*, 36 A 370; *Kalidas* v *Draupadi*, 22 C. W N. 104; *Rebati* v *Harish*, 24 C W N. 749; *Gyanendra* v *Paresh*, 26 C. W. N. 73; *Niranka* v. *Atul*, 28 C. W. N 1009; *Hirjee Devraj* v *Maung Nyun*, 2 Rang 414: A. I. R. 1925 Rang 49

(3) *Where the effect of the amendment would be to raise a totally different, new and inconsistent case*—No amendment should be allowed which would introduce a totally new and different case; *Upendra* v *Janaki*, 45 C 305. 47 I. C. 129; *Padma* v *Giris*, 46 C. 168: 45 I. C. 241; *Mahesh* v. *Radha Kishore*, 12 C W. N 28; *Fatta* v. *Musst. Bhago*, 27 P. L R 20. No amendment should be allowed if its effect is to substitute one distinct cause of action for another or change *the character* of the suit; *Ma Shwe Mya* v. *Maung Mo Hnayung*, 48 I. A. 214: 48 C 832, 835 Leave to amend should not be granted if the effect of the [illegible] a suit of another [illegible] *ge Bank of India*, [illegible] nt would change the fundamental character of the suit; *Kasinath* v *Sadasiv*, 20 C 805

(4) *Where the application for amendment is not made in good faith.*—Leave to amend should be refused, where the party seeking the amendment is acting *mala fide*; *Tildesley* v *Harper*, 10 C. D. 393. Want of *bona fides* may be inferred if there has been a great delay in making the application; *Krishna* v. *Pachaiyappa*, 47 M. L. J. 540: A. I. R. 1924 Mad. 883.

Instances Where Amendments were Not Allowed.—An amendment will not be allowed where it was deliberately not sought to be made and

was deferred till the failure of another suit made it clear to the plaintiff that without amendment he had no chance of obtaining the relief he desired; *Mg. Than* v. *Uthe*, 8 I. C. 600; or when it is merely technical or immaterial; *Nagendrabala* v. *Secy. of State*, 14 C L J. 83, or when it prejudices the rights of the opposite party as existing at the date of such amendment; *Md. Ayyab* v. *Gunnis & Co.*, 24 M L. J. 562, or when a claim is deliberately omitted; *Bhuki* v. *Ram Khelawan*, 17 C. W. N. 311; or when the effect of such amendment is the substitution of a fresh cause of action or a separate cause of action for the one disclosed in the plaint as originally framed; *Ma Nyun* v. *Maung Shew Kaung*, (1919) 3 U. B. R 171. 52 I C. 961 Amendment may be allowed when the omission is merely inadvertent; *Jalal* v. *Quaim*, 62 P. R. 1914 · 255 P. L. R. 1914.

Where a plaintiff bases his claim on a *specific legal relation* alleged to exist between him and the defendant, he may not be allowed to amend the plaint so as to base it on a different legal relation; *Narayan* v. *Hari*, 13 B. 664, *Jhari Singh* v. *Pirthi Nath*, 2 Pat L J. 69; *Surendra* v. *Bhai Lal*, 22 C. 752.

Where the plaintiff's claim was based on the allegation that a certain will was invalid, amendment by inserting a clause that, even if the will were valid, it did not dispose of the whole of the testator's property will not be allowed —*Damodar* v. *Purmanand*, 7 B. 155

When a person brings a suit alleging that he had the right to sue, and when it is found that he had not the right, the Court will not be justified in directing an amendment of the plaint in order to enable the proper party to sue; such a direction of amendment is without jurisdiction; *Sammana* v. *Rama Subramania*, (1926) M W N 288 93 I C. 305 · A. I. R 1926 Mad. 577.

In an action for revision of a contract and for return of earnest-money, the plaintiff can be allowed an amendment claiming a specific performance as an alternative relief, arising out of the same facts The Court has always the power to strike out matters which tend to prejudice, embarass or delay the trial, if the occasion arises during the trial, *Chandra Prasad* v. *Hira Lal*, (1923) Pat 357 · 75 I. C. 433.

Suit based upon negligence cannot be amended so as to rest on nuisance; *McInerny* v. *Secy. of State*, 38 C. 797 Suit for recovery of debt cannot be amended into a suit for partnership accounts, *Beragiram* v. *Rajaram*, 163 P. L. R. 1911 Claim for rent cannot be converted into one for damages; *Karamchand* v. *Hurdial*, 11 I C. 849; *Leary* v. *Mg. On. Gaing*, 11 I. C. 863. Suit for adoption cannot be treated as a suit for partition of undivided family property; *Venkata Samba* v. *Papayya*, (1918) M. W. N. 828. A suit founded [illegible] be allowed to be converted into one based on
Ba Thein v. *Ma Than Myint*, 8 Rang. 483.
charged, another kind of fraud cannot, upon failure of proof, be substituted for it; *Abdool Hossain* v. *Turner*, 11 B. 620: 14 I. A. 111.

An amendment of plaint, a year or more after the institution of the suit and inconsistent with the original claim, should not be allowed — *Shyama Charan* v. *Abhiram*, 33 C. 511: 3 C. L J. 306 · 10 C W. N. 739.

Amendment cannot be allowed at a late stage, where plaintiffs s as reversionary *heirs* and it was found that they are not; *Avula Guru* v. *Avula*, (1913) M. W. N. 383. Amendment of plaint after case is res ed for judgment cannot be allowed; *Bisheshar* v. *Gobind*, 12 A. L. J. 8

In a suit for libel, leave to amend the written statement at the co mencement of the trial so as to include a plea of privilege was disallo on the ground of unfairness to plaintiff to allow such a new defence to raised at that stage of which he had no notice, *Lala Lajpat Rai* v. *Engl man*, 13 C. W. N. 895: 36 C. 883.

Effect of Amendment.—If by amendment a fresh relief or a n cause of action is allowed to be introduced in the plaint, it relates ba to the date of the *institution* of the suit; *Nemasa* v. *Ram Krishna*, 10 L. R. 32: 23 I. C. 165. Where a plaint has been rightly amended, t date of institution of the claim is the date of the presentation of the o ginal and not of the amended plaint; *Jalal* v *Qaim*, 62 P. R. 191 Amendment in the plaint by leave of Court cannot in any case amou to addition or substitution of a new plaintiff within the meaning of s. 2 Limitation Act; *Rani Kuarmoni* v. *Wasif Ali*, 19 C W N 1193: I. C. 818.

Amendment of Pleadings in Appeal—When Allowed and When Not.- Amendment of plaint should not be allowed in second appeal when involves *fresh* evidence and fresh issues, *Nag Tan* v *Nag Kan*, 12 I. C 200. An amendment not asked for in the Court of first instance ough not to be allowed in the High Court, *Rameshwar* v *Laliteshwar*, 36 C 481; but an amendment of plaint can be allowed for the first time eve in the second appeal, if justice requires it, *Rama Chandra Charyulu* v. *Ranga Charyulu*, 51 M L J 418 98 I C 39 A I. R 1926 Mad. 1117. In *Muhammad Zahoor Ali* v *Rutta Koer*, 11 M I A 468, the plaintiff was allowed to amend his plaint in appeal before the Privy Council; but in a later case, the Privy Council refused to entertain a new contention raised in appeal for the *first* time, on the ground that it involved a radical amendment of the plaint, *Gajadhar* v *Ambika Prasad*, 47 A. 459 P. C.

The present Code of Civil Procedure confers a plenary jurisdiction upon the Court to order an amendment of the plaint even in the highest Court of appeal, *Manji* v *Ghulam Mahomed*, 3 Lah. L. J. 75· 2 L. 75.

Though under r 17 of Or VI, C. P. Code, very wide powers of amendment are vested in the Court, an application for amendment *in* the second Appellate Court was disallowed on the ground that the plaintiff would start afresh on allegations wholly inconsistent with those made in the original plaint and to support the new allegations, he would have to bring forward evidence directly contradictory to the evidence already placed by him on the record; *Padma Lochan* v *Girish*, 46 C. 168: 27 C. L J. 392: 45 I. C. 241.

Ordinarily an Appellate Court will not allow amendment *if* the plaintiff has elected to go to trial on an issue whether the frame of the suit is correct notwithstanding the objection of the defendant that it offends s. 42 of the Specific Relief Act. But where it is framed *bona fide* believing consequential relief is not open to him, the Appellate Court can allow an

amendment of the plaint; *Sheopujan Rai* v. *Maharaja Bahadur Kesho Prasad Singh*, 2 Pat. 919.

The High Court in second appeal will not allow an amendment of the plaint so as to allow the plaintiff to sue on a cause of action which has arisen subsequently to the suit; *Mobarak Molla* v. *Hechamuddi Mulla* 65 I. C. 214.

In a suit on an oral agreement, amendment was not allowed in second appeal to enable the plaintiff to claim title under a written contract *Ereseun Nair* v. *Yasava*, 7 M. L. T. 225: 6 I C. 288 An amendment of date, in second appeal on the plea that the date was wrong not allowed; *Badri* v. *Dila*, 6 I. C 542. Declaratory suit based on partition cannot be amended to rest claim on inheritance; *Palaneappa* v. *Ma Shwe*, 9 I. C 774. In second appeal, mortgagors were allowed to amend their plaint so as to include a prayer for redemption of both mortgages; *Brijlal* v. *Bhawani*, 7 A. L J. 821

When the plea of misjoinder has been allowed and the suit decided, and an appeal brought, the Appellate Court should dispose of the suit in the mode in which the lower Court ought to have disposed it of by returning the plaint for amendment —*Lingammal* v. *Chinna Venkatammal*, 6 M. 239 (2 A. 669 *dissented from*) *See* also *Rajjo Kuar* v *Debi Dial*, 18 A. 432; *Ganeshilal* v *Khairati Singh*, 6 A 279 To cure the defect of misjoinder of causes of action, an Appellate Court should direct the lower Court to return the plaint for amendment —*Sarala* v *Saroda*, 2 C. L. J. 602.

Where a minor plaintiff's suit had been dismissed as the plaint was technically not properly drawn up, amendment was allowed in second appeal; *Sangat* v *Uttam*, 29 I C. 769: 109 P. L. R. 1915

It is not open to a plaintiff in second appeal to apply to alter the character of his suit so as to convert it from a suit for possession into one to enforce a mortgage, *Mohendra Nath* v *Jagat Chandra*, 59 I C 63.

In execution of a decree against a father, the joint family property was attached, to which his two sons preferred claim, which was disallowed They then brought a joint suit for a declaration that their shares were not liable to attachment. The first Court gave a decree. The lower Appellate Court dismissed the suit on the ground of misjoinder of causes of action. *Held*, that the plaintiffs should have been allowed to amend their plaint by striking out the name of one of them —*Behari Lal* v *Kodu Ram*, 15 A. 380.

A plaintiff was allowed in second appeal to amend his plaint by addition of parties.—*Hari Gopal* v. *Gokul Das*, 12 B 158, *Bombay and Persia S. N. Co.* v. *Shepherd*, 12 B 237. *See* also, *Seshamma* v. *Chennappa*, 20 M. 46; *Gangadhar* v. *Abdul Ajij*, 2 I. C 77. But see, *Alagappa Chetty* v. *Vellian Chetti*, 18 M. 33, in which the plaintiff was not allowed to amend his plaint by bringing his partners on the record.

Where in a suit framed as for a specific legacy the plaint contained all the necessary allegations to give the relief to which the plaintiff is entitled, the Court allowed him to amend the plaint in second appeal into one for administration: *Chandra Chhinna Lakshmi* v. *Neralla Venkatasubba Rao*, 33 M. L. J. 195: 41 I. C. 605

Amendment of plaint in respect of parties was allowed, on appeal, by striking out the name of one defendant and substituting the name of a new defendant.—*Nilkanthapa* v. *Magistrate of Sholapur*, 6 B. 670. Followed in *Balaram* v *Magistrate of Igatpuri*, 6 B 672.

Where the object of an amendment is merely to seek relief ancillary to the principal prayer, such amendment does not alter the character of the suit; *Prary Mohan* v. *Narendra*, 5 C. W. N. 273 *See* also, *Percival* v. *Collector of Chittagong*, 30 C 516 But see, *Farzand Ali* v. *Yusuf Ali*, 2 A. 669.

A suit to establish plaintiff's exclusive right to the partnership property, attached and seized in execution of a decree against another partner, was allowed, on appeal, to be converted into one for dissolution of partnership and account, with direction to the lower Court to make the other partners parties to it and to take an account —*Karimbhai* v. *Conservator of Forests*, 4 B 222 *See* also, *Dhani Ram* v *Bhagirath*, 22 C. 692.

In a suit to recover a deposit paid on a wagering contract, the lower Court rejected the plaintiff's claim on the ground that it did not disclose a cause of action *Held*, that the lower Court, instead of rejecting the plaintiff's claim, ought to have returned the plaint for amendment —*Dayabhai Tribhovandas* v *Lakhmi Chand*, 9 B 358

In a suit on mortgage with a prayer for sale, amendment asking for prayer to get 12 years' annuity cannot be allowed; *Masuma Khatun* v. *Tahira*, 11 A. L J. 580 19 I. C 661.

In special appeal, the High Court allowed the plaintiff to amend his plaint by praying a redemption of the land from the defendant's mortgage, and to treat his suit, which was in the nature of an ejectment suit, as one for redemption —*Radha Bai* v. *Shamrav Vinayak*, 8 B. 168

In a suit brought in the name of the idol of a temple, the Court in second appeal allowed the plaint to be amended, by substituting the name of the manager of the temple.—*Raghunathji* v *Shah Lal Chand*, 19 A 330.

In a suit for a declaration of right, the High Court, on a regular appeal, allowed the plaint to be amended by insertion of a prayer for an account —*Bai Anope* v *Mul Chand*, 9 B. 355

A suit should not be dismissed by an Appellate Court on the ground of its being one asking merely for a declaratory decree, and no consequential relief, where that objection has never been taken by the defendants. The plaintiff should, in such a case, be allowed an opportunity to amend the plaint; *Limba Bin Krishna* v *Rama Bin Pimlu*, 13 B. 548. *See* also, *Sardar Singji* v. *Ganpat Singji*, 12 B. 395

In a declaratory suit it appeared on the evidence for the defence that the defendant was in possession of a part of the property. The plaintiff was allowed to amend the plaint in appeal by adding a prayer for possession; *Abdul Kadar* v. *Mahomed*, 15 M 15 But see, *Narayana* v *Shankuni*, 15 M. 255, and *Raj Narain* v. *Shama Nando*, 26 C 645: 4 C. W. N. 162. *See* also *Mahabharat* v. *Abdul Hamid*, 1 C. L. J. 73.

An appellate Court can amend the wrong number of fields given in the memorandum of appeal in an ejectment suit; *Sumara* v. *Tulshi Ram*, L. R. 4 A. 365 (Rev.).

See also the following cases as to the Appellate Court's power to allow amendment —*Sadda Khan* v. *Sultan Khan*, 58 I. C. 965; *Bajrang Lal* v *Brahma Dat*, 6 O. L. J 322: 52 I C 849; *Kirpa* v. *Mt. Chinti*, A. I. R 1923 Lah. 530.

Amendment and Limitation.—Amendment of plaint by correcting the description of the plaintiff has not the effect of introducing a third party on the record and no question of limitation arises; *Jodhi Bai* v. *Basdeo*, 8 A L. J 813 F. B : 10 I. C 47. Where an amendment of a plaint is allowed, it relates back to the date of the presentation of the plaint and the period of limitation of the suit is counted from the date of the presentation of the plaint, and not from the date on which the plaint is actually amended; *Nripendra Nath* v *Hemanta Kumar*, 63 I C. 701. Where the amendment amounts to a mere correction of the description of the property, limitation relates back to the date of institution of suit; *Md. Sadiq* v. *Abdul Majid*, 8 A L J 636

A power of amendment should not as a rule be exercised where its effect is to take away from a defendant a legal right which has accrued to him by lapse of time, but there are cases where such considerations are outweighed by the special circumstances of the case; *Charandas* v. *Amir Khan*, 47 I A (P C.): 18 A L J. 1095· 39 M. L J 195· 25 C. W. N. 289 48 C 110, *Dip Chand* v. *Parmanand*, 19 S L R 262.

Amendment that would deprive a party of the defence of limitation should not be allowed; *Janardan* v *Sib Prosad*, 20 C W N. 475: 43 C. 95; *Mi Ein* v *Mi Ni*, 21 I C 306· U B R 1913 (2nd Qr) 175; *Lakshmana Charyulu* v *Venkataramanuja Charyulu*, 51 M L J 414 96 I. C. 700: A I R. 1926 Mad. 827 *See* also, *Gatiganti Subbarayadu* v *Arumith*, 37 I. C 914 But not so where a party was never fairly entitled to it. Thus *A* sued *B* for dissolution of partnership and accounts. The Court of first instance found that *A* had advanced Rs 4,001 to *B*, but dismissed the suit holding that no partnership existed and the suit was bad in form *A* appealed and at the hearing applied for leave to amend by adding a prayer for recovery of Rs 4,001 which was allowed and the suit decreed. *B* appealed on the ground that the amendment was wrongly allowed, especially as at its date it was time-barred It was held that the amendment was rightly allowed as it only withdrew from *B* an advantage which he ought never to have received, *Kisandas* v. *Rachappa*, 33 B 641

In the absence of special circumstances, amendment allowing a fresh relief which has become barred since the institution of the suit will not be allowed If an amendment has been asked for within the period of limitation, the fact that the first Court wrongly disallowed it, will not prevent an appellate Court from giving effect to it, even though the appellate order is passed after the period of limitation; *Nemasa* v. *Ramkrishna*, 10 N L R 32 Where the cause of action has become barred by limitation, amendment by introducing a new cause of action cannot be allowed, *Balkaran* v *Gaya Din*, 36 A. 370; *Galrajmal* v. *Pamanmal*, 8 S L R 69, *Bisheshar* v *Gobind*, 12 A L J. 833

A Court can allow a plaint to be amended even though at the time of the amendment a new suit on the same cause of action would be barred; *Satchidananda* v. *Nrityanath*, 27 C W. N. 1007: 50 C. 878.

An amendment ought not to be allowed whereby the cause of action is materially changed and a party is prevented from setting up a plea of limitation; *Sreedharan Valiah Rajah* v. *Narayana Namouripad*, 41 M L. J. 525: (1921) M. W. N 639.

An amendment of a plaint should not be allowed when the suit, if brought on the amended plaint, would be barred by limitation; *Narayanan* v. *Ratnasabapathy*, 29 M. L J 464: 28 I. C. 828.

Where a suit is mistakenly brought in the name of a wrong person, amendment even if made after the period of limitation does not bar the suit. But where under some mistake the plaintiff intends to sue the wrong person, an amendment will not make the suit within time against the right person, if it is already barred; *Narayana* v. *Mangalathammal*, 23 I. C. 764.

A suit was brought against persons who were dead at the time it was instituted *Held that* the plaintiff should not be allowed to amend the plaint by substituting the names of the legal representatives of the deceased, as against whom the suit would have been barred by limitation. —*Mallikarjuna* v. *Pullayya*, 16 M. 319 *See also*, *Veerappa* v. *Tindal*, 31 M. 86.

Where no substitution or addition of a new plaintiff was made by an amendment, but only the description of the plaintiff was corrected, there is no question of limitation that arises; *Bakaram* v. *Ram Chandra Maharaj*, 71 I. C. 39 · A. I. R 1923 Nag. 96

Where a plaintiff originally suing for possession of certain plots of land seeks to amend the plaint by including certain other plots, the question is not one of amendment of plaint, but of an addition of entirely new lands and as regards such lands and as regards such new lands, the suit must be taken to have been filed on the date when the claim in respect thereof was made by the plaintiff; *Manindra Chandra* v. *Rangalal*, 41 I. C. 728.

Power of Court to Amend Pleadings at Any Stage.—Leave to amend may be granted at any stage of the proceedings. It may be granted on appeal [s. 107, sub-sec. (2)], or even on second appeal (s. 108). In *Muhammad Zahoor Ali* v. *Rutta Koer*, 11 M I. A. 468, leave to amend his plaint was given to the plaintiff in appeal before the Privy Council The amendment of a plaint is in the discretion of the Judge and is not the right of the suitor. It is not enough to show that the amendment does not alter the character of the suit; *Tapi Ram* v *Sadu*, 21 B. 570.

The power to amend is inherent in Court; *Kanakammal* v. *Panchapakesa*, 26 M. L. J. 313: 23 I. C 82; and it has always the discretion to allow or disallow; *Satyes* v. *Monmohini*, 19 C. L. J. 518. It has power to allow amendment enabling continuance of suit on cause of action *pedente lite*, when original cause of action has failed The Court's power of amendment may supply a cause of action where one does not appear,

and there is no distinction between what does not appear and what does not exist; *Musst. Nur Khattun* v. *Sumar*, 9 S. L. R. 61.

When a plaintiff sues on a promissory note simply and solely, without adding an alternative cause of action based on the original loan, he should be allowed to succeed on such original cause of action after necessary amendment. The plaintiff sued the defendant on a promissory note for Rs. 175. The defendant denied execution of the pro-note, but admitted receipt of Rs. 100 only. The plaintiff failed to prove execution of the pro-note. It was held that inspite of the fact that no alternative cause of action based on the original consideration was pleaded by the plaintiff, he could be given a decree for Rs 100 (the amount admitted by the defendant) after the plaint was amended, *Maung Shwe Myat* v. *Maung Po Sin*, 3 R. 183 89 I C. 425: A. I. R. 1925 Rang. 282 F. B.

A Court has power to make all such amendments in the plaint, and in issues, as may be necessary in order to bring about a fair and proper trial of the matter which the plaintiff takes into Court to have tried.—*Gobind Chandra* v. *Ganga Dhye*, 7 Bom L. R. 333. *See* also, *Sahiji Kesraji* v. *Raj Sangji*, 2 Bom H. C. 169. Plaint may be returned for amendment after framing of issues; *Sasi* v. *Rasik*, 17 C. W. N. 989.

Amendment of plaint by Subordinate Judge by striking out a portion of the reliefs asked for, and then returning for presentation in the Small Cause Court, is not allowable.—*Motabhai Moti Lal* v. *Surat City Municipality*, 20 B. 675. *See* also, *Annaji* v. *Rama Kurup*, 10 M. 153, in which it has been *held that, where a suit brought for an amount was in excess* of jurisdiction of a Court, the plaint cannot be amended to bring it within its jurisdiction. *See*, however, *Karum Bajira* v. *Authimoola*, 33 M. 262: 3 I. C. 338.

Alteration of Nature of Suit—Amendment When Allowed and When Not.—The general rule is that any amendment allowed must be such as is either raised in the pleadings, or is consistent with the case as orginally laid, and that the state of facts and the equities and grounds of relief originally alleged and pleaded by the plaintiff should not be departed from; *Eshan Chunder* v. *Shama Charan*, 11 M. I A. 7; *Mukhoda* v. *Ram Charan*, 8 C 871; *Hamilton* v. *Land Mortgage Bank*, 5 A. 456. It follows from the above general rule that an amendment which materially transforms the nature of the claim cannot be made and certainly not in appeal; *Bai Shri Majirajba* v. *Magan Lal*, 19 B. 303; *see* also, *Dassorathy* v *Ramkrishna*, 9 C. 526

The wide powers of amendment given under the Code of 1908 are always subject to the rule that, by means of an amendment, the subject-matter of the suit cannot be changed, or one distinct and inconsistent cause of action cannot be substituted for another; *Inaganti Venkatarama Row* v. *Venkatalingama Nayanim*, 42 M. L. J. 43: (1922) M. W. N. 42.

An amendment of plaint which entirely alters the points of contention between the parties, or puts forward an entirely new case inconsistent with the plaint cannot be allowed in appeal; *Narayanrar Damodar* v. *Jarherrahu*, 12 B. 431; *Punjab National Bank* v. *Mercantile Bank*, 8 I. C. 98.

A plaintiff ought not to be allowed to alter his case so as to convert a suit of one character into a suit of another and inconsistent character — *Lakshman Bhisaji* v. *Hari Dinkar*, 4 B. 584; *Bala Krishna* v. *Govind*, 5 N. L. R. 67: 2 I. C. 241; *Mahabharat*, v. *Abdul*, 1 C. L. J. 73; *Narayan* v. *Rameswar*, 51 I. C. 435; *Laxmi Shankar* v. *Hemjabhai*, 22 Bom. L. R. 735: 44 B. 515.

A plaint cannot be returned for amendment, where it is found that the suit is not maintainable in the form in which it is brought, so as to convert the suit into one of a different character.—*Mussoorie Bank* v. *Barlow*, 9 A. 189

The Court will not add an issue or amend the plaint, so as to raise a wholly different question to that upon which the parties have come into Court.—*Bizjic Bibee* v. *Monohar*, 2 Ind., Jur., N. S. 118. *See* also, *Nehora Roy* v. *Radha Pershad*, 5 C. 64: 4 C. L. R 353. A plaintiff cannot be allowed to amend his plaint by abandoning his own story, and adopting that of the defendant and asking relief on that footing —*Shib* v *Abdul*, 5 C. 692.

Amendment of plaint by referring to a document not included in the list of documents annexed to the plaint does not alter the nature of the suit; *Gunnaji* v. *Makanji*, 11 Bom L. R. 498: 6 M. L. T. 234: 3 I C. 159.

Suit based upon fraud and upon instigation of false claims cannot be allowed to be converted into one based upon implied contract, by amendment; *Palakunath* v. *Manathanath*, (1913) M. W. N. 983.

The Court refused to amend a plaint of a *Mitakshara* son who sought to set aside mortgages effected by his father and grandfather prior to his birth, by adding a prayer for redemption, *Bhola* v. *Kartick*, 11 C. W. N. 426.

A suit for the restoration of a pond, which, it was alleged, the defendants were wrongfullly filling up, to its original condition, was altered into one for declaration of plaintiff's right to share in the produce and the use of the water by way of easement. *Held*, that the alteration was a material one; *Farzand Ali* v. *Yusuf Ali*, 2 A. 669.

A plaint in a suit for arrears of rent by a co-sharer landlord, for his separate share of rent, cannot be amended so as to convert it into a suit for recovery of full rent.—*Lala Ram* v. *Nem Narain*, 6 C. W. N. 326. *See* also, *Obhoy* v. *Hurry*, 8 C. 277.

A suit for possession of a share of a joint Hindu family property, before partition can be converted into a suit for partition by amending the plaint —*Krishnaji* v. *Sitaram*, 5 B. 496

A suit to recover possession of land based upon title, cannot be treated partly as a summary suit for possession under sec. 9 of Act I of 1877 and partly as a suit based on title —*Ramasami* v. *Paraman*, 25 M 118; *contra* in *Ram Harakh* v. *Sheodihal*, 15 A. 384.

A suit for possession cannot be amended into one for a declaration for a charge; *Md. Ebrahim* v. *Mg. Ba*, 24 I. C. 482: 7 Bur. L T. 69;

or a suit for ejectment into one for redemption; *Munna* v. *Maiku*, 24 I. C. 723.

Where a suit was brought for a declaration that certain alienations made by a Hindu widow were invalid, and pending appeal by the plaintiff, the widow died. *Held* that the plaintiff was not entitled to proceed with his appeal; that he could not be permitted to amend his plaint, and claim for possession.—*Gobinda* v *Perumdevi*, 12 M. 136.

Where, in an action of ejectment against a tenant holding over, the lease sued on was inadmissible in evidence for want of registration, and the plaint was not amended by adding an alternative claim for partition. *Held* that the plaintiff could not be allowed to obtain a decree for partition.—*Ram Chandra Bapuji* v. *Vasudev Morbhat*, 10 B. 451.

In a suit for perpetual injunction to restrain the defendant from the erection of a building, if it appears at the hearing, that the defendant erected the building after the filing of the suit, the plaint may be amended by adding a prayer for mandatory injunction directing the demolition of the building.—*Bindu Basini* v. *Jahnabi Chowdhrani*, 24 C. 260. *See* also, *Magan Lal* v. *Chhotalal*, 26 B. 136, where it has been further held that without amending the plaint, the Court can pass a decree for mandatory injunction, as the plaint contains a prayer for such other relief as the Court might think fit In *Ram Adhar* v. *Ram Shankar*, 26 A. 215, it has been held that no action on the part of the defendant subsequent to the institution of the suit can affect or prejudice the plaintiff's right and he is not required to amend the plaint on account of such subsequent dispossession.

Where the plaintiff, in a suit to enforce the right of pre-emption, did not allege in his plaint that he was ready and willing to pay any price which the Court might find the actual price, and on the day of the hearing of the suit, presented an application that he was ready and willing to do so. *Held* that the Court was not bound to allow him to amend his plaint. —*Durga Prasad* v. *Nawazish Ali*, 1 A 591

Where the plaintiff alleged that he was in possession of certain room as representing his father and uncle, who were alive, but who were not parties to the suit, and that he had been dispossessed from such room within six months of the institution of the present suit *Held*, that his possession, not being judicial possession, did not entitle him to maintain a suit under s 9 of Act I of 1877 Permission to amend the plaint by alleging that plaintiff's possession was exclusive on his own account was not allowed, such allegation being inconsistent with the case in which he came into Court.—*Nritto Lall* v. *Rajendro Narain*, 22 C 562

A suit for the share of produce of the property left undivided at a partition cannot be amended by making it a suit for partition without entirely changing its character —*Gouri Shankar* v *Atmaram*, 18 B 611.

Plaintiff originally claimed a share in two bonds as heir of his wife, but subsequently he obtained leave to amend his plaint, so as to claim the two houses as his own property. *Held* that this amendment was allowable.—*Mani Jan* v. *Abdul*, (1907) A W. N. 203.

Suit for redemption of a mortgage cannot be so amended as to make it a suit for avoidance of sale; *Rambilas* v. *Brijnarain*, 14 I C. 713.

Amendment as to Relief.—An amendment may be allowed at any time so long as it does not alter the character of the suit. An alteration in the relief does not alter the character of the suit, *Kashinath* v *Sadasu*, 20 C. 105; *see* also, *Lakshmakka* v. *Nagi Reddi*, 28 M. 500. A mere technical mistake in pleading will not affect the relief to which the parties are entitled; *Vithoba* v. *Gyaniram*, 5 N. L. R. 66. *See* also, *Or. VII, r. 7 and notes.*

No amendment will be allowed if the application for amendment is made at a late stage of the proceedings, so that, if allowed, it would necessitate trying the case *de novo*, *Narayana* v *Shankunni*, 15 M. 255; *Ramanadan* v. *Pulikutti*, 21 M. 288. If the character of the suit is not materially altered, and the defendant cannot possibly be taken by surprise, amendment may be allowed. Thus a mortgagee suing for sale of the mortgaged property may be allowed to amend the plaint by merely asking for a simple money-decree against the mortgagor; *Sukhdeo* v. *Lachman*, 24 A. 456. Similarly, in a suit for specific performance, the purchaser may be allowed to amend his plaint by asking for a refund of the earnest money in the alternative, *Ibrahimbhai* v. *Fletcher*, 21 B. 827.

Where an order for amendment would operate prejudicially to the defendants so far as their evidence of possession is concerned, the Court will refuse to allow amendment of plaint, *Mahobar Das* v. *Ramdas*, 75 I. C. 549: A. I. R. 1923 Sind 17.

In a suit for declaration of right, if the defendant objects that the suit is barred by the proviso to s. 42 of the Specific Relief Act, the Court should allow the plaintiff to amend the plaint by adding thereto a prayer for injunction by way of consequential relief, even if the application for amendment is made long after the settlement of issues.—*Kalabhai Bapuji* v. *Secretary of State*, 29 B. 19.

Leave was granted to plaintiff to amend his plaint and convert the suit for recovery of possession of the disputed share, subject to the exercise of the right of redemption of the defendant.—*Jugdeo* v. *Habibulla*, 6 C. L. J. 612.

***Cause of Action Arising After Institution of Suit can be Included* by way of Amendment.**—Events that happened, even after the filing of suit, including those that add to the title of the plaintiff, may be taken notice of, so that a cause of action that arose after the filing of the suit can be included by the amendment of a plaint. But the discretion ought not to be exercised when there is a change of jurisdiction, or when there is a great delay in making the application, and may not be exercised if fresh inquiry on other facts is necessary. But when these features do not exist, the amendment ought, as a general rule, to be allowed, to avoid multiplicity of proceedings; *Appalasuri* v. *Kannama Nayuralu*, A. I. R. 1926 Mad. 6; *Buddala Gangayya* v. *Vennavalli*, 91 I. C. 503: A. I. R. 1925 Mad. 1021. Where the basis of the plaintiff's right to sue has been jeopardized by a decision in another suit after the plaint in the suit was filed, an application for the amendment of the plaint put in promptly ought to be allowed; *Venkataratnam* v. *Venkamma*, A. I. R. 1926 Mad. 754: 23 L. W. 618.

Variance between Pleading and Proof.—The rule that allegations and proof must correspond is intended to serve a double purpose, *viz.*, *first*,

to apprise the defendant distinctly and specifically of the case he is called upon to answer so that he may properly make his defence and may not be taken by surprise; and *secondly*, to preserve the accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations Hence every variance between pleading and proof is not fatal; *Hiralal* v *Giribala*, 23 C. L J. 429 (18 C. W. N. 473 *followed*). The rule should not be applied in an abstract way. The question in ultimate analysis is one of circumstances and not of law; *Haji Umar* v. *Gustadji*, 20 C. W. N. 297 P. C.. 30 M. L. J. 444: 1916 M. W. N. 187.

A plaintiff is not entitled to a decree upon a cause of action not alleged in the plaint, but proved in the course of trial. He is only entitled to succeed upon the cause of action alleged by him in his plaint.—*Madhub Ali* v. *Hossain Riza*, 4 C. L. R. 52; *Gobindrav Desmukh* v. *Ragho Desmukh*, 8 B. 543; *Lakshman Bhikaji* v. *Hari*, 4 B. 584; *Hari Ravji* v. *Shapurji Hormasji*, 10 B. 461; *Hamilton* v *Land Mortgage Bank*, 5 A. 546; *Terictput* v. *Sudarsan*, 4 C. 46; *Muttsuami* v. *Rama*, 12 M. 292; *Mylapore Iyasawmy Vyapoory* v. *Yeakay*, 14 C. 801 (P C.); *Abdul* v. *Turner*, 11 B 620 (P. C.); *Krishna* v. *Rangasami*, 18 M. 462, *Nana* v. *Appa*, 20 B. 627, *Sheo Prasad* v. *Lalit*, 18 A 403, and the cases therein referred to. But in the following cases a different view seems to have been taken.—*Shib* v. *Joymala Dasi*, 7 C. L R 103; *Appayya* v *Ramiraddi*, 11 M. 367; *Chimnaji* v *Shakharam*, 17 B. 365; *Ranchor Das* v *Mancklal*, 17 B. 648; *Nurul Hossain* v. *Sheosahai*, 20 C 1 (P. C), *Parashram* v. *Miraja*, 20 B. 569; *Rasul Jehan* v. *Ram Suran*, 22 C 589.

Although the rule is that proofs must correspond with the allegations in the pleadings, the requirement in that behalf is fulfilled if the substance of the declaration is proved No variation ought to be regarded as material, when the allegation and the proof substantially correspond —*Balbhadar* v. *Barkat Ali*, 11 C. W N. 85· 4 C. L. J. 370 (3 C L J 481 *followed*).

A plaintiff is only entitled to succeed upon the cause of action alleged in his plaint A plaintiff seeking to redeem a mortgage of 1854 and failing to prove it, is not entitled to a decree to redeem other mortgages which might be found to subsist between the parties, but which formed no part of the cause of action upon which the plaintiffs came into Court.—*Sheo Prasad* v. *Lalit Kuar*, 18 A 403. *See* also, *Krishna Pillai* v. *Rangasami*, 18 M. 462, and *Govindrav Deshmukh* v *Ragho Deshmukh*, 8 B. 543, in which it has been held that a plaintiff, failing to establish the particular instrument on which the suit is based should not be allowed to fall back upon some other instrument of a similar description.

A litigating party can only succeed *secundum allegata et probata*, and the Courts should check the tendency of defeated litigants to evade their defeat by devising a new case which was never set up when it should have been set up A Court of appeal is not justified in exposing a party after he has obtained his decree to be the brunt of a new attack of which he had never had notice during the hearing of the suit. *Nathu* v. *Umedmal*, 33 B 35.

Where the plaintiff in his pleadings pledged himself to prove a specific case of fraud, and made his cause of action entirely dependent on t[illegible]

he was not allowed to succeed, when he failed to prove fraud on a collateral matter.—*Saheb Roy* v. *Gujadhur Pershad*, 22 W R 221

A suit based on fraud, and fought out on the ground of fraud, and dismissed in the first Court on the ground of there having been no fraud, cannot be converted on appeal into one for redemption —*Ram Dao* v. *Indromani*, 3 C. W. N. 325. *See* also *Ghurphekni* v *Purmeshar Dayal*, 5 C. L. J. 653.

Where a plaintiff claimed in his plaint a right of pre-emption as co-partner of the vendor. *Held* that he could not be entitled to a share on the ground of vicinage.—*Kunjabehari Lal* v *Girdhari Lal*, 1 B L. R., S. N. 12. 10 W. R. 189 *See* also *Shiu Suhai* v *Lala Hari Suhai*, 3 B. L. R Ap. 142 Where a plaintiff founded his claim on a special agreement, he was not allowed on appeal to set up a claim to enforce his right of pre-emption founded on custom —*Chadami Lal* v *Muhammad Baksh*, 1 A. 563.

A plaintiff who sues on and fails to prove an alleged gift, may rely on his title by inheritance —*Tirumala Chariar* v *Andal Ammal*, 30 M. 406.

Where a plaintiff sues to recover possession of property on the ground that it is his self-acquired property, the Court is not justified in giving him a decree for a partition of the property on the ground that the whole was the property of a joint Hindu family in which the plaintiff was a co-sharer.—*Mukhoda* v *Ram Churn*, 8 C 871 11 C L R 194

Where a plaintiff claims possession of a separate share in entire property and fails to prove the separation, he is entitled to a decree for joint possession to the extent of his share along with other co-sharers —*Ananta* v. *Parmananda*, 12 C W N 172-n (8 C 871 *explained*)

When a plaintiff asks for one thing (exclusive possession), a Court ought not to give a decree because he proves that he is entitled to another thing (joint possession) —*Bejoy Nath* v *Luckheemonee*, 12 W R. 248; *Sree Narain* v *Miller*, 15 W R 7 Exclusive possession can only be awarded on proof of exclusive title If a case not alleged by the plaintiff is disclosed in the evidence, the Court can allow it to be set up, provided a specific issue is raised on it and the defendant is given an opportunity of meeting it —*Parasram* v *Miraji*, 20 B 569 *See* also, *Nana* v. *Appa*, 20 B 627, and *Naranbhai* v *Ranchod*, 26 B 141

Where the plaintiff claimed exclusive possession of immoveable property, to which the defendant also claimed to be exclusively entitled. *Held*, that the Court was competent, upon the finding that the properties belonged to the parties jointly, to give the plaintiff a decree for joint possession.—*Wahad Alam* v. *Safat Alam*, 12 A 536 (10 A. 637 *distinguished*).

Where a plaintiff sued to eject a tenant, alleging that he had forfeited his tenure by denying his landlord's title, and it was found that no relation of landlord and tenant existed between the parties. *Held* that the plaintiff was not entitled to succeed on the ground that the defendant was a trespasser.—*Laljee Singh* v. *Bunwari Lall*, 25 W. R. 148.

Where a plaintiff sued for rent and failed to prove any contract, express or implied, to pay it, he was held not entitled to change his case and ask for compensation for use and occupation.—*Luchmeput* v. *Enael*

Ali, 22 W. R. 319. *See* also, *Surendra Narain* v. *Bhai Lal*, 22 C. 752 (13 B. L. R. 243: 21 W. R. 208, *referred to*); *Rachhea Singh* v. *Upendra Chandra*, 27 C. 239 (13 B L. R. 243, 21 W. R. 208, and 22 C. 752, *referred to and followed*). *See*, however, *Azim Sirdar* v *Ram Lall*, 25 C 324.

In a suit for rent, if the plaintiff fails to prove the amount of the *jumma* claimed in his plaint, he is entitled to a decree at the rate admitted by the defendant provided he accepts the defendant's admission as a whole.—*Bonomalee Churn* v. *Hafhzuddin*, 13 B. L. R. 247-*note*; 12 W. R. 317; *Lukhee Kanto* v *Sumeruddi*, 13 B L R (F. B.) 213: 21 W. R. 208, *Roushan Bibee* v. *Hurray Kristo*, 8 C 926; *Kishen Mohun* v. *Rajoo Dey*, 13 B. L. R. 245-*note*. 19 W R. 234, *Rukmini Kant* v *Sarikatunissa Bibee*, 13 B. L. R. 246-*note*. 20 W. R 64; *Hulodhur Sen* v. *Seetul Chunder*, 23 W. R. 85.

In a suit for rent, where there is no specific prayer in the plaint for ejectment, the Court is competent to pass a decree for ejectment under s. 66 (2) of the B. T. Act, on failure to pay the arrears claimed within a given time.—*Chand Mia* v. *Asima Banu*, 3 C. L. J. 43-*n*

In a suit for rent, based upon an alleged settlement, the plaintiff failed to prove such settlement. *Held* that the suit must either be decreed at the rate admitted by the defendant or dismissed.—*Lutf Ali* v. *Fakira*, 6 C. L R 208; *Sufder Reza* v. *Amzad Ali*, 7 C. 703; *Nangali* v. *Raman*, 7 M. 226.

Where plaintiff fails to prove the rate of rent claimed it is the duty of the Court to find the proper rate, and not to give a decree merely for the rent admitted by the tenant.—*Punoo Singh* v. *Nirghin Singh*, 7 C. 298: 8 C. L. R. 310. But see, *Rash Dhari* v. *Khakon Singh*, 24 C. 433, in which it has been held that it is not the duty of the Court to ascertain the proper rate unless it is asked to do so. *See* also, *Pijraddi* v. *Ambika*, 5 C. W. N. 121.

The plaintiff sued to eject the defendant, alleging that the defendant was his tenant, who denied the tenancy and pleaded adverse possession for more than 12 years; it was found that the plaintiff was the owner of the land and defendant's possession was permissive. *Held*, that the plaintiff was entitled upon the facts found to a decree for possession notwithstanding that his case had been that the defendant was his tenant.—*Abdul Ghani* v. *Musammat Batin*, 25 A. 256 F. B. But see, *Haji Khan* v. *Baldeo Das*, 24 A. 90 and *Naiku Khan* v. *Gayani Kuar*, 15 A. 186.

A plaintiff must recover according to the allegation made in the plaint, and no decree should be given in his favour on a point not raised in the pleadings and not embodied in an issue.—*Joytara* v. *Mahomed Mobaruck*, 8 C. 975. 11 C. L. R. 399; *Tara Chand* v. *Nobin Chunder*, 21 W. R. 132: *Protap Chunder* v. *Collector of Goalpara*, 22 W. R. 216 and 31 M. 531.

A plaintiff ought not, by reason of his having claimed too much, to be precluded from recovering a proportionate amount, to which he is entitled, if the pleadings are sufficient to cover such a claim. The question as to whether a partial decree ought to be made, in such a case, is not one of indulgence to be granted or refused at the Court's discretion.—*Malik Ahmad* v. *Shamsi Jahan Begum*; 10 C. W. N. 626 P. C.: 28 A. 482; 3 C. L. J. 481.

Lawful possession of land is sufficient evidence of right as owner as against a mere trespasser. A plaintiff failing to prove title is entitled to a declaratory decree on the strength of his long possession.—*Ismail Ariff* v. *Mahomed Ghous*, 20 C. 834 (P C) Followed in *Gangaram Chimma* v. *Secretary of State*, 20 B 798. *See* also, *Wali Ahmed* v *Ajudhia Kandu*, 18 A. 537; *Mustappa Saheb* v *Santha Pillai*, 23 M 179; *Narayana Ram* v. *Dharmachar*, 26 M. 514, and *Hanmant Rav* v. *Secretary of State*, 25 B. 287. *See*, however, *Shama Churn* v *Abdul Kabeer*, 3 C. W N. 158; *Kedar Nath* v. *Raj Nath*, 3 C W N. 497, and *Nisa Chand* v *Kanchiram*, 3 C. W. N. 568: 26 C. 579.

In a suit to recover possession of land if the plaintiff fails to prove the specific title set forth in the plaint, he is entitled to succeed on the strength of his title by adverse possession —*Sundari Dassee* v. *Mudhoo Chunder*, 14 C. 592 (2 C. 418, *distinguished*, 8 C 975, *discussed*) *See* also, *Goluck Chunder* v. *Nundo Coomer*, 4 C. 699 3 C. L R 450; *Gossain Das* v *Issur Chunder*, 3 C 224, and *Somasundaram* v *Vadivelu*, 31 M. 531. But see, *Bhaygo Muty* v. *Mahomed Wasil*, 25 W R. 315; *Krishna Churn* v. *Protap Chunder*, 7 C 560; *Tirumalasami Reddi* v *Rama Sami*, 6 M. 420 and 17 C. 444 (448)

A Court can in its discretion pass a decree for redemption in a case in which the plaintiffs have sued for possession —*Parshotam Bhaishankar* v. *Ramalzunjar*, 20 B 196 *See* also, *Kokilasari Dasi* v *Mohunt Rudranand*, 5 C. L J 527, and *Ghurphekni* v *Purmeshar Dayal*, 5 C. L. J. 653

The plaintiff sued for a declaration of *mokurari* rights to certain lands. *Held*, that a decree on a ground of occupancy-right, not claimed in the plaint is wrong —*Brindabun Chunder* v *Dhununjoy*, 5 C. 246; 4 C. L. R. 443. *See*, however, *Shib Chand* v. *Joymala Dasi*, 7 C. L. R. 103.

Plaintiff sued to recover dower under a *kabinnama* which was not proved, but the Court gave a decree holding that, according to the custom of the family, the plaintiff was entitled to get the amount claimed. *Held* that the Court was wrong in decreeing the suit on the basis of the family custom not alleged by the plaintiff and not admitted by the other side.—*Khaja Mahomed Asghur* v *Manija Khanum*, 14 C 420

The plaintiffs, being members of a joint family, alleging division and a sale to them by other members of their share, sued to eject a more recent purchaser They failed to prove division as alleged. *Held*, that the plaintiffs, having failed to prove division, as alleged, were not entitled in second appeal to have the suit treated as a suit for partition.—*Muttusami* v. *Rama Krishna*, 12 M 292 *See* also, *Palani Kanan* v. *Mosakonan*, 20 M. 243.

The determination in a cause must be founded upon a case either to be found in the pleadings, or involved in, or consistent with the case thereby made —*Mylapore Iyasawmy Vyapoory* v *Yeolay*, 14 C. 801, P. C.

The objection that the plaintiff cannot be allowed to succeed on a right different from that on which he came into Court was not allowed to be taken in appeal when it was not raised in the first Court, where the plaint and issues might have been amended had the objection been taken.

—*Nurul Hossein* v. *Sheo Sahai Lal*, 20 C. 1 P. C. (11 M. I. A. 7: 6 W. R. P. C. 57, *refrd. to*).

A usufructuary mortgagor having failed to deliver possession of the mortgaged property, the mortgagee sued for the principal and interest by enforcement of lien. The property was not hypothecated as security for the mortgage money. *Held*, that, as regards the money claim, the suit might be treated as one for compensation for breach of contract, and should be determined on its merits.—*Mohesh Singh* v. *Chauharia Singh*, 4 A. 245, and *Sheo Narain* v. *Jai Gobind*, 4 A. 281.

The plaintiffs sued to recover certain lands, alleging that they had succeeded thereto on the death of their collaterals, widows and daughters being excluded from inheritance according to their custom. *Held*, that the plaintiffs should not have been allowed to shift the basis of their claim from an alleged custom which excluded both widows and daughters to one which only excluded daughters.—*Desai Ranchoddas* v. *Ramal Nathubhai*, 21 B 110.

The plaintiff sued for possession alleging partition. He also prayed in the alternative, that if the alleged partition be not proved, then the land should be partitioned. He failed to prove partition, and the suit was dismissed. *Held*, that the plaintiff's failure to prove partition did not preclude him from seeking the alternative relief on the strength of his general title.—*Ningappa* v. *Shivappa*, 19 B 323.

In a suit for possession, relief was granted on a different ground from that asked for.—*Rasul Jehan Begum* v. *Ram Surun Singh*, 22 C. 589.

Where, in a suit for redemption, the plaintiff fails to prove the mortgage set up by him, the Court may allow the plaintiff to redeem on the basis of a different mortgage under which the defendant claims to hold.—*Kadalamvalli* v. *Mokkath Ussain*, 30 M. 388: 17 M. L. J. 329.

Costs.—It is generally the privilege of the opposite party to get costs when amendment is allowed. The words " upon such terms as to payment of costs as the Court thinks fit " have been omitted in the present rule, and it has been stated in terms of the English rule, where amendments are allowed " on such terms as may be just." See *Gunaji* v. *Mahanji*, 34 B. 250. The Court therefore can now impose *any* terms that may seem to it just and proper when allowing amendments, and not terms as to costs only.

Return of Plaint for Amendment or Refusal of Amendment and Revisional or Appellate Powers of High Court.—The mere fact that the discretion of refusing amendment was erroneously exercised is no ground of interference in revision; *Vadlamudi* v. *Vadlamudi*, (1911) 2 M. W. N. 257; the discretion cannot be interfered with until it is shown to have been abused or perversely exercised; *Indar Narain* v. *Nanak*, 193 P. W. R. 1911; 9 I. C. 267; *see* also, *Heydorn & Co.* v. *Md. Shafi*, 34 A. 348: 9 A. L. J. 294: 14 I. C. 507; *Hari Krishna* v. *Dinor*, 29 I. C. 355. An illegal order returning plaint for amendment may be interfered with in revision; *Mahadeo* v. *Nago*, 7 N. L. R. 130. But see *Gurdas* v. *Bhag*, 11 I. C. 231: 216 P. L. R. 1911, where it has been held that the High Court will not interfere, in revision under s. 15, with an erroneous order refusing to allow amendment of plaint, there being no error in the exercise of juris-

diction or material irregularity. *See also Kanhailal* v. *Mulchand*, 26 I. C. 808. In *Mahalingam* v. *Natesa*. (1916) M. W. N. 146: 3 L. W. 107, it has been held that an order refusing leave to amend is not a judgment within the meaning of cl. 15 of the Letters Patent, Madras, and is not appealable.

Where a party has another effective remedy, the High Court will not interfere under s. 115. As an erroneous order, refusing to allow amendment of a plaint can be questioned by way of appeal under s. 105 (1), the High Court will not interfere under s. 115; *Penumarti* v. *Reddi Subbamma*, 14 M. L. T. 588: 22 I. C. 89 (1914) M. W. N. 98 (12 I. C. 104, 10 M. L. T. 188, *folld*.) *See* also *Ramji Ram* v. *Saligram*, 14 C. L. J. 188. *See notes on* s. 115, *ante*

As to the revisional powers of High Court to set aside the Lower Courts' order, see, *Shamsuddin* v. *Debi Das*, A. I. R. 1923 Lah. 505.

Failure to amend after order.

18. If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited, then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court. [New.]

COMMENTARY.

This rule is new, and follows the English Or. XXVIII, r. 7. It provides that if a party fails to amend his pleading within the time fixed, he shall not be permitted to amend after the expiration of the time limited by this rule. But this rule does not affect the Court's general power of amendment under s. 153 of this Code.

A plaint was rejected on the ground that the plaintiff had no right to bring a suit without filing an agreement to arbitrate under cl. 20 of Second Schedule. *Held*, that neither Or. XVII, r. 3, nor Or. VII, r. 11, nor Or. VI, r. 18 applied. Under Or. VI, r. 18, the Court has no power to reject the plaint or to dismiss the suit, but must proceed to try the suit on the original plaint.—*Murlidhar* v. *Narain Das*, 19 I. C. 472, 160 P. L. R. 1913: 107 P. W. R. 1912.

Powers of High Court Independently of this Rule.—In an appeal, High Court held that the plaint did not specify properly the property as was required by s. 47, Chotanagpur Landlord and Tenant Procedure Act (I of 1879) and sent it to the lower Court for amendment. On an objection that the plaint was amended after fifteen days of order, it was held that the High Court order was not made under this rule, but under the power of the Court to order that certain steps should be taken by the parties to enable the difference between them to be properly settled, and the amendment was not out of time; *Madan Mohan* v. *Maharaja of Chotanagpur*, 19 C. W. N. 200: 22 I. C. 778.

ORDER VII.

PLAINT.

Particulars to be contained in plaint.

1. The plaint shall contain the following particulars :—

(*a*) the name of the Court in which the suit is brought;

(*b*) the name, description and place of residence of the plaintiff;

(*c*) the name, description and place of residence of the defendant, so far as they can be ascertained;

(*d*) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;

(*e*) the facts constituting the cause of action and when it arose;

(*f*) the facts showing that the Court has jurisdiction;

(*g*) the relief which the plaintiff claims;

(*h*) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and

(*i*) a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of Court-fees, so far as the case admits. [S. 50.]

COMMENTARY.

Alterations.—This rule corresponds to s. 50 of the C. P. Code of 1882 with some additions and alterations. In the first para. the word "*shall*" has been substituted for the word "*must.*" The distinction between the words "*must*" and "*shall*" has been clearly pointed out and explained in *Sheo Prasad* v. *Lalit Kuar*, 18 A. 403.

Clauses (*a*), (*b*) and (*c*) exactly corresponds to clauses (*a*), (*b*) and (*c*) of the old section. Clauses (*d*), (*f*) and (*i*) are new. Clause (*e*) corresponds to clause (*d*) of the old section, with some alterations. Clause (*d*) of the old section ran as follows: "*A plain and concise statement of the circumstances constituting the cause of action, and where and when it arose.*" Clause (*g*) corresponds to cl. (*e*) of the old section, with some verbal alterations. The words "*a demand of*" which occurred in the old section have been omitted. Clause (*h*) corresponds to cl. (*f*) of the old section; "where" has been substituted for "*if*"

diction or material irregularity. *See* also *Kanhailal* v. *Mulchand*, 26 I. C. 808. In *Mahalingam* v. *Natesa*. (1916) M W. N 146: 3 L W. 107, it has been held that an order refusing leave to amend is not a judgment within the meaning of cl. 15 of the Letters Patent, Madras, and is not appealable.

Where a party has another effective remedy, the High Court will not interfere under s. 115. As an erroneous order, refusing to allow amendment of a plaint can be questioned by way of appeal under s 105 (1), the High Court will not interfere under s 115; *Penumarti* v *Reddi Subbamma*, 14 M. L T 588: 22 I C 39 (1914) M W. N 98 (12 I C. 101: 10 M. L. T. 188, *folld.*) *See* also *Ramji Ram* v *Saligram*, 14 C L. J. 188 *See notes on* s. 115, *ante*

As to the revisional powers of High Court to set aside the Lower Courts' order, see, *Shamsuddin* v. *Debi Das*, A I. R. 1923 Lah. 505.

Failure to amend after order.

18. If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited, then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court. [New.]

COMMENTARY.

This rule is new, and follows the English Or XXVIII, r. 7. It provides that if a party fails to amend his pleading within the time fixed, he shall not be permitted to amend after the expiration of the time limited by this rule But this rule does not affect the Court's general power of amendment under s 153 of this Code.

A plaint was rejected on the ground that the plaintiff had no right to bring a suit without filing an agreement to arbitrate under cl. 20 of Second Schedule *Held*, that neither Or XVII, r 3, nor Or VII, r. 11, nor Or. VI, r 18 applied Under Or VI, r 18, the Court has no power to reject the plaint or to dismiss the suit, but must proceed to try the suit on the original plaint —*Murlidhar* v *Narain Das*, 19 I C 472: 169 P L. R. 1913: 107 P W R 1912

Powers of High Court Independently of this Rule.—In an appeal, High Court held that the plaint did not specify properly the property as was required by s. 47, Chotanagpur Landlord and Tenant Procedure Act (I of 1879) and sent it to the lower Court for amendment. On an objection that the plaint was amended after fifteen days of order, it was held that the High Court order was not made under this rule, but under the power of the Court to order that certain steps should be taken by the parties to enable the difference between them to be properly settled, and the amendment was not out of time, *Madan Mohan* v. *Maharaja of Chotanagpur*, 19 C W. N. 200: 22 I C. 778.

As to plaints in suits by Companies against a Member of the Company, *see* Indian Companies Act IV of 1882, s. 94; between Landlord and Tenant in the C. P., Central Province Tenancy Act XI of 1898; between Landlord and Tenant in Chotanagpur, Chotanagpur Landlord and Tenant Procedure Act I of 1879; under the N. W. P. Rent Act XII of 1881, ss. 104, 110, 111; under the Oudh Rent Act XXII of 1886; s. 137; for recovery of rent in Madras, the Madras Recovery of Rent Act VIII of 1865, c. 50; for recovery of rent in Bengal, Bengal Tenancy Act VIII of 1885, s. 148 (*d*).

Minor or Person of Unsound Mind.—As to suits by or against such persons, *see* Or. XXXII

Cause of Action.—As to its meaning, *see* s. 20, and Or. II, r. 2

Facts Constituting the Cause of Action.—It is imperative under this rule that the plaint should contain in addition to other particulars the facts constituting the cause of action and when it arose; *Madras Steam N. Co.*, v. *Shalimar Works, Ld.*, 42 C. 85 (100): 28 I. C. 463; *Kalikanuna* v. *Biprodas*, 19 C. W. N. 18 (24). Every party should state the material facts on which he relies for his claim or defence. This has been dealt within Or. VI, r. 2. *See* notes, *ante*. As to the particulars to be given in cases of fraud, etc., *see* Or. VI, r. 4 and notes.

A plaintiff must set out in his plaint the cause of action in the way prescribed in this rule; *Gano* v. *Sidheswar*, 4 Bom. L. R. 58. The plaint should include all the existing points on which the plaintiff can succeed; *Hanmer* v. *Flight*, 24 W. R. (Eng.) 846. As to what should and what should not be stated in the plaint, see, *Moti Lal* v. *Judhistir*, 20 C. W. N. 310: 22 C. L. J. 254. The Court cannot go outside the allegations in the plaint in order to decide an issue as to whether the plaint discloses a cause of action; *Kshitish* v. *Osmond*, 16 C. W. N. 516: 39 C. 587: 14 I. C. 4.

A part of the cause of action arises at a place where the pro-note is endorsed; *Subramanian* v. *Maung Po*, 11 I. C. 851.

If in a partition suit it cannot be ascertained with precision whether some of the owners are alive, then both the unascertained owners and their legal representatives should be added as defendants and notice on them under Or. V, r. 20 is sufficient; *Srinath* v. *Probodh*, 11 C. L. J. 580.

A Court is justified in refusing to give a decree upon a plaint which it deems to be intentionally indistinct and obscure; *Mahomed* v. *Krishna*, 20 W. R 147. See *Ram Dayal* v. *Ram Doolal*, 11 W. R. 273.

Cause of action for a claim of dower is distinct from the cause of action for a share in inheritance; *Kisar Begam* v. *Nizam*, 10 O. C. 69.

Where a person, by right of inheritance, sued for a declaration of his title to a share in a certain sum of money to which the defendants laid claim, and the defendants met that allegation by setting up a sale which the plaintiff admitted, *held*, that the plaintiff was bound to mention in his plaint the fact that he had parted with his title, and to allege the particular circumstances, misrepresentation, under-value or fraud, on

which he relies to have the sale set aside; also that the cause of action arose at some time within the period of limitation.—*Azimudin Khan* v. *Ziaulnissa*, 6 B. 309.

The whole subject of pleadings has been allotted to Or. VI, r. 2, and what facts constituting the cause of action should or should not be alleged and what particulars should be embodied in the plaint have been discussed there.

Cause of Action must Arise Before the Institution.—A plaintiff, whose right to sue had not accrued at the date of institution of suit, cannot claim a decree simply on the ground that his right to sue has become complete during the pendency of the suit; *Nanak Chand* v. *Mehr Jawata*, 137 P. W. R. 1910.

The cause of action must be based on something which accrued antecedent to the suit.—*Mallika* v. *Makkam*, 2 C. L. J. 389, 9 C. W. N. 928.

A denial of a right in a written statement does not give rise to a cause of action or operate as forefeiture of tenancy; a cause of action must be antecedent to any allegation made in the pleadings.—*Nizamuddin* v. *Mamtazuddin*, 28 C. 135 (13 C. 96 *followed*). *See* also, *Pertap* v. *Maigh*, 36 C. 927, 13 C. W. N. 949 and *Madan* [illegible] *Mohun* v. *Rajab Ali*, 28 C. 223.

Institution of suit is not itself a notice to quit; [illegible] the tenancy must be determind before the institution of the suit.—*Heman*[illegible]*gini* v. *Srigobinda*, 29 C. 203: 6 C. W. N. 69 (23 C. 200 *not followed*; [illegible] 2 C. 146 F. B. *followed*). In a suit for ejectment, held that the cause of action must be based on something that accrued antecedent to the suit. A disclaimer of the landlord's title in the pleadings after suit brought, does not of itself determine the tenancy, and § 445 [illegible] notice to quit [illegible] unnecessary.—*Pran Nath Saha* v. *Madhu Khulu*, [illegible] desc. [illegible] *Vithu* v. [illegible] *Dhondi*, 15 B. 407; *Ambabai* v. *Bhau*, 20 B. 759 [illegible] an [illegible] *Gulzar* v. [illegible] *Kalyan*, 15 A. 399. But see, *Baba* v. *Vishna Nath*, [illegible] 8, and *Pertap* v. *Maigh*, 36 C. 927.

The Civil Courts must adjudicate on the rights of the parties as they existed when the plaint was filed and not on any title subsequently derived.—*Purkhit* v. *Ananda*, 8 C. L. J. 116 (21 M. 288 *referred to*).

The defendants obtained advances of money on *hundis* by making untrue representations, knowing them to be untrue. *Held*, that the plaintiffs were entitled to rescind the contract and claim immediate repayment before the due date of the *hundis*.—*Baboo Lall* v. *Jaylall*, 24 C. 543.

Where plaintiff has got a right, every invasion of that right gives him a fresh cause of action; *Jevanand* v. *Beni*, 12 O. C. 320.

Date and Place of Cause of Action.—The date and place of the accrual of the cause of action must be inserted in the plaint; *Ram Prosad* v. *Sachi Dassi*, 6 C. W. N. 585, p. 588; *Baidyanath* v. *Ojan*, 11 W. R. 238. But a plaintiff is not absolutely bound by the statements made in his plaint as to the date; *Fuckoruddeen* v. *Mohim*, 4 C. 529, p. 531.

A plaint must state when the cause of action arose and in an action of ejectment, it is for the plaintiff to prove a title subsisting at the date of the suit; *Parsoo* v. *Munna Lal*, 13 N. L. R. 16: 39 I. C. 21.

Suit to be Tried on the Original Cause of Action—Exception to the Rule.—The rule that a suit must be tried in all its stages on the cause of action as it existed at the date of its commencement was recognized in *Radhay* v. *Ajodhya*, 7 C. L. J. 262; *Govinda* v. *Perumdevi*, 12 M. 136; *Ramanandan* v. *Pulikatti*, 21 M. 288; *Wamanrao* v. *Rustomji*, 21 B. 70; *Narasayya* v. *Venkatagiri*, 37 M. 1 and *Anundmoyee* v. *Sheeb Chunder*, 9 M. I. A. 287 (301). An exception to this rule, namely, that a Court may take notice of events which have happened since the institution of the suit and afford relief to the parties, on the basis of the altered conditions, is applied in cases where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or do complete justice between the parties; *Rai Charan* v *Biswanath*, 20 C. L. J. 107. The grounds of exception have been fully considered in *Ramratan* v. *Mohunt*, 6 C. L J. 74: 11 C. W. N. 732. *See* also, *Sakharam* v. *Hari*, 6 B. 113; *Sangili* v. *Mookun*, 16 M. 350; *Ahmadjee* v. *Mahmadjee*, 1 Bom. L. R. 218; *Rustomji* v. *Sheth*, 25 B. 606; *Balkishan* v. *Kishan Lall*, 16 A. 148; *Hazari* v. *Janaki*, 6 C. L J. 92; *Ramyad* v. *Bindeswari*, 6 C. L. J 102; *Udit Chobey* v. *Radhika*, 6 C. L. J. 662; *Hedlot* v. *Karan*, 15 C L. J. 241; *Bunwari* v. *Daya Sunker*, 13 C. W. N. 815.

"Facts showing the Court has jurisdiction."—*See notes to ss. 16, 19 and 20.*

"Relief which the plaintiff claims."—*See Or. VII, r. 7 and notes.*

"Where the plaintiff has allowed a set-off or relinquished."—*See Or. II, 2 (2) and notes.*

Valuation for Purposes of Jurisdiction and for Purposes of Court-fees.—It is not contemplated under Or. VII, r. 1 that the subject-matter of the suit should be given two values, one purely arbitrary and fanciful for purposes of *jurisdiction*, and one in strict conformity to the real value for purposes of Court-fees In either case the valution should conform to the reality. Therefore when a plaint contains a valuation for purposes of jurisdiction, it is a natural presumption that the same valuation would apply, if it were necessary to have a valuation for an *ad valorem* Court-fee; *Annapurnayya* v. *Nagaratnamma*, 92 I. C 730: A. I. R 1926 Mad. 591

In money suits.

2. Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed: But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaint shall state approximately the amount sued for.

[S. 50, paras. 2 & 3.]

COMMENTARY.

It is wholly unnecessary for the plaintiff to fix any value for the purposes of jurisdiction. The approximation required by this rule may be a rough and ready approximation such as the plaintiff in any given case is able to give —*Bai Hiragavri* v. *Gulabdas*, 15 Bom. L. R. 1123.

Money.—If a plaintiff seeks the recovery of money, the plaint must state the precise amount so far as the case admits, while, in a suit for the amount which will be found due on taking unsettled accounts, the plaint need only state approximately the amount sued for.—*Khusal Chand Mulchand* v. *Nagindass*, 12 B. 675.

Mesne Profits.—This clause has no application to suits where mesne-profits are claimed from date of institution, *Ram* v *Bhima Bai*, 15 B. 116. In a suit for mesne profits which had accrued due, the plaintiff is bound to state approximately the amount sued for Court-fees cannot be levied in respect of a claim for mesne profits *pendente lite*. A Munsif has no jurisdiction to entertain a claim for mesne profits in excess of the limits of his pecuniary jurisdiction; *Bhupendra* v *Purna*, 24 I. C. 232 (15 B 416: 21 M. 371: 13 C. W. N 815 *relied on*) As to the essence of a claim for mesne profits, see *Maniyam* v *Kuppanna*, 29 I. C. 195 (1915) M. W. N. 319. For measure of compensation as mesne profits in respect of a godown, see *Kamini* v *Krishna*, 10 I C. 312.

Account.—In a suit for an account, the valuation entered in the plaint for the purpose of fixing Court-fees, determines the question of jurisdiction the valuation for both purposes being the same under section 8 of Act VII of 1887.—*Bhagawantrai* v *Bajurao*, 18 B 40; *Bai Amba* v *Pranjivandas*, 19 B. 198. *See* also, *Ijuttulla* v *Chandra*, 34 C. 954, F B 11 C. W. N. 1133: 6 C. L. J 255 The value of an account suit is the value as originally tentatively stated by plaintiff for purposes of Court-fees and jurisdiction; *Olpherts* v *Arjundas*, 9 N L R. 112: 20 I C 928 In an account suit the claim was valued at Rs 150 After the preliminary decree the amount due was found to be Rs. 8,424. *Held*, that as the jurisdiction of the Munsif was up to Rs 1,000 a decree for any sum above this cannot be passed.—*Golap* v *Indra*, 13 C W. N. 491 9 C L J. 367. Discussion as to form of plaint in a suit for an account —*Gobind* v. *Sheriff*, 7 C 169; 8 C L R 357, *Shoshi* v. *Guru*, 7 C 89 8 C. L R. 285. A "suit for an account" is a special form of suit and does not include every case in which accounts have to be gone into for ascertaining the amount claimed —*Maroti* v *Balaji*, 14 I. C. 786 8 N. L. R. 36.

Contribution.—A claim for contribution should distinctly set forth the amount due by each party sued; *Bhola* v. *Indra*, 14 W R 373. *Quaere*: Whether claim for contribution can be made in respect of further liability; *Muthamal* v. *Secy. Of State*, 24 M L J 405 19 I C. 68. A statement showing the liability of each defendant may be submitted afterwards; *Bishnu* v *Bepin*, 18 C. W N 622.

Partnership.—The plaint in a partnership suit ought to be framed on the lines of Form No 49 (Plaints) and the accounts should be taken as prayed in that form —*Ram* v *Manick*, 7 C. 248 9 C L R. 157. In a suit by a sole surviving partner to recover partnership debt, the plaint ought to

allege that the debt was a partnership-debt, that the deceased partner had died before the suit, and that the suit was brought by the plaintiff for his own benefit and that of the estate.—*Gobind* v. *Chandra*, 9 A. 486.

Damages, Trespass.—Where the owner of a tank wishes to bring a suit against a person for fishing in the tank without his permission, the plaint should be framed for the recovery of damages for trespass, and should be based on an alleged dispossession by reason of the defendant's fishing in the tank; *Lukhimoni* v. *Korunna*, 3 C. L. R. 509.

In a suit for damages based on fraud the plaintiff may claim an amount approximately and offer to pay extra Court-fee if they prove heavier; *Raghavaji* v. *Annamalai*, 17 M. L. J. 625 *As to suits in general, see s. 9 and notes.*

Where the subject-matter of the suit is immoveable property.

3. Where the subject-matter of the suit is immoveable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers. [New.]

COMMENTARY.

This rule is new. It is similar to Or. XX, r. 9 of this Code which directs that a decree for recovery of immoveable property should contain boundaries.

Immoveable Property.—A right to extra-territorial fishery is not immoveable property for all purposes; but it is an interest in immoveable property; *Lokenath* v. *Jahania*, 14 C. L J. 572. Right to cut and appropriate plaints is an interest in immoveable property, *Kuttavat* v. *Thoppai*, 15 I. C. 234

The Plaint shall Specify Boundaries or Survey Numbers, etc., Sufficient for Identification.—A suit to recover land without defining boundaries cannot be maintained, because, if decreed, the decree cannot be executed. —*Mahomed Ismail* v. *Lalla Dhundhur Kishore*, 25 W. R. 39 *See* also, *Kangal Chundra* v. *Kanye Lall*, 4 C 69 But where merely a declaratory decree in respect of title is sought, the suit should not be dismissed upon the ground that no boundaries were given —*Raj Narain* v. *Shama Nund*, 26 C. 845: 4 C. W. N. 126.

In suits concerning immoveable property, the plaintiff must describe the property in such a manner as may suffice for its identification, it is not absolutely necessary to set forth the boundaries —*Aftabooddeen* v. *Shumsoddeen*, 18 W. R. 461.

The mere omission from the schedule annexed to a plaint of the boundaries of the land will not exclude from the operation of the decree matters which are by name strictly claimed in the plaint and referred to as such in the decree and which do not need any further specification.—*Shib Narain* v. *Ram Narain*, 20 W. R. 142

Where the object of the suit is to prevent the plaintiff's rights over certain lands from being infringed upon, the boundaries of the land should be given in the plaint.—*Ajoodhia Lall* v. *Gunamani Lall*, 2 C. L. R. 134.

In case of boundary dispute or where there is any doubt about the identity of the land in suit, the Judge should insist on a good plan.—*Po Gyi* v. *Mg. Paw*, 2 I. C. 347: 5 L. B. R. 1.

A suit cannot be dismissed merely on the ground that the plaint did not contain a specification of the lands in defendant's possession, and that there was an error in the plaint in the description of the defendant's residence.—*Riza Ali* v. *Purnanund*, 6 B. L. R. Ap 84. 14 W. R. 474. *See* also, *Kazeem* v. *Danes*, 1 C. W. N. 574, and *Jaladhar* v *Kinoo*, 1 C. W. N. clxxxix (189).

Where a whole estate bearing a name is sued for, the boundaries need not be given.—*Ramdoyal* v. *Ajoodhia Ram*, 2 C. 1 25 W R 425.

In a suit in which the plaintiff claimed several plots of land, but did not specify the boundaries in respect of one of them, it was held that the proper course was for the Court to call upon the plaintiff to amend his plaint.—*Jonabali* v *Golam Assad*, 21 W R 187

Boundaries of Lands in Rent Suits.—In a suit for arrears of rent it is not absolutely necessary for the plaintiff to give the boundaries, it is enough if a description sufficient to identify the lands is given.—*Pijraddi Naskar* v. *Ambika Churn*, 5 C. W N 121. *See* also, *Durga Churn* v *Kala Chand*, 7 C W N 615 But see, *Murari Mohun* v *Rani Amriteswari*, 1 C L J 27-n.

As to the effect of misdescription of area and boundaries in a suit for enhancement of rent.—*Tarnee Churn* v *Mohima Chunder*, 22 W. R. 426

Right of Way.—*In a suit for obstruction of a private right of way*, the plaintiff should state with reasonable precision the termini of the way and its course, *Harris* v *Jenkins*, 22 Ch. D 481

Conflict between Boundary and Quantity.—In such cases that which is more certain and stable must prevail, *Raja Durga* v *Rajendra*, 10 C L J. 570. 14 C. W N 268 37 C 293 Where there is a description of land in a conveyance or lease setting forth the boundaries and specifying the area, the land within the boundaries passes by the deed, *Annada* v. *Mathura*, 13 C W N 702

When plaintiff sues as representative.

4. Where the plaintiff sues in a representative character, the plaint shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.

[S 50, para. 4.]

COMMENTARY.

This rule corresponds to para. 4 of s. 50 of the Code of 1882, with verbal changes only. The three illustrations have been omitted, but they

are reproduced here for clear exposition of the object and meaning of the rule:—

(a) A *sues as* B'*s executor. The plaint must state that* A *has proved* B'*s will.*

(b) A *sues as* C'*s administrator. The plaint must state that* A *has taken out administration to* C'*s estate.*

(c) A *sues as guardian of* D, *a Muhammadan minor.* A *is not* D'*s guardian according to Muhammadan law and usage. The plaint must state that* A *has been specially appointed* D'*s guardian.*

"Where the plaintiff sues in a representative character."—The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased vests in him as such (Indian Succession Act XXXIX of 1925). A suit by a person as executor or administrator of a deceased person is a suit by him in representative character. It is not necessary in all cases to obtain probate or letters of administration to entitle a plaintiff suing in representative character to a decree in respect of the estate of the deceased. In the case of *Europeans, Parsis, Jews and Armenians* subject to the provisions of the Indian Succession Act (XXXIX of 1925), no right as executor or legatee can be established in a Court of Justice unless a probate or letters of administration, as the case may be, are obtained. In the case of *Indian Christians*, up to the year 1901, it was necessary for the executor, where the deceased left a will, to obtain probate (Succession Act, 1865, s 187), and where the deceased died intestate, letters of administration were necessary (Succession Act, 1865, s. 190) But since the passing of the Native Christians Administration of Estates Act (VII of 1901), which declared that the provisions of s. 190 of the Indian Succession Act, 1865, shall not apply to any part of the property of an Indian Christian who has died intestate, it is not necessary for Indian Christians, in the case of intestacy, to obtain letters of administration The repeal of these Acts by the Indian Succession Act (XXXIX of 1925), has made no change in the law in this respect —*See* ss. 212 and 213 of the Indian Succession Act (XXXIX of 1925). In the case of *Hindus*, probate is necessary in the case of wills made by any Hindu, Buddhist, Sikh or Jain, where such wills are of the class specified in s. 57 of the Indian Succession Act, but no letters of administration are necessary when a Hindu dies intestate (s 212, Succession Act, 1925). In the case of *Mahomedans*, neither probate nor letters of administration are necessary.

This rule does not require that when the plaintiff sues in a representative capacity, that fact should be stated in the cause title of the plaint, although that is a convenient place to state it; *Rani Kuarmoni* v. *Wasif Ali*, 19 C. W. N. 1193: 28 I. C. 818.

"Has taken the steps."—The grant of probate is not a condition precedent to the institution of the suit and that the executor or legatee (mentioned in s. 213, Indian Succession Act, 1925) may institute the suit without obtaining probate, but that no decree in the suit will be passed till he obtains probate; *Chandra Kishore* v. *Prasanna Kumari*, 38 C. 327: 38 I. A. 7: 9 I. C. 122; *Jamshedji* v. *Hirjibhai*, 37 B. 158. The same principle applies where there is no will and a person takes out letters of

administration after institution of the suit but before decree. A contrary view was, however, taken in *Sethna* v. *Hemingway*, 38 B 618, where it was held that if the plaint does not show that letters of administration have been obtained before institution of suit, it should be rejected, but if the suit is not rejected and the hearing is allowed to proceed, there is nothing to prevent the Court from passing a decree if letters of administration are obtained before decree. *See* also, *Administrator-General of Bengal* v. *Lalit*, 12 C. W. N. 738.

When Plaintiff Sues as Representative.—Before the introduction of the C. P. Code, it was not obligatory for a Hindu manager to set forth that he sued in a representative character.—*Gansavant* v *Narayan*, 7 B. 407.

When an administrator sues in his capacity as such, no suit is maintainable unless and until letters of administration are issued to him; *Administrator-General* v *Lalit Mohun*, 12 C W N 738.

The purchaser of the rights and interests of the judgment-debtor, who is a member of a joint Hindu family, at a sale in execution of a decree, does not acquire any title to the rights and interests of the other members of the family, unless it is clear that the judgment-debtor was sued in his representative capacity —*Loki Mahto* v *Aghoree Ajail*, 5 C 144. 4 C. L. R. 465.

A decree was obtained against the *karnavan* and *anandravan* of a Malabar *tarwad*, but the plaint did not describe them otherwise than by their individual name. *Held*, that the decree and the execution-sale thereunder did not bind the *tarwad*, *Sankaran* v. *Parvati*, 12 M 434

Suit By or Against Club.—An action for price of goods supplied to a member cannot be brought in the name of the secretary, as the goods belonged to the club, *Michael* v *Briggs*. 14 M 591. The secretary of a club cannot be sued personally for goods delivered for use of the club, nor can the club be sued through its secretary, *N. W P. Club* v *Sadullah*, 20 A 497.

Suit By or Against Shebait.—Where a suit is brought by or against a person in a representative capacity, it is not necessary to state in the cause title of the plaint, the representative capacity in which the plaintiff or the defendant sues or is sued, although, no doubt, that is a convenient place to make such a statement; *Bidhushikhar* v. *Kulada Prasad*, 46 C 877: 50 I. C. 525.

A mortgagee praying for the sale of the property and asking for no relief personally against the mortgagor is not bound to take out a certificate, under Act VII of 1889, before he can obtain a decree —*Kanchan Modi v. Baij Nath*, 19 C. 336; *Palaniyandi Pillai* v. *Veerammal*, 20 M. 77. *See* also, *Amanna* v. *Gurumurthi*, 16 M. 64; *Baijnath Das* v. *Shamanund Das*, 22 C. 143; *Mahamad Yusuf* v. *Abdur Rahim*, 26 C. 839: 4 C. W. N. 558; followed in Nanchand v. *Yenawa*, 28 B. 630, and *Subramanian* v. *Rakku*, 20 M. 232. But see, *Fatehchand* v. *Mahammad Buksh*, 16 A. 259.

Application by heir of mortgagee for supplementary decree under s. 90 of T. P. Act IV of 1882: *Held* (on review of authorities) that no such

decree could be made without a certificate under the Act.—*Sahadev* v. *Sakhawat*, 12 C. W. N. 145; 7 C. L. J. 658; *Abdul Sattar* v. *Satya Bhusan*, 35 C. 767.

What Is and What Is Not "Debt" within S. 4 of Succession Certificate Act.—Debt has been defined by LORD JUSTICE LINDLEY in *Webb* v. *Stenton*, 11 Q. B. D. 518 (527), as "a sum of money which is now payable or will become payable in future by reason of a present obligation." *See* also, *Syud Tuffuzzool* v. *Loghoo Nath*, 14 M. I A. 40 (56). In *Nemdhari* v. *Bissessari*, 2 C. W. N. 591, it was held that the Succession Certificate Act refers to such debts as the deceased could sue upon, but debts accruing due after death can be sued upon without certificate This decision has been overruled by a Full Bench in *Bancharam* v. *Adya Nath*, 13 C. W. N. 966: 10 C. L. J 180 36 C. 936, where it has been held that a debt that falls due *after* the death of a creditor also comes within s. 4, and his heirs cannot obtain decree without certificate *See* also, *Abdul Karim* v. *Maqbulunnissa*, 30 A. 315 5 A L. J. 598.

Rent.—In a suit for rent which became due after the death of the deceased, it was held that no certificate is necessary, *Ranchordas* v. *Bhaghubhai*, 18 B 394; the principle of this case is identical with that of *Jones* v. *Thompson*, E. B. & E 63, where CROMPTON, J., held that rent not due is not an existing debt, and cannot therefore be described as a debt accruing.

Rent is not a debt within the meaning of s 4 of the Succession Certificate Act VII of 1889 A suit for rent accruing due partly during the lifetime of the registered tenant, and partly after his death, is maintainable by the legal representatives of the deceased without a certificate; *Nagendra Nath* v *Satadulbashini*, 26 C. 536: 3 C W N. 294. *See* also, *Andolammal* v. *Venkatacharlu*, 17 M L J 257

Amount of decree for rent deposited by judgment-debtor is considered rent even after the death of decree-holder and his heir can withdraw it without certificate; *Surendra* v *Upendra*, 18 I. C 495

A suit for account is not a suit for the recovery of a debt within the meaning of s 4 of the Succession Certificate Act —*Bisseswar Roy* v. *Durgadas*, 32 C. 418.

Dower of a deceased Mahomedan wife is a debt and cannot be recovered by her heirs without certificate.—*Abdul Karim* v. *Maqbulunnissa*, 30 A. 315.

Succession certificate cannot be granted for collection of a part only of debt; *Gofur* v. *Kalandari*, 33 A. 327. But see, *Md. Abdul Hossani* v. *Sarifan*, 16 C. W. N. 231: 15 C. L. J 384, where 33 A 327 has been dissented from and it has been held that certificate may cover a part of the debt; *see* also, *Annapurna* v. *Nalini*, 18 C. W. N. 836: 42 C. 10.

Cases Where Succession Certificate Is Not Necessary.—Where probate or letters of administration have been obtained; *Ramanugrah* v. *Chuni*, 27 I. C. 822. Recovery of moveable property left by the deceased or recovery of unliquidated claim; *Subbanna* v. *Munekka*, 18 M. 457; *see* also, *Sabjusahib* v. *Noordin Sahib*, 22 M. 139. Leave to sue in *forma pauperis*

to recover assets forming part of the estate of a deceased, *Kammathi* v. *Mangappa*, 16 M. 454 Suit by widow who had succeeded her husband as trustee of an endowment for debt due thereto; *Yarlagadda* v. *Makerla*, 20 M. 162, P. C. A curator appointed under Act XIX of 1841, before he can obtain a decree; *Babashab* v. *Narsappa*, 20 B. 437 Suit by a person claiming by right of survivorship to recover money advanced from the funds of a joint Hindu family, and is due to that family; *Palamraju* v. *Bapanna*, 22 M. 380; *see* also, *Jagmohan* v. *Allu Maria*, 19 B. 338; *Pateshuri* v. *Bhagwati*, 17 A. 578; *Subramanian* v. *Rakku Servai*, 20 M 232; *Venkataramanna* v. *Venkayya*, 14 M. 377; and *Bissen Chand* v. *Chatrapat*, 1 C. W. N. 32. Revival of suit by sons who are members of a joint Mitakshara family, on plaintiff's death; *Beejraj* v *Bhyropersaud*, 25 C. 912. Suit by successor to impartible estate governed by Mitakshara for recovery of debt due to deceased; *Gur Pershad* v *Dhani Rai*, 15 C. W N 49 (*Amar* v. *Sebak*, 34 C. 642: 11 C. W N 693 *distinguished*) Suit by one of two joint creditors for recovery of the debt, at any rate as to the share of the plaintiff; *Sital* v. *Manik*, 13 C W N 509 9 C L J. 331; (*Pyari* v. *Nobin*, 26 C 400: 3 C W N 371, *approved*) Suit by a receiver appointed by Court, *e g.*, one of the sons of the deceased person appointed as receiver; *Harihor* v. *Harendra*, 37 C 754 12 C L J 252 (20 B 837 *referred to*). Debts due to a member of a joint family, *Pichaikuttia* v *Ranganadan*, 28 M L J 323 17 M L T. 264 28 I C 490 Suit for recovery of money due to a deceased member of joint Hindu family by adopted son, *Ramanathan* v *Subramania*, 28 M L J 372

Cases where Certificate is Necessary.—Suit by an assignee of a debt due to a deceased creditor, *Karuppa Sami* v *Pichu*, 15 M 419; *see* also, *Mancharam* v *Bai Mahali*, 18 B 315, *Aravamuda* v *Kalia*, 24 I C. 143 Representing a deceased partner in a suit by the surviving partners to recover partnership-debt, *Ram Narain* v *Ram Chunder*, 18 C. 86; *Vidya Natha* v *Chinnasami*, 17 M. 108 Successor to an impartible estate for recovery of debts due to its predecessor, *Rajah of Kalahasti* v *Achigadu*, 30 M 454 17 M L J 367, but see, *Gur Pershad* v *Dhani*, 15 C W N. 49.

It is a serious irregularity not to ask for certificate in the case of a separate Hindu family, *Ghisu* v *Ram Ballabh*, 13 I C 363

Right to Execute Decree Without Certificate of Administration.—The heir of decree-holder applying for execution of the decree is bound to obtain a certificate of heirship under Act VII of 1889—*Chimniram Umaji* v. *Hanmant*, 15 B. 265 (15 B. 79 *referred to*).

Application for execution of a decree may be made by the legal representative of a deceased person without a certificate, the certificate being supplied during the pendency of the proceeding.—*Brojo Nath* v. *Isswar Chandra*, 19 C. 482 (13 C. 47 *followed*). *See* also, *Mangal Khan* v. *Salimullah*, 16 A. 26; *Kalian Singh* v. *Ram Charan*, 18 A. 34.

A decree in favour of a deceased *mohunt* for costs incurred in proceedings carried on by him on behalf of the *muth* may be executed by the successor and representative of the *mohunt* without certificate—*Jogendra Nath* v. *Ram Chunder*, 20 C. 103.

An application for execution of a decree by the legal representative of a deceased decree-holder, without the production of a certificate under Act VII of 1889, is one made in accordance with law within the meaning of Art. 179 (4) of the Limitation Act, 1877.—*Balkishan* v. *Wager Singh*, 20 B. 76; *Hafizuddin* v. *Abdool*, 20 C. 755; *Adhar* v. *Lalmohun*, 24 C. 778.

Right of Executors, etc., to Sue Without Probate or Letters of Administration.—It has been held by the Privy Council that where probate was obtained subsequent to suit, but before decree, this was sufficient compliance with s. 213 of the Succession Act: *Chandra Kishore* v. *Prosanno Kumari*, 38 C. 327: 15 C. W. N. 121 P. C.: 13 C. L. J. 58: 8 A. L. J. 96. It is submitted that the same principle ought to apply to cases where there is no will, and a person takes out letters of administration after institution and before decree. A contrary view has however been taken in *Sethna* v. *Hemingway*, 38 B. 618, where it has been held that if the plaint does not show that letters of administration have been obtained before institution of suit, it should be rejected; but if the plaint without being dismissed the hearing is allowed to proceed, a decree passed is not contrary to s. 190 Succession Act. *See* also, *Admn -Genl.* v. *Lalit*, 12 C. W. N. 738.

Where a will is not governed by the Hindu Wills Act, s. 187, Succession Act does not apply; the estate of the deceased vests in the executor under s. 4, Probate and Admn. Act, on his death and there is nothing to prevent his instituting a suit at once for debt due without taking out probate. Of course if he omitted to take out probate he could not get a decree without producing a succession certificate but he can produce this at any time after institution and before decree; *Balakrishnadu* v. *Narayanswamy*, 37 M. 175 24 I. C. 852, *Jamsetji* v. *Hirjibhai*, 37 B 158· 15 Bom L R.. 92: 19 I. C. 406

Sec. 187 of the Indian Succession Act X of 1865, not being made applicable to wills of Hindus made before 1st September 1870, it is not obligatory on executors or legatees under them to take out probate or letters of administration in order to establish their rights in a Court of Justice.—*Krishna Kinker* v. *Rai Mohun*, 14 C. 37 (referred to in *Krishna Kinker* v. *Panchurani*, 17 C. 272). *See* also, *Kanhaiya Lal* v *Munni*, 18 A. 260 and *Sarat Chandra* v. *Bhupendra Nath*, 25 C 103.

An executor in order to bring a suit must file, not merely a copy of the grant of administration, but also the copy of the will attached to it, the two together forming the probate.—*Delaney* v. *Rohamat Ali*, 32 C. 710

Sec. 187 of the Succession Act does not debar a defendant from relying upon a will of which no probate or letters has been taken out, *Caralapathi* v. *Cota*, 33 M. 91. A will, of which probate has not been taken, may be proved in a proceeding other than under the Probate Act; *Basanta* v. *Gopal*, 18 C. W. N. 1136.

In Bombay, Mahomedan executors can sue without first taking out a probate.—*Moosa* v. *Essa*, 8 B. 241. Probate need not be taken of Mahomedan will; *Sakina Bibee* v. *Md. Ishak*, 15 C. W. N. 185: 37 C. 839 (8 B. 241 *folld.*). It is not obligatory on a Hindu to obtain letters of administration to the estate of the last owner; *Jogendra* v. *Apurma*, 18 C. W. N. 1190.

Defendant's interest and liability to be shown.

5. The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand. [S. 50, para, 5.]

COMMENTARY.

This rule corresponds to para 5 of s 50 of the Code of 1882, with this modification that the word "*shall*" has been substituted for the word "*must*" after the word "plaint," and the illustration has been omitted But for the clear exposition of the object and meaning of the rule, the illustration attached to the old section is reproduced below —

"*A dies, leaving B his executor, C his legatee, and D a debtor to A's estate. C sues D to compel him to pay his debt in satisfaction of C's legacy The plaint must show that B has causelessly refused to sue D, or that B and D have colluded for the purpose of defrauding C, or other such circumstances rendering D liable to C*"

For the distinction between the words "*shall*" and "*must*," see *Sheo Prasad* v *Lalit Kuar*, 18 A 403

Where the defendant is sued in a representative character, that fact must be stated, *Girdhur* v *Bai Shiv*, 8 B 309, *Loki* v *Aghoree*, 5 C. 544.

Grounds of exemption from limitation law.

6. Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed. [S. 50, last para.]

COMMENTARY.

This rule corresponds to the last para of section 50 of the Code of 1882 with some change of language only The grounds on which exemption can be claimed are set forth in sections 12 to 20 of the Limitation Act, 1908

Applicability of Rule.—Order VII, r 6 applies to cases in which the suit, as laid in the plaint, is *prima facie* barred by limitation; *Khandu Lal* v. *Fazal*, 1 Lah, 21: 51 I. C. 956. But see, *Deo Raj* v. *Shiv Ram*, 70 P. R. 1914: 105 P. W. R. 1914.

Grounds of Exemption from Limitation Law.—A plaintiff cannot take advantage of any ground of exemption from the law of limitation which has not been set up in the plaint —*Jogeshwar Roy* v *Raj Narain*, 31 C. 195: 8 C. W. N. 171. See, *Gulam* v. *Mahamad*, 34 B. 540, *Gobinda* v. *Santa*, 83 P. R. 1914: 26 I. C. 441; *Bhupendra* v *Purna*, 24 I. C 232; *Uttam Chand* v. *Mt. Thakur Debi*, 4 Lah. L. J. 190; 3 Lah 233, *Nanak Chand* v. *Muhammad Khan*, 75 I. C. 1048.

If the plaint shows the ground of exemption, the requirements of this rule are satisfied and the plaint cannot be rejected merely because the

exemption is not claimed specifically; *Raghunath* v. *Syed Samad*, 12 C. W. N. 617: 7 C. L. J. 560; *Gangadhar* v. *Abdul*, 11 C. L. J. 34: 14 C. W. N. 128.

When a ground has been stated in the plaint, the plaintiff is not precluded from taking another and not inconsistent ground, if he believes that the latter is the true ground to get over the bar of limitation; *Yakub* v. *Bai Rahimat*, 10 Bom. L. R. 316. In *Parmeshri Das* v. *Fakiria*, 3 Lah. L. J. 22: 60 I. C. 772; *Hingu* v. *Heramba*, 13 C. L J. 139; *Gangadhar* v. *Khaja*, 14 C. W. N. 128, it has been held that a plaintiff who has stated one ground of exemption may be allowed to take another and inconsistent ground.

Effect of Omission to Set Out Grounds of Exemption in Plaint.—Though Or. VII, r. 6, C. P. Code, requires the plaint in a suit filed after expiry of the period of limitation to show on what ground exemption is claimed, yet an omission to do so in respect of a suit filed on the day the Court re-opened after the summer vacation (the period of limitation for bringing which had expired during the vacation) would not entail dismissal of the suit S. 57 (a) of the Evidence Act empowers the Court to take judicial notice of any public holidays notified in the official gazette and the plaintiff is entitled to presume that the Court would take such notice, at any rate the Court in such a case should not dismiss the suit, but require the plaint to be amended; *Tekchand* v. *Patto*, 56 I. C. 926.

Objections based on plaintiff's failure to set out the ground of exemption from limitation in the plaint must be taken in the trial Court, otherwise the High Court will not permit them to be raised before it in revision; *Reguva Nagendran Chetty* v *Kuppuswami*, 4 L. W 148 36 I. C 593. A plaintiff should not be allowed to rely upon a ground of exemption from the law of limitation for the first time in appeal; *Uttam Chand* v *Musst Thakur*, 3 Lah 233 69 I. C. 419: A. I. R 1922 Lah. 39

Under Or VII, r. 6, C P Code, a plaintiff, whose suit is on the face of it barred by limitation, must state explicitly in the plaint the ground on which the bar is saved and where nothing is so stated, and no issue is framed on it, any document cannot afterwards be used in the course of the trial as being an acknowledgment saving limitation; *Marudai Muthurian* v. *Chinna Kannu*, 25 M L. T. 295: (1919) M. W N. 429 · 52 I C 243.

If a plaint does not show any ground of exemption, the Court of first instance should allow the plaint to be amended, save under very exceptional circumstances; *Gunnaji* v *Makanji*, 34 B. 250: 3 I C. 159; *Ramsukh Das* v *Ghulam*, 46 I. C. 495.

Relief to be specifically stated.

7. Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement. [New.]

COMMENTARY.

This rule is new. It follows English Or. XX, r. 6 and has adopted the principle laid down in several cases in India.

Relief to be Specifically Stated.—This rule makes it imperative that the plaintiff shall state *specifically*, in his plaint, the relief which he claims. If he omits, except with the leave of the Court, to sue for all the reliefs to which he may be entitled in respect of the same cause of action, he will not afterwards be permitted to sue for any relief so omitted [Or II, r. 2 (3)].

Though a relief is claimed upon a specific ground, *it is competent to* the Court to grant it upon a different ground if the ground is disclosed by the allegations in the plaint and the evidence in the case; *Rasul Jehan* v. *Ram Saran*, 22 C. 589; *Haji Khan* v. *Baldeo*, 24 A 90. When the plaintiff asks for more relief than he is entitled to, he may be given that much relief only that he is entitled to, but the suit should not be dismissed on that account; *Pitambar* v *Ramjoy*, 7 W R. 93 · *Lakshman* v. *Hari*, 4 B. 584.

" General or other relief."—It is no longer necessary under the present rule to specifically ask for general relief Where a suit is for cancellation of a sale deed on the ground of failure of consideration and for recovery of property comprised in it. *Held* that the Court might grant the plaintiff a decree for the unpaid portion of the purchase-money; *Mahalinga* v. *Tirumalai*, 8 M. L. T. 463.

The relief to be awarded to the plaintiff depends upon the facts established by him and not upon an unfounded assertion of a claim by him which is negatived by the Court; *Surendra Nath* v. *Girdhari*, 62 I. C. 633.

The mere fact of a plaintiff not having asked for a relief specifically would not debar the Court from granting it if it thinks just to do so; *Naraindas* v. *Butto*, 13 S L R 159, 53 I C 722.

A usufructuary mortgagee who sues the purchasers of the equity of redemption, and prays (1) for a decree on the mortgage, or (2) for possession, or (3) for a money-decree, is not entitled to a decree for the usufruct of the property accumulated in the hands of the District Magistrate while the property was under attachment in proceedings under s. 145 of the Cr. Pro. Code; *Khebhani Ojha* v *Gulab Ojha*, 2 Pat L J. 698: 43 I. C. 463.

If a suit for specific performance be dismissed, the Court can nevertheless give the plaintiff a decree for refund of the deposit, although he had not asked for any such alternative relief, *Raghunath* v *Chandra*, 17 C. W. N. 100.

A plaintiff is entitled to ask for any remedy which the Court may think proper upon the state of facts disclosed in his plaint and established by the evidence, and a mistake in asking for a particular remedy will not debar him from some other remedy similar in its nature and not more extensive, provided it requires no change in the facts.—*Nudiar Chand* v. *Prannath*, 21 W. R. 8.

Where a plaintiff mistakes the relief to which he is entitled in his special prayer, the Court may afford him the relief to which he has a right,

provided it is such a relief as is agreeable to the case made by the plaint.—*Nistarini* v. *Makhan*, 9 B. L. R. 11: 17 W. R. 482. *See* also, *Gobind* v. *Durga*, 14 B. L. R. 337: 22 W. R. 248; *Kristo Mohiny* v. *Kally*, 6 C. 485: 8 C. L. R. 43.

A plaintiff proving a wrong done to him, though not exactly to the extent of which he complains, is entitled to relief, though not to the extent or on the ground on which he seeks.—*Bishnu* v. *Ram*, 22 W. R. 2 (5 B. L. R. 514-*note*: 12 W. R. 248, *explained and distinguished*).

Relief not founded on the pleadings should not, as a rule, be granted. But where substantial matters which constituted the title of all the parties are touched in the issues, and have been fully put in evidence and formed the main subject of discussion and decision in the Courts, the case does not come within the rule, and a declaration of the rights of the parties, though not founded on the pleadings, may be made.—*Srimahanta Gobind Rao* v. *Sita Ram*, 2 C. W. N. 681 P. C.; *Mohan Lal* v. *Maya Mal*, 4 Lah. L. J. 393.

In a suit for possession by partition of certain property from which the defendants had ousted the plaintiffs, the plaintiffs proved their title, but the only obstacle in their way was that the property was of a nature incapable of being partitioned. On this ground, the Court dismissed the suit entirely and refused to grant a declaratory decree as such a relief had not been specifically asked for. *Held*, that the Court should have granted as much of the plaintiff's prayer as it could and given them a decree for joint possession over such share as was found to belong to them; *Rajjab Shah* v. *Tahir Shah*, 43 A. 318: 19 A. L. J. 61.

When the plaint contains a statement of all the material circumstances, but the prayer is inartistically framed, the Court should give the plaintiff the appropriate relief if he is otherwise entitled to it.—*Gopi* v *Bansidhar*, 27 A. 325 P. C.: 9 C. W. N. 577; *Satyataran* v. *Jyoti Prasad*, (1923) Pat. 153.

Relief may be granted of a different description from the specific relief prayed-for by the bill, provided the bill contains charges putting in issue material facts which will sustain such relief.—*Gangaram* v. *Junmajoy*, 1 C. L R. 144; *Cockrell* v. *Dickens*, 2 M I. A 353 · *Brojendra* v. *Luckhey*, 6 C. W. N. 816; *Sukhdeo* v. *Lachman*, 24 A. 456. But upon a prayer for general relief, a plaintiff is not entitled to any relief which is inconsistent with his plaint.—*Hira* v. *Mati*, 5 B. L. R. 682. The plaintiff cannot desert the specific relief claimed, and under the claim for general relief, ask for specific relief of another description, unless the facts and circumstance alleged on the pleadings will, consistently with the rules of the Court, maintain that relief; *Kokamal* v. *Golab Singh*, 27 Bom. L. R. 277. 87 I. C. 481: A. I R. 1925 Bom. 248; *Ramgharib* v. *Shankar*, 29 A. L J. 15: A. I. R. 1922 All 5. *See* also, *Debi* v. *Bhan*, 31 C. 433: 8 C. W. N. 408, where it has been held that a prayer for a general relief is limited by the facts alleged and by the prayer for express relief.

The rule that the plaintiff is entitled to relief only upon the case made by his pleadings, is strictly enforced when he relies upon fraud; *Banshiram* v. *Panchami*, 20 C. W. N. 638; *see* also, *Rajendra* v. *Gangaram*, 37 C. 856.

Alternative Relief.—Where the title on which a plaintiff sues is put forward in the alternative, not inconsistent with each other, he ought to obtain a decree if he makes out either branch of his alternative.—*Woodit* v. *Baldeo*, 21 W. R. 12. *See* also, *Perumal* v *Kavedi*, 16 M. 121, and *Ningappa* v. *Shivappa*, 19 B. 323. But where a plaintiff claims in his plaint two alternative reliefs, which are wholly inconsistent with each other, the Court should not grant him any relief—*Mahomed Buksh* v. *Hussein Bibi*, 15 C. 684 P. C.; *Iyyappa* v. *Ramlakshmamma*, 13 M. 549; dissented from in *Jeno* v. *Manon*, 18 A. 125.

A plaintiff may sue to set aside a deed of gift on the ground that she executed it under a fraudulent representation that it was a power-of-attorney, or, in the alternative, on the ground that she executed it under undue influence; *Official Assignee* v *Bidyadhari*, 24 C. W. N. 145: 54 I. C. 700

A plaintiff can claim in the alternative over the same plot of ground rights of (i) ownership, and (ii) easement; *Narendra* v *Abhoy*, 34 C. 51 F. B.: 11 C W N 20 4 C L J 437, *see* also, *Durgamani* v. *Ambika*, 4 C L J 367 A plaintiff in a pre-emption suit may base his claim in the alternative, on contract, custom, or Mahomedan Law; *Muhammad* v *Shamsunnisa*, 36 A 456, or he may set up his claim as owner in the alternative, *Bhagurti* v *Parmeshar*, 36 A 476.

In a suit for specific performance of a contract, the purchaser may, as an alternative relief, claim a return of the earnest money, and at the hearing may give up his prayer for specific performance and ask for a return of the earnest money, and the Court may direct the defendant to return the earnest money, *Karson Das* v *Chhota Lal*, 48 B. 259: A. I. R 1924 Bom 119. 77 I C 275.

Relief founded on separate grounds

8. Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated, as far as may be, separately, and distinctly. [New.]

This rule is new and it should be read with Or I, r 3

Procedure on admitting plaint.

9. (1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it; and, if the plaint is admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court, by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements,

Concise statements.

(2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued.

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

(4) The chief ministerial officer of the Court shall sign such list and copies or statements if, on examination, he finds them to be correct. [S. 58.]

COMMENTARY.

This rule corresponds to section 58 of the Code of 1882, with some modifications of a verbal character. The last para. of section 58 of the old Code has been omitted and inserted under Or. IV, as r. 2.

10. (1) The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

Return of plaint.

(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it. [S. 57.]

COMMENTARY.

CALCUTTA HIGH COURT

1. *Cancel* Clause (1), Rule 9, Order VII and *substitute* therefor the following :—

"(1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it

(1) (*a*) The plaintiff shall present with his plaint —

(*i*) as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements;

(*ii*) a petition for service of summons to appear and answer together with the fees and draft forms of summons " (P 1056)

Alternative Relief.—Where the title on which a plaintiff sues is put forward in the alternative, *not* inconsistent with each *other*, he ought to obtain a decree if he makes out either branch of his alternative.—*Woodit* v. *Baldeo*, 21 W. R. 12. *See* also, *Perumal* v. *Kavedi*, 16 M. 121, and *Ningappa* v. *Shivappa*, 19 B. 323. But where a plaintiff claims in his plaint two alternative reliefs which are wholly inconsistent with each other, the Court should not grant him any relief.—*Mahomed Buksh* v. *Hussein Bibi*, 15 C. 684 P. C.; *Iyyappa* v. *Ramlakshmamma*, 13 M. 549; dissented from in *Jeno* v. *Manon*, 18 A. 125.

A plaintiff may sue to set aside a deed of gift on the ground that she executed it *under* a *fraudulent* representation that it was a *power-of-attorney*, or, in the alternative, on the ground that she executed it under undue influence; *Official Assignee* v. *Bidyadhari*, 24 C. W. N 145: 54 I. C 700.

A plaintiff can claim in the alternative over the same plot of ground rights of (*i*) *ownership*, and (*ii*) *easement*; *Narendra* v *Abhoy*, 34 C. 51 F. B : 11 C. W. N 20: 4 C. L. J 437, *see also*, *Durgamani* v. *Ambika*, 4 C. L J. 367 A plaintiff in a pre-emption suit may base *his* claim *in* the alternative, on contract, *custom*, *or* Mahomedan Law; *Muhammad* v. *Shamsunnisa*, 36 A 456; or he may set up his claim as owner in the *alternative*, *Bhagurti* v. *Parmeshar*, 36 A. 476.

In a suit for specific performance of a contract, the purchaser may, as an alternative relief, claim a return of the earnest money, and at the hearing may give up his prayer for specific performance and ask *for* a return of the earnest money, and the Court may *direct* the defendant to return the earnest money; *Karson Das* v *Chhota Lal*, 48 B. 259: A I. R. 1924 Bom 119. 77 I C. 275.

(2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued.

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

(4) The chief ministerial officer ot the Court shall sign such list and copies or statements if, on examination, he finds them to be correct. [S. 58.]

COMMENTARY.

This rule corresponds to section 58 of the Code of 1882, with some modifications of a verbal character. The last para. of section 58 of the old Code has been omitted and inserted under Or. IV, as r. 2.

10. (1) The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

Return of plaint.

(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it. [S. 57.]

COMMENTARY.

This rule corresponds to section 57 of the Code of 1882, with several important changes. Clauses (*a*) (*b*) and (*c*) of the old section have been omitted; and the words "*in which the suit should have been instituted,*" have been added to sub-rule (1). These words mean where the suit ought to have been instituted in some other Court in accordance with the provisions of ss. 15, 16, 17, 18, 19 and 20 of this Code. Thus the present rule embodies in a more convenient and concise form the provisions contained in clauses (*a*), (*b*) and (*c*) of s. 57 of the old Code.

"At any stage of the suit."—The words **"at any stage of the suit"** have been added to sub-rule (1). The addition is an important one and it has been made in accordance with the principle laid down in *Prabhakar* v. *Viswambhar*, 8 B. 313 F. B., where it has been held that the provisions of this rule might be put into force at any stage of the suit, even after the trial has begun and concluded Sub-rule (2) exactly corresponds to the last para. of 57 of the old Code.

Want of Pecuniary Jurisdiction.—On the hearing of a suit, the Court came to the conclusion that the value of the property in dispute placed the claim beyond its jurisdiction, and it therefore dismissed the suit *Held* that the plaint ought to have been returned to the plaintiff for presentation to the proper Court.—*Moshingan* v. *Mozari Sajad*, 12 C. 271.

See also, *Ram Gutty* v. *Goonomonee Dabee*, 11 W. R. 177; *Kartick Nath* v. *Roy Nundeput*, 23 W. R. 263, and *Shridhar Hari* v. *Chinna Valad*, 10 B. H. C. 17.

Or. VII, r. 10 applies to a Small Cause Court, and where a Small Cause Court Judge finds that he has no jurisdiction to entertain a suit he must return the plaint for presentation to the proper Court He must not go into the merits of the case; *Abdul Armith* v *Ponnambala*, 51 M. L. J. 158: 94 I. C. 550: A. I. R. 1926 Mad 679

Where, after a trial has begun, or even after it has concluded, it appears that the Court has not jurisdiction to hear the case, the plaint should be returned for presentation to the proper Court, and no additional Court-fees are required.—*Prabhakarbhat* v. *Vishwambhar*, 8 B. 313; *Visweswara* v. *Nair*, 35 M 567. *See* also, *Khimji Jivraju* v *Purshotam*, 7 M. 171; *Nagamma* v. *Subba*, 11 M 197, and *Kandu* v *Konda*, 8 M. 62.

Where an appeal is presented to a wrong Court, the proper procedure is to return the appeal for presentation to the proper Court; *Krishna Pattar* v. *Kavalappara*, 5 L W 294 · 38 I C 772

Where a portion of the claim is struck out in a superior Court, and the rest of the claim is within the jurisdiction of the inferior Court, the superior Court should return the plaint for presentation to the inferior Court.—*Krishna* v. *Ravi Varma*, 8 M. 384.

Where a plaint contains several causes of action and the Court has jurisdiction to try only one of them, the Court should return the plaint and strike out from the plaint that part of it which is beyond its jurisdiction, and the plaintiff can file another suit upon the cause of action so struck out; *Shankar* v *Balkrishna*, 28 Bom. L. R 521 94 I. C 783: A. I R 1926 Bom 283

If in a suit for ejectment, in which the defendant shows he is a mortgagee, the defendant consents to a decree for redemption, and the amount, secured by the mortgage exceeds the jurisdiction of the Court, the Court should not proceed further, but return the plaint for presentation to the proper Court; *Chandu* v. *Kombi*, 9 M. 208.

Want of Jurisdiction for Other Causes.—In a suit for immoveable property if the property is situate outside the jurisdiction of the Court in which the suit is filed it ought not to dismiss the suit, but should return the plaint to be presented to the proper Court, *Isak* v. *Khatija*, 23 B. 756.

Where a suit is wrongly filed in a Revenue Court, the Court should not dismiss the suit but return it for presentation to the proper Court; *Ramjas* v *Balu*, 44 A. 686 70 I C 98: A I. R. 1922 All. 424.

A suit was dismissed on the ground that none of the defendants (who were agriculturists) was residing within the local limits of the Court in which it was filed. *Held* that the suit should not have been dismissed, but the plaint should have been returned for presentation to the proper Court.—*Ladhaji Nathaji* v. *Hari*, 23 B. 679; *Ramjas Singh* v. *Balu Nandan Singh*, 44 A. 686.

A Judge of a Small Cause Court cannot proceed to try and dismiss a suit on the merits which he on the objection of the defendants, holds not to be cognisable by a Court of Small Causes, for, under Or. VII, r. 10, C. P. Code, it is incumbent upon him to return the plaint at any stage for presentation to the proper Court; *Padu Mahammad* v. *Chatra Nath*, 27 C. L. J. 590; 41 I. C. 203.

Where a plaint consists of a claim within the local jurisdiction of the Court and also a claim outside such jurisdiction, *e.g.*, where a suit is brought on two contracts only one of which was entered into the local jurisdiction of the Court, that portion of the plaint which relates to the matter outside the jurisdiction is to be deemed as though it was a distinct plaint by itself and returned under Or. VII, r. 10 for presentation to the proper Court; *Kishan Lal* v. *Ram Sundar*, 19 A. L J. 822

Return by Appellate Court.—Where the Appellate Court decides that the lower Court had no jurisdiction to entertain the suit, it should return the plaint to plaintiff for presentation to the proper Court —*Bai Mahkor* v. *Bulakhi Chaku*, 1 B. 538; *Dheraj Mahtab Chand* v. *Damoder Singh*, W. R. (1864) 65; *Shurut Soonduree* v. *Khemunkuree*, 5 W R., Act X, 87; *Abdulla* v. *Ashraf*, 7 C. L. J. 152. An Appellate Court is not bound to return the plaint under all circumstances where defect of jurisdiction appears.—*Yacoob* v *Mohan Singh*, 11 M. 482

The High Court, in second appeal, finding that the lower Court had no jurisdiction to try a case, directed the plaint to be returned for presentation to the proper Court.—*Babaji* v *Lakshmibai*, 9 B 266; *Kalian Dyal* v. *Kaliyan Narer*, 9 B. 259.

A Munsif dismissed a suit for improper valuation and want of jurisdiction. The lower Appellate Court affirmed the order, and directed the plaint to be returned This was not done *Held* that a second appeal would lie.—*Joynath* v. *Lall Bahadoor*, 8 C 126 · 10 C L. R. 146.

Where the first Court returned a plaint for want of jurisdiction, and the Appellate Court remanded the case, holding that the first Court had jurisdiction: *Held* that the lower Appellate Court's order was not appealable.—*Bindeshri* v. *Nandu*, 3 A. 456, and *Krishna Ram* v *Narsing*, 3 A. 855. But see, *Goor Bux* v. *Brijilal*, 26 C. 275 · 3 C W N. 243.

Provisions of Or. VII, R. 10 Mandatory.—The direction in Or. VII, r. 10 is mandatory and where in an ejectment suit by a land-holder, the Court arrives at the conclusion that the defendants tenants have permanent rights of occupancy, it is bound to return the plaints for presentation to the Revenue Court even though the plaintiff himself may not have asked for such return; *Ambalavana* v *Pichakutti Odayar*, (1920) M. W. N. 163: 10 L. W. 525.

Appeal.—An order under this rule returning a plaint for presentation to the proper Court, whether such order is made by the Court of first instance or by the Court of first appeal in the exercise of powers conferred by s. 107, is appealable; *Wahidullah* v. *Kanhaya Lal*, 25 A. 174; *Dalip Singh* v. *Kundan Singh*, 36 A. 58; *Nanda Kishore* v. *Abdur Rahman*, 42 A. 74: 52 I. C. 801; *Goor Bux* v. *Birj Lal*, 26 C. 275; *Chinnasami* v. *Karuppa*, 21 M. 234; but no second appeal lies from the order of the first

Appellate Court; *Nil Kanth* v. *Balvant*, 27 Bom. L. R. 635; A. I. R. 1925 Bom. 431: 88 I. C. 753.

Limitation.—The Court returning a plaint may grant a reasonable time for presentation to the proper Court, and if it is filed within that time, the suit will not be barred by limitation; *Nibaran* v. *S. C. Mukerjee*, 6 I. C. 637.

The combined effect of this rule and s. 14 of the Limitation Act is that when a plaint, which has been returned, is presented in a proper Court, the suit must be taken to be instituted on the date of such presentation; *Hedlot* v. *Karam*, 15 C L. J. 241.

Rejection of plaint.

11. The plaint shall be rejected in the following cases :—

(*a*) where it does not disclose a cause of action :

(*b*) where the relief claimed is undervalued and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so :

(c) where the relief claimed is properly valued, but the plaint is writen upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so :

(*d*) where the suit appears from the statement in the plaint to be barred by any law. [Ss. 53 & 54.]

COMMENTARY.

Clause (a) of this rule corresponds to the latter part of clause (*a*) of s. 53, clause (*b*) to clause (*a*) of s. 54, and clause (*c*) to clause (*b*) of s. 54 of the old Code with some verbal changes.

Clause (d) corresponds to clause (c) of s. 54 of the old Code, with this important alteration, that the words "*by any law*" have been substituted for the words "any positive rule of law" which occurred in the old section. The words "*any law*" would include codified as well as case law. But the words "*any positive rule of law*" meant only any codified law.

Clause (*d*) of s. 54 of the Code of 1882, has been omitted. The reason seems to be, that there is no express provision in the present Code for return of pleadings for amendment —Or. VI, r. 16, 17. *See* 44 C. 352.

Clause (a). "Where the plaint does not disclose a cause of action."—A suit is liable to be dismissed on the ground that the plaint discloses no cause of action, although such ground is taken in the argument of the pleader and not in the written statement of the defendant.—*Umamoyee Dassee* v. *Rajkristo Nundun*, 3 C. W. N. 220.

A plaint can be rejected under this section on the ground that it does not disclose any cause of action; but it is too late for an Appellate Court to reverse the decree solely on that ground; *Shah Ahmed* v. *Taree*, 7 C. 343.

The lower Court returned the plaint on the ground that it did not disclose a cause of action. *Held* that the plaint should have been rejected. —*Nagar Mal* v. *Macpherson*, 8 A. 766.

Where a plaintiff seeks relief on the ground of fraud, and the plaint contains general allegations, but no specific instances of the alleged fraud, it ought to be, immediately on presentation, rejected or returned for amendment, as it does not disclose a cause of action.—*Ganga Narain* v. *Tiluck ram*, 15 C. 533 (P. C.); *Krishnaji* v. *Wamaji*, 18 B. 144. *See* also, *Abdul Hossein* v. *Turner*, 11 B. 620.

When the plaint does not *sufficiently* disclose the cause of action, and a cause of action exists, the plaintiff should be allowed to amend his plaint. —*Luckee Prea* v. *Brindabun*, 12 W. R. 318. Where it appears that the plaintiff has misstated his cause of action, the plaintiff should be directed to amend his plaint.—*Daboo Jha* v. *Luwa Jha*, 11 W. R. 223.

Where in a suit for money, the real cause of action arose only after the institution of the suit, the Court should not reject the plaint and drive the plaintiff to filing a fresh suit, but pass a decree there itself; *Kanshi Ram* v. *Jaimal Singh*, 75 I. C. 562: A. I. R. 1923 Lah. 590.

Clause (b). " Where the relief claimed is undervalued."—If the relief sought is undervalued, the Court should require the plaintiff to value the relief he seeks, and then, if the plaintiff undervalues the relief, the Court can apply this section, and reject the plaint, but the Court cannot itself value the relief; *Balvantrao* v. *Bhima Shankar*, 13 B. 517.

If the relief claimed is undervalued, the Court should, in the first instance, require the plaintiff to pay the additional Court-fee, and on his failure to do so, the Court should not return the plaint for amendment under Or. VII, r. 10, but should reject it under this rule. If, however, the plaintiff pays the requisite Court-fee, and the Court finds that the value of the subject-matter exceeds its jurisdiction, it should return the plaint under Or. VII, r 10; *Kandasami* v. *Subbai*, 46 M L. J. 345: 77 I. C. 781. A. I. R 1924 Mad 646

The valuation of the relief in a suit for a declaration of right and for an injunction, rests with the plaintiff and not with the Court; *Sardar Singji* v. *Ganpat*, 17 B. 56 *See* also, *Harishankar* v. *Kali*, 32 C. 734: 9 C. W. N. 690, But see, *Bibi Umatul* v. *Nanji*, 11 C. W. N. 75, where it has been held that the Court has power to raise the valuation.

The decision of a first Court, that a plaint is undervalued, is binding upon the Court of Appeal, Reference, or Revision; but the first Court is not justified in rejecting the plaint without giving to the plaintiff an opportunity of supplying the additional stamp.—*Bai Anope* v. *Mulchand*, 9 B. 355 (2 B 145 and 219 *followed*). *See*, however, *Vithal* v. *Bal Krishna*, 10 B. 610, in which it has been held that the decision of a subordinate Court on a question of valuation is subject to revision.

Clause (c). " Where the plaint is insufficiently stamped."—Where the plaintiff fails to supply the requisite stamp-paper within the time fixed by the Court, the Court has power, under this rule, to reject the plaint even after it has been numbered and registered as a suit; *Brahmomoyi* v. *Andi Si*, 27 C. 376; *Padmanund* v. *Anant Lal*, 34 C. 20.

Where a plaint written upon paper insufficiently stamped is presented to the Court on the last day allowed by the law of limitation and the Judge to whom it is presented directs extra Court-fee to be paid, but fixes no time for payment, and the plaintiff pays the extra Court-fee though it be after the expiry of the period of limitation and the Court accepts it, the plaint should be treated as if the full fee had been paid in the first instance, and the suit cannot be held to be barred by limitation; *Surendra* v. *Atabuddin*, 26 C. W. N. 391: 70 I. C. 43: A. I. R. 1922 Cal. 234; *Gaya* v. *Awadh*, 1 Pat. L. J. 420: 37 I. C. 507. In a similar case, it was held by the Patna High Court that the acceptance of the deficit Court-fee, though tendered late, and the subsequent admission and registration of the plaint amounted to an exercise by the Court of its discretion to allow the deficiency to be paid on the day when it was tendered, and therefore, the suit was not barred by limitation, *Raghunandan* v. *Ram sundar*, 4 Pat. 190: 85 I. C. 172: A. I. R. 1925 Pat. 299. The Court directed a plaintiff to put in deficit Court-fees within a time fixed by it. He failed to do so, but put in the Court-fee on a subsequent date, and the plaint was admitted and registered. *Held* that the plaint might be regarded as presented on the date it was registered, with all the consequences that would follow in regard to limitation.—*Padmanand Singh* v. *Anant Lal*, 34 C. 20, F. B. 11 C. W. N. 38: 4 C. L. J. 421.

Where a plaint is presented with a deficit Court-fee, the Court is bound to fix a time within which the deficit shall be paid, and has no discretion to refuse to fix it. The Court also has discretion to extend the time already fixed to any limit, and if the fee is paid within the time fixed, the plaint shall stand good as on the day of presentation. *Basavayya* v. *Venkatappayya*, (1926) M. W. N. 341: A. I. R. 1926 Mad. 676.

The date of the institution of the suit should be reckoned from the date of the presentation of plaint, and not from that date on which the requisite Court-fees are subsequently put in, *Moti Sahu* v. *Chhatri Das*, 19 C. 780. Followed in *Rajkishori* v. *Madan*, 31 C. 75, and in *Dhondiram* v. *Taba Savodan*, 27 B. 330. *See* also, *Hari Mohun* v. *Naimuddin*, 20 C. 41, and *Surendra* v. *Kunja*, 27 C. 814: 4 C. W. N. 818; *Gauranga* v. *Botokrishna*, 32 M. 305 F. B. *See*, however, *Venkatramayya* v. *Krishnayya*, 20 M. 319; *Assan* v. *Pathumma*, 22 M. 494, *Bishnath* v. *Jagarnath*, 13 A. 305 and *Brahmomoyi* v. *Andi Si*, 27 C. 376.

For the purposes of limitation, an appeal is preferred when the memorandum is filed, and not when (where the memorandum is insufficiently stamped, and is returned in order that the deficiency may be supplied) it is again presented. An Appellate Court should fix a time within which the deficiency is to be supplied.—*Sheo Partab* v. *Sheo Gholam*, 2 A. 875. *See* also *Jagannath* v. *Lalman*, 1 A. 260.

Where a plaintiff in the initial stage of the litigation abandons a portion of his claim he is not compellable to pay Court-fees in respect of the portion abandoned under a penalty of having the whole of his suit

dismissed.—*Ram Prosad* v. *Bhiman*, 27 A. 151. But see, *Vallie* v. *Mahmad*, 16 Bom. L. R. 763; *Midnapur Zem. Co.* v. *Secy. of State*, 44 C. 352.

Where the plaintiff sues in the alternative for one of two reliefs, the larger of the two reliefs sought determines the amount of stamp.—*Kashi Nath Narayan* v. *Govinda Bin*, 15 B. 82. (6 B. 302. *followed*).

An appeal lies against an order rejecting a plaint on the ground of its being insufficiently stamped.—*Ajoodhya* v. *Gunga*, 6 C. 250: 6 C. L. R. 567. *See* also, *Muhammad Sadik* v. *Muhammad Jan*, 11 A. 91: *Kanaran* v. *Komappan*, 14 M. 169; *Omrao Mirza* v. *Jones*, 12 C. L. R. 148; *Mt. Sada Kaur* v. *Buta Singh*, 80 P. R. 1914: 25 I. C. 565.

Where a memorandum of appeal is insufficiently stamped, it is competent to the Appellate Court to levy the deficiency.—*Chennappa* v. *Raghunath*, 15 M. 29. *See* also, *Parshotam Lal* v. *Lachman Das*, 9 A. 252.

Where the plaintiff fails to pay the required Court-fee as ordered by the Court, the suit should not be dismissed but the plaint should be rejected; *Nanak* v. *Jiwan*, 237 P. L. R. 1914: 25 I. C. 435.

Provisions of This Rule are Mandatory.—The provision of Or. VII, r. 11, are mandatory and they require that where a plaint is written on paper insufficiently stamped, the Court is bound to give the plaintiff time to make good the deficiency (38 B. 41; 2 Pat. L. J. 74 *refd. to*). The fact that the objection is heard at a time subsequent to the registration of the suit is immaterial because the provisions of the rule can be brought into operation at any stage of the suit, *Radha Kanta* v. *Debendra*, 49 C. 880 (12 A. 553: 47 C. 376: 34 C. 20 *relied on*)

A Court is not justified in rejecting a plaint under Or. VII, r. 11 unless and until it has given the plaintiff an opportunity to supply the deficit Court-fee within a time fixed for the purpose and the latter has failed to comply with the order; *Jiwan Das* v *Khushabi Ram*, 27 P. L. R. 1917: 39 I. C. 766

The provisions of Or. VII, r 11 (*c*) are mandatory, where the plaintiff fails to supply the deficit Court-fee within the time fixed, the plaint must be rejected; the Court has no jurisdiction to allow the plaint to be amended by omitting the prayer in respect of which the extra Court-fee was directed to be paid; *Midnapur Zemindary Co* v. *Secy of State*, 44 C. 352: 21 C. W. N. 834. *See* also, *Vallie* v. *Mahmad*, 16 Bom. L. R. 763.

Rejection of Plaint in Part.—This rule does not justify the rejection of any particular portion of a plaint; *Raghubans* v *Jyotis*, 29 A. 325.

Cl. (c). Extension of Period Fixed for Payment of Deficit Court-fee.—Under Or. VII, r. 11, a Court has power to extend the period originally fixed by it for the payment of the deficit Court-fees. Such extension may be granted by the Court even more than once, *Nasir Mandal* v. *Satish Chandra*, 51 I. C 154 If such deficiency is made good within the time prescribed, the fact that in the meantime limitation had expired would not affect the suit, *Ram Dial* v *Sher Singh*, 45 A 518 21 A. L. J 387: 74 I. C. 358.

When the party pays the deficit Court-fee beyond the time fixed and has not asked the Court to extend the time for payment, but the Court

nevertheless excuses the delay and receives the fee, the only reasonable interpretation is that the Court has implicitly, although not explicitly, extended the time.—*Gopal* v. *Rajendra*, 20 C. W. N. 615; *Thangathammal* v. *Iravatheswara*, (1915) M. W. N. 228: 28 I. C. 504; *Raj Kishori* v. *Madan Mohan*, 31 C. 75; *Basavayya* v. *Venkatappayya*, (1926) M. W. N. 341: A. I. R. 1926 Mad. 676.

The obligation cast upon a Court by s. 4 of the Limitation Act to dismiss a suit, although limitation has not been set up as a defence, is only in cases where the Court is in a position to dismiss the whole claim or suit; *Kandasamy* v. *Annamalai*, 28 M. 67.

Where a suit appears, from statements in the plaint, to be barred by the law of limitation, the Court may, in a proper case, without rejecting it, allow it to be amended at the hearing; *Gunnaji* v. *Makanji*, 34 B. 250: 8 I. C. 159.

Where a plaint in a civil Court alleges facts which, if true, would show that the dispute or the matter involved in the suit was one to which s. 93 or s. 95 of Act XII of 1881 would apply, the plaint should be rejected under Or. VII, r. 11; *Tarapat* v. *Ram Ratan*, 15 A. 387.

An action for defamation was brought against a Judge for words used by him whilst trying a cause in Court on the allegation that the words were false, malicious and without reasonable cause. The District Judge rejected the plaint under Or VII, r. 11 as barred under Act XVIII of 1850. *Held* that the order was right; *Ramannayar* v. *Subramanya Ayyar*, 17 M. 87.

The provisions of s 80 are imperative. Where they are not complied with, the plaint should be rejected under Or. VII, r 11; *Bachchu Singh* v. *Secretary of State*, 25 A 187

This rule does not apply where there is no statement in the plaint which suggests that the suit is barred, *Ratan* v *Secy. of State*, 18 C. W. N. 1340.

Where the plaintiff questions the propriety of orders (under Reg. III of 1872) passed by the Commissioner as *ultra vires*, a plaint cannot be rejected under Or VII, r 11; *Nawab Singh* v. *Charan Rana*, 6 C. W. N. 411.

If a suit appears from the statement in the plaint to be barred by any law, the proper course is to reject the plaint and not to dismiss the suit; *Prankrishna* v. *Kripanath*, 21 C. W. N 209 . 29 C. L. J 17.

A suit which is bad for multifariousness falls under this clause, and so if a plaint is rejected on this ground as not amended within the time allowed, the plaintiff is not precluded from bringing a fresh suit on the same cause of actoin merely on account of such rejection; *Sewan Singh* v. *Surain Singh*, A. I. R. 1927 Lah. 83.

At What Stage the Plaint can be Rejected.—A plaint can be rejected at *any* stage of the suit, even after it has been registered, *Kishore Singh* v. *Sabdal Singh*, 12 A. 553; *Venkatesha* v. *Ramasami*, 18 M. 339; *Padmanund* v. *Ananta Lal*, 34 C. 20 F. B.: 11 C. W. N. 38: 4 C. L. J. 421.

For a contrary view, see, *Habibul* v. *Mahomed Reza*, 8 C. 192; *Valiya Kesava* v. *Suppan Nair*, 2 M. 308 and *Bhawan* v. *Zahur*, 29 I. C. 410.

The powers conferred by this rule are intended to be exercised only before the final disposal of the case; *Mahadei* v. *Ram Kishen*, 7 A. 528.

An Appellate Court has the same powers of rejecting a plaint under Or. VII, r. 11 as the Court of first instance, *Vithoba Yadeo* v. *Sunabhan*, 69 I. C. 554.

Rejection of Plaint on Other Grounds.—The words "rejecting the plaint" in s. 2, are not limited to cases provided for in Or. VII, r. 11; *Beni Ram* v. *Ram Lal*, 13 C 189.

A and *B*, worshippers at a temple, obtained sanction under s. 18 of Act XX of 1863 for the removal of the managers, on the ground of breach of trust and for damages. They sued to remove the managers without claiming any damages. *Held* that, as the suit instituted differed from the one for which sanction was given, the plaint was properly rejected.—*Srinivasa* v. *Venkata*, 11 M. 148.

A suit was brought against several persons claiming under different titles. The Court, after inquiry, gave the plaintiff the option of amending the plaint by withdrawing his claim against any particular sets of defendants; but the plaintiff elected to go to trial on the suit as brought, and it was dismissed. *Held* that the proper order of the Court should have been to reject the plaint and not to dismiss the suit on the ground of misjoinder.—*Sudhendu Mohun* v. *Durga Dasi*, 14 C. 435.

Under this rule the Court cannot reject a plaint in part.—*Raghubans* v. *Jyotis*, 29 A. 325.

There is no provision in the Code for the dismissal of a suit on the ground that the land in suit has not been sufficiently identified.—*Kazem* v. *Danesh*, 1 C. W. N. 574 *See* also, *Durga* v. *Kalachand*, 7 C. W. N. 615.

The mere fact that there is a misjoinder of parties and of causes of action does not justify rejection of a plaint; *Shahabuddin* v. *Anjuman*, 248 P. W. R. 1911: 10 I. C. 212

A Court can reject a plaint filed by a next friend on behalf of a minor, on the ground that the suit was not instituted in the interests of the minor; *Lakshmanan* v. *Lakshmanan*, 1 L. W. 875: 25 I. C. 738.

The want of a proper signature of the plaintiff on the plaint is not included in Or. VII, r. 11, among the circumstances which necessitate the rejection of a plaint; *Duragir* v. *Kollu*, 7 N. L. R. 33: 10 I. C. 731.

Rejection of Plaint When Proper.—A Court has no jurisdiction either to dismiss a suit or reject a plaint merely because the plaint is defective in that it does not comply with a provision of the law. The proper procedure is to call on the plaintiff to cure the defect and on his failure to do so, the Court may proceed to decide the suit forthwith and to dismiss it under Or. XVII, r. 3 or it may reject the plaint under its inherent powers; *Maharaja Sir Rameswar Singh* v. *Sadanand*, 1 Pat. L. T. 188: 55 I. C. 445. Where a plaintiff who is directed to produce a certain docu-

ment by a certain time fails to do so, he cannot put it in as evidence later without leave of Court, but this does not entitle the Court to reject his plaint—neither Or. VII, r. 11 nor Or. XVII, r. 3 applies to such a case; *Mahomed Baksh* v. *Malik Musa*, 76 I. C. 254.

Appeal.—An order rejecting a plaint is a decree and is under s. 2 (2 therefore appealable as such; *Musst. Sada Kaur* v. *Buta Singh*, 265 P. L R. 1914: 25 I. C. 565. It has been held by the Patna High Court ii *Chandra Mani* v. *Basdeo Narain*, 4 Pat. L J. 57. 49 I. C. 442 that ar order rejecting a plaint is not appealable when such order is based on a question of valuation *pure and simple*, but when the order necessarily involves a decision of the category or class under which a suit falls, even though it incidentally decides a question of valuation, the order is appealable.

Revision.—The Calcutta High Court has held that the decision of the Court of first instance, on the question of the correctness or incorrectness of the valuation put by the plaintiff on his claim, is not open to revision on the ground that it does not fall under any of the three clauses contained in s. 115; *Falkner* v *Mirza*, 29 C W N 627. 86 I. C 853: A. I R. 1925 Cal 814 But it has been held by the Patna High Court in *Mani Lal* v. *Durga Prasad*, 3 Pat 930 A I R. 1924 Pat 678, that an order of the Court of first instance demanding additional Court-fee, which involves a question as to the jurisdiction of the Court to try the suit, is open to revision.

Review.—An order under clause (*c*) of this section rejecting a plaint is open to review, *Rameshwardhari* v *Sadhu*, 2 Pat. 504. 72 I. C. 629: A. I. R 1923 Pat. 354

In a proper case, an order under clause (*b*), rejecting a plaint, is also open to review, *Adit Prasad* v *Ramharakh*, 4 Pat. 180. A I. R. 1925 Pat 435: 91 I. C 213.

Rejection of Plaint for Non-payment of Court-fee—Application for Restoration under Or. IX, R. 9, Not a Proper Remedy.—Where a plaint has been rejected by a Court for non-payment of Court-fees and the order has been signed by the Court, the order operates as a decree and the Court has no power to restore the suit undr Or XI, r 9, C P. Code, or under its inherent powers under s 151 The proper remedy of the plaintiff is by way of an application for review under Or XLVII, r 1; *Rameshwardhari Singh* v *Sadhu Saran*, 2 Pat 504. 4 Pat L T. 261.

12. Where a plaint is rejected, the Judge shall record an order to that effect with the reasons for such order.

Procedure on rejecting plaint.

[S. 55.]

COMMENTARY:

Where a memorandum of appeal is summarily rejected, whether under Or. XLI, r. 3, or under Or. VII, r. 11, read with Or. XXII, r. 11, the reasons for such rejection should be recorded —*Rudra Prasad* v. *Baij Nath*, 15 A. 367.

13. The rejection of the plaint on any of the grounds

Rejection of a plaint for non-appearance of plaintiff in Mamlatdar's Court under Bombay Act III of 1876 does not preclude the plaintiff from bringing a fresh suit in the Civil Court on the same cause of action.—*Raja Ram* v. *Ganesh Hari*, 21 B. 91; *Ram Chandra* v. *Narsinhacharya*, 24 B. 251. *See*, however, *Ram Chandra* v. *Bhikabai*, 6 B 477.

The "dismissal" of a suit under s. 10 or s. 11 of the Court-fees Act has the same effect as that provided by Or. VII, r. 13 in the case of "rejection" of a plaint under Or. VII, r. 11.—*Balkaran* v. *Gobind*, 12 A. 129.

DOCUMENTS RELIED ON IN PLAINT.

14. (1) Where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

Production of document on which plaintiff sues.

(2) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint [S. 59.]

List of other documents.

COMMENTARY.

This rule exactly corresponds to s 59 of the old Code Its object is to prevent the dishonest fabrication of documents and to give the opponent notice of the documents relied on by the plaintiff in support of his claim. The penalty for not complying with this rule is that prescribed in r. 18. In the recent Privy Council case of *Sulaiman* v *Biyaththumma*, 21 C. W .N. 553: 32 .M L. J. 137, it has been held that the High Court should not have treated a Razi petition, as *creating rights*, where the plaintiff did not produce it in Court when he presented his plaint, or which or a copy whereof he did not deliver to be filed with the plaint as required by this rule. The trial Court had treated the document merely as *a piece of evidence*, and it is pointed out by the Privy Council that had it been put forward by the plaintiff, as creating rights, a line of defence requiring

evidence might have been adopted which was unnecessary so long as it was used merely as a piece of evidence.

The object of Or. VII, r. 14 is to shut out suspicious documents and to afford as little opportunity as possible for the production of false and fabricated documents in Court. If however it is clear to the Court that, in spite of the documents not having been filed or entered in the list along with the plaint, the document cannot be said to have been fabricated on the face of it, there is no reason why the party should be debarred from using such a document in Court; *Sukan Sahu* v. *Jhari Mahto*, 60 I. C. 372.

A party who sues upon a certain document must produce it at the time he files the plaint and not spring upon the opposite party a considerable time after when the suit comes on for hearing, *Gangadhar Mahadev* v. *Krishnaji Vishram*, 44 B. 625: 22 Bom. L. R. 819.

Under Or. VII, rr. 14, 17 and 18, C. P. Code, it is incumbent on a plaintiff to produce in Court the accounts or other documents on which he bases his claim when the plaint is filed, and if he intends to rely upon any other documents as a piece of evidence in the case, he is bound to produce it at the first hearing as is required by Or. XIII, rr. 1 and 2, C. P. Code; *Ram Singh* v. *Ram Chand*, 9 P. L. R. 1920. 6 P. W. R. 1920: 57 I. C. 185.

A defendant is entitled under the Madras High Court rules, to be furnished with a copy of documents sued on, which are deposited with the plaint.—*Haji Mahomed* v. *Subba Naidu*, 21 M. 490.

This rule requires a plaintiff to annex to his plaint a list of documents on which he intends to rely, *Khetsidas* v. *Narotumdas*, 32 B. 152.

It is not obligatory on the plaintiffs, unless they are called upon to do so, to produce documents which are not such as ought to have been produced in Court when the plaint was presented.—*Talewar Singh* v. *Bhagwan Dass*, 12 C. W. N. 312. 8 C. L. J. 147 (1 B. L. R. 120: 21 W. R. 42 *followed*).

In probate cases, it is not obligatory upon creditors to file a list of the documents with the application for probate. If the proceeding becomes contentious, leave should be given under Or. VII, r. 18 to put them in and to prove them.—*Surendra Nath* v. *Kasimoni Debi*, 1 C. L. J. 49-*n*.

Failure to Produce Documents.—As regards the penalty for non production of documents mentioned in this rule, *see* Rule 18, below. In such a case, the plaint should not be rejected, *Gopal* v. *Vishnu*, 22 B. 971.

Secondary Evidence can be Given where Document is Lost After Production.—Where a promissory note happened to disappear from the file after it was produced and delivered to the Court by the plaintiff as required by this rule, it was held by the Judicial Committee that the plaintiff was entitled to offer secondary evidence under s. 65 (2) of the Evidence Act without showing how it disappeared; *Tulsi Ram* v. *Ram Saran*, 27 Bom. L. R. 777: 86 I. C. 552: A. I. R. 1925 P. C. 80.

"**He shall enter such documents in a list.**"—A plaintiff is not bound to list any document in his plaint as relied upon, unless he knows of the existence of that document when he files the plaint; *Lahanu* v. *Matiram*, 63 I. C. 968. A document not listed with the plaint may not be admitted by Court at any subsequent stage; *Jiwan* v. *Nawab*, 8 Lah. L. J. 346: 95 I. C. 258: A. I. R. 1926 Lah. 527.

Statement in case of documents not in his possession or power.

15. Where any such document is not in the possession or power of the plaintiff, he shall, if possible, state in whose possession or power it is. [S., 60.]

Suits on lost negotiable instruments.

16. Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost, and an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may pass such decree as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delieverd a copy of the instrument to be filed with the plaint. [S. 61.]

COMMENTARY.

The endorsee of a cheque sued the endorser alleging that the cheque had been lost, and that the defendant refused to give a duplicate of it, and claiming a duplicate of it, or the refund of the money paid on that cheque. *Held* that the plaint should be amended by joining the drawer as a defendant; *Baldeo Prasad* v. *Grish Chandra*, 2 A. 754.

Under this rule a plaintiff basing his claim on a lost *hundi* must furnish security against possible claims; *Durga* v. *Kanshi*, 166 P. L. R. 1912.

Production of shop book.

17. (1) Save in so far as is otherwise provided by the Banker's Books Evidence Act, 1891, where the document on which the plaintiff sues is an entry in a shop-book or other account, in his possession or power, the plaintiff shall produce the book or account at the time of filing the plaint, together with a copy of the entry on which he relies.

Original entry to be marked and returned.

(2) The Court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification; and after examining and comparing the copy with the original, shall, if it is found correct, certify it to be so and return the book to the plaintiff and cause the copy to be filed. [S. 62.]

COMMENTARY.

"On the suggestion of the British Indian Association the word 'account' has been substituted for the word 'book'."—*Report of the Select Committee.*

Where copy of extract from account books was annexed with the plaint, but the copy was not compared and verified by the production of the originals, the plaintiff will not be able to put in that account book, without the special leave of the Judge.—*Gopal* v *Vishnu*, 22 B. 971.

Inadmissibility of document not produced when plaint filed.

18. (1) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(2) Nothing in this rule applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory. [S. 63.]

COMMENTARY.

The object of these rules is to place a check upon the fabrication of evidence They are not intended to prevent a person from commencing his suit until he has collected all his documentary evidence

When a plaintiff can satisfy the Court at the hearing that some document, on which he desires to rely, was not presented with the plaint, because he was ignorant of its existence at the time, the Court will probably allow it to be received as evidence —*Campbell* v *Keith*, 1 Hyde 287, *Ritchie, Stewart and Co* v. *Gladstone, Wyllie and Co*, 1 I. J. (O. S.) 125; *Mohabeer Dass* v. *Lalla Dass*, 1 W R 12

It is for the Court of first instance to decide whether the documents which ought to have been mentioned in the original list, or ought to have been produced earlier, were not so produced for good and sufficient reason. —*Talewar Singh* v. *Bhagwan Dass*, 8 C. L. J. 147: 12 C. W. N. 312.

Notwithstanding the omission of the plaintiff to enter a document in a list annexed to the plaint the Court ought to receive the document, which is a registered one in evidence under this rule; *Mahadevappa* v. *Srinivasa Rau*, 4 M. 417 (418).

If there is no doubt as to the existence of the document on the date of the suit, the Court should not refuse to accept it, because it was not filed with the plaint.—*Deridas* v. *Pirjada*; 8 B. 377; *see also* 13 C. W. N. 797; *Jogunder Kumar* v. *Ananda*, 44 I. C. 21. But the Court may in such a case refuse to receive the document in evidence if it is produced

at a very late stage of the proceedings, *e.g.*, ten years after the institution of the suit and only on the day before the judgment was delivered.—*Gangadhar* v. *Krishnaji*, 44 B. 625; 57 I. C. 598.

When documents are admitted in evidence by the lower Court, the appellate Court cannot reject, but is bound to consider them.—*Minakshi* v. *Velu*, 8 M. 373; *Haji Begam v. Jawahir*, 11 A. L. J. 537.

An Appellate Court has no right to refuse to admit on general grounds a document which has been received and read in the Court below without objection.—*Akbur Ali* v. *Akram Sen*, 6 C. 666: 7 C. L R. 497; *Mohabeer Dass* v. *Lalla Roy*, 1 W. R. 12; *Gour Surn* v. *Kanhya Singh*, 2 W. R. 237; *Crawley* v. *Maling*, 1 Agra 63; *Hur Chunder* v. *Wooma Soonduree*, 23 W. R. 170; *Roy Luchmeeput* v. *Moshuruff Ali*, 25 W. R. 80; *Kashee Nath* v. *Mohesh Chunder*, 25 W. R. 168; *Nem Roy* v. *Lalmun Roy*, 25 W. R. 376.

Where leave was granted by the first Court under this rule for the production of a document at a late stage: *Held*, that the Appellate Court ought not to reverse the judgment on that ground alone, unless it was satisfied that the grant of leave had affected the merits. Policy of this rule pointed out; *Mewa Lal* v. *Kumeri*, 13 C. W. N 797. 10 C. L. J. 33.

A document which is in the possession of a third party, and is called for in order to rebut a plea raised by the defendant, may be produced in the course of the trial; *Gappamal* v. *Piarilal*, 33 P. W. R. 1916.

"Or handed to a witness merely to refresh his memory."—Where in order to support the case of the plaintiff that he was born on a particular date, a witness produced an almanac and horoscope, and it was rejected on the ground that it had not been entered in the list of documents as required by Or. VII, r. 14 of the C P. Code: *Held* that the order rejecting the document was erroneous It was not one to be relied upon as a probative document in itself, but it was a record made by the witness at the time, to which he was entitled to refer for the purpose of refreshing his memory; *Goswami Banwari Lal* v. *Mahesh*, 23 C W. N 577 45 I. A. 284 P. C.

ORDER VIII.

WRITTEN STATEMENT AND SET-OFF.

1. The defendant may, and, if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence. [S. 110.]

Written statement.

COMMENTARY.

This rule corresponds to s. 110 of the old Code. Material alterations have been made as will appear from a comparison with the old section which is reproduced here: "*The parties may, at any time before or at the first hearing of the suit, tender written statements of their respective cases, and the Court shall receive such statements and place them on the record.*"

Under this rule it is not obligatory upon the defendant to put in a written statement; but if required by the Court he is bound to put in his written statement at or before first hearing, or within such time as the Court may permit.

A written statement tendered by a party either before or at the first hearing of the suit is exempted from Court-fee; *Nagu* v. *Yeknath*, 5 B. 400; *Cherag Ali* v. *Kadir Mahomed*, 12 C. L. R. 367.

2. The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality. [New.]

New facts must be specially pleaded.

COMMENTARY.

This rule is new. It has been borrowed from English Or. XIX, r. 15. Full particulars of fraud, undue influence, etc., must be stated. *See notes under Order VI.*

It is open to a defendant to plead tenancy and limitation in the alternative.—*Keamuddi* v. *Hara Mohan*, 7 C. W. N. 294. *See also*, *Dinomony* v. *Doorga*, 21 W. R. 70; *Ruttonmonee* v. *Komola Kanth*, 12 W. R. 364; *Tekaitni Gowra Kumari* v. *Bengal Coal Company*, 13 W. R. 129, affirmed by P. C. in 19 W. R. 252; *Maidin Saiba* v. *Nagapa*, 7 B. 96; *Budesab* v. *Hanmanta*, 21 B. 509. But see, *Watson and Company* v. *Shurut*

Soonderee, 7 W. R. 395, where it has been held that the defendant admitting himself the plaintiff's tenant is precluded from pleading limitation or adverse possession.

It is well established that there can be adverse possession of a tenant's limited interest in property as well as of the full title as owner. A tenant is not precluded by an admission of tenancy from showing that the nature of the tenancy asserted by him to the knowledge of the landlord has been for the period prescribed by the Limitation Act *pro tanto* adverse to the right to evict either at will or on notice given.—*Thakore Fatesingji* v. *Bamanji*, 27 B. 515. *See* also, *Bagdu* v. *Raja Durga Prosad*, 9 C. W. N. 292; *Ishan* v. *Ramranjan*, 2 C. L. J. 125: 27 A. 18; *Ichharan* v. *Nilmoney*, 35 C. 470 and *Krishna Mohan* v. *Takani Prasad*, 12 C. W. N. 195*n*.

It is open to the defendant to set up as a defence that he is the owner of the property in dispute, and if not, he has a right of easement over it; *Purnendu* v. *Dijendra*, 8 C. L J 289.

A defendant may, by way of equitable defence, set up the invalidity of a deed, although his right to have it avoided by a separate suit has become time barred; *Lakshmi* v *Roop*, 30 M. 169; *Raghu* v *Gobind*, 28 B. 639.

A defendant in possession whose right to sue to set aside a sale is barred by limitation, may set up the invalidity of such a sale as a defence.—*Venkatachalapathi* v. *Robert Fischer*, 30 M 444; *Ramanasari* v. *Muthusami*, 30 M. 248 *See* also, 14 B 222, 17 M 255, 12 C. W N. 60, 32 C. 546, 2 C L J. 73 and 2 C L J. 599.

The rule that the plaintiff must be held to the state of facts and equities alleged and pleaded by him in his plaint, or involved in or consistent therewith, applies also to the case made on the pleadings by a defendant.—*Chova Kara* v *Isa Bin*, 1 B. 209 (11 M I. A 7 and 468, *referred to*).

A defendant is not precluded from availing himself of any equity which might arise out of the facts proved at the trial, merely because he has not raised that equity on the face of his written statement.—*Gour Chunder* v. *Greesh Chunder*, 7 W R. 120

In a suit for wrongful dismissal, in which the defendants pleaded justification by reason of the plaintiff's misconduct. *Held* that the defendants at the hearing could not give evidence of a transaction involving instances of misconduct not set forth in their written statement —*Muncheshaw* v. *New Dhurumsey Spinning and Weaving Co.*, 4 B 576

Pleas of estoppel of whatever nature are not barred by this rule even if not set up in the written statement. A plea of *res judicata* not put forward in the written statement, nor in the grounds of appeal in the lower Court, may be raised with the leave of the Court under Or XLI, r 2; *Kishen Dyal* v *Mohomed Amirul*, 19 C W. N 912.

Where a point is not specifically taken in the written statement but was decided in the lower Courts without objection. *Held* that the parties cannot object to it in second appeal —*Kannu* v. *Gopalan*, (1914) M. W. N. 883.

A question cannot be raised for the first time in appeal, specially when the question raised depends upon evidence for its determination.—*Hanmant Ram* v. *Shankar Lal*, 95 I. C. 573: 28 Bom. L. R. 518.

Order VIII, r. 2 cannot be raised as overriding the established practice, *viz.*, that effect should be given to a plea of limitation raised at the hearing, even though raised for the first time; *Dhanji Jairam* v. *Secy. of State for India*, 45 B. 920: 23 Bom. L. R. 279.

"Facts showing illegality."—In a suit on a bond, the illegality of consideration must be specifically pleaded. Where the defence in a suit on a bond was want of consideration, the Court should not entertain the plea that the consideration was unlawful (stifling criminal prosecution) if such plea is raised for the first time in the argument of the Counsel at the close of the case; *Nur Ilahi* v. *Mawaz Khan*, 7 Lah L. J. 80: 86 I. C. 683: A. I. R 1925 Lah 345

Defence of Limitation if to be Allowed to be Raised in Appeal.—A question of limitation cannot be raised for the first time in appeal; *Bhusan Chandrá* v. *Narendra Nath*, 32 C L J. 236 60 I C 280 The general rule is that points of limitation should not be allowed to be raised for the first time in appeal when they involve a decision upon questions of fact; *Secretary of State* v *Ananda Mohan* 34 C L J 205 *See also*, *Sheikh Haji Sadakah Khan* v *Janaki Nath*, 69 I C 194

Denial to be specific.

3. It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

[New.]

COMMENTARY.

"Deal specifically with each allegation of fact."—This rule is new. It has been borrowed from English Or XIX, r 17 Under the new rule, it is no longer sufficient for the defendant to deny generally the facts alleged by the plaintiff He must take each such fact separately and either admit it, or deny it, or say that he does not admit it. He must make it perfectly clear how much he admits and how much he denies. No denial is necessary as to the damages claimed or their amount. Nor need matters of law be traversed

The expression "not admitted" is a specific denial within Or. VIII, r. 3; *Balaghat Hussain* v. *Abid Baksh*, 95 I C 1

No Court ought to enforce an illegal contract, if the illegality is brought to its notice; it matters not whether the defendant pleaded illegality or not; *Alice Mary Hill* v *W. Clarke*, 27 A 266

Where the defendants admitted execution of a document, but did not plead fraud or undue influence, and no issue was raised regarding the same, it is not open to Courts to find that the defendants were not aware

of the contents of the document; *Sadanand Tewari* v. *Deb Nath*, A. I. R 1922 Pat. 154: (1922) Pat. 184.

"Except damages."—In a suit for damages, it is not necessary for a defendant to deny the damages specifically. If he pleads generally to damages, it is sufficient; *Ross & Co.* v. *Scriven*, 43 C. 1001, 34 I. C. 235.

4. Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances. [New.]

Evasive denial.

COMMENTARY.

This rule is new. It has been borrowed from English Or. XIX, r. 19.

Evasive Denials.—It is the duty of defendants to particularize in their defence all points either of law or of fact which they desire to take. Evasive denials are deprecated and the points of defence must be stated specifically and clearly; *Sharifun Mandalin* v *Feradone Khatun*, A. I. R. 1923 Cal. 578.

5. Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:

Specific denial.

Provided that the Court may in its discretion require any fact so admited to be proved otherwise than by such admission. [New.]

COMMENTARY.

This rule is new. It has been borrowed from English Or. XIX, r. 13, which, however, operates only with respect to *material* allegations. See *Taylor on Evidence, 10th Ed, Vol I, p* 580. The proviso to this rule exactly corresponds to the proviso to s. 58 of the Indian Evidence Act.

"They have, however, endeavoured to modify the rigour of the rules by providing, in accordance with s 58 of the Indian Evidence Act, that the Court may, notwithstanding the absence of any specific denial, require any fact to be proved by the party who relies upon it."—*Report of the Special Committee.*

The doctrine of admission by non-traverse was not strictly applicable in India as will appear from the following cases.

Scope of the Rule.—Or. VIII, r 5, C. P Code is limited in its application to cases where there is in fact a pleading of the defendant before the Court. Or. VIII, r 5 is really a rule of construction of the defendants' pleadings This rule does not apply where there is no written statement at all; *Ross & Co* v *Scriven*, 43 C 1001 20 C W N 1192.

Admission of Fact in Pleadings.—A failure by the defendant to deny an allegation in the plaint is not conclusive in favour of the plaintiff, for, under the proviso, the Court may still call upon the plaintiff to prove his allegations, *Satyesh* v *Monmohini*, 19 C L J 518

Pleadings in India should not be construed with the same strictness as in England This is quite apparent from the proviso to this rule as well as the proviso of section 58 of the Evidence Act Following this principle, the defendant was in the following cases allowed to traverse, at the hearing of the suit, allegations of fact made in the plaint which he had omitted to specifically traverse in his written statement.—*Natha Singh* v *Jodha Singh*, 6 A 406, *Madho Persad* v *Gajadhar*, 11 C. 111; *Vir Singh* v *Bhola Singh* 6 Lah L J 358 A I R 1924 Lah. 744.

A defendant must be taken to admit all material allegations in the plaint which he does not traverse —*Vehnath* v *Gulab Chand*, 1 Bom H C 85, *Ahmehdee* v *Dabee* 18 W R 287 But the mere fact that an allegation is not traversed does not relieve a plaintiff from the burden of proving his case *Mulji* v *Anupram*, 7 Bom H C 136; *Hameedoollah* v. *Gendee*, 17 W R 171

The strict rule that averments not traversed must be taken to be admitted is not applicable to pleadings in Indian Courts —*Deo Nundon* v *Meghumahton* 11 C W N 225 5 C L. J 181 [9 M I A. 287 (305) *followed*]

In this country a very high standard of pleadings cannot be expected. The absence of specific denial in defendant's written statement cannot therefore be construed as an admission of the plaintiffs' claim; *Najamia* v *Abdul Kadar*, 45 I C 878.

Where facts are alleged by the plaintiff and not denied in the written statement or put in issue at hearing it might be presumed that the defendant did not deny those facts; *Apaji Patil* v. *Apa*, 26 B. 735.

In a suit to set aside a sale on the ground of fraud, the defendant could not be held, by reason of his not having denied it, to have admitted the truth of the plaintiff's allegation as to the date on which knowledge of the fraud was acquired; *Natha* v. *Jodho*, 6 A. 406

Order VIII, r 5 is really a rule of construction of the defendant's pleading It does not justify the passing of a decree on no evidence where there is no written statement; *Ross & Co* v. *Scriven*, 43 C. 1001: 20 C. W. N. 1192.

In a suit to recover money the plaintiff relied in the plaint on a letter written by the defendants as saving limitation. The defendants denied

that the letter saved limitation. *Held* that in the absence of any specific denial the letter must be taken as admitted; *Lakshmi* v. *Chimniram*, 18 Bom. L R. 948: 41 B. 89.

Where in a suit by a reversioner to recover possession of properties alienated by the widow of a deceased Hindu, the defendants in their written statement pleaded that they did not admit the date on which the widow died as stated in the plaint and also took the further plea that the suit was barred by limitation and an issue was framed by the Court as to the date of the widow's death, it was held that there was no admission by the defendants of the date of widow's death as stated in the plaint, merely because they did not state in their written statement the date which according to them was the correct date of the widow's death; *Rajagopala Chariar* v. *Bhasya Chariar*, 47 M. L J. 520 · 82 I. C. 584: A I. R. 1924 Mad. 838.

Onus of Proof When Allegations in Plaint Not Denied in Written Statement.—Where an allegation in a plaint is not denied specifically or by necessary implication it must be deemed to have been admitted and the plaintiff is not bound to prove it by evidence unless required by the Court to do so; *Srimati Sakalbatti* v *Munshi Mundal*, 49 I C 733

Effect of Admissions and Statements in the Pleadings.—Where a person uses the admission of another as evidence, the whole admission must be put in. He cannot put in the half, and exclude the other half.—*Nilmony* v. *Ramanoograh*, 7 W R 29, *Sriram* v *Ramlal*, 11 A L. J. 255. *See*, however, *Brojoraj* v *Bishonath*, W R (1864) 305

A plaintiff abandoning his own case, and falling back on the admission of the defendant, is bound to take these admissions as they stand, and in their entirety.—*Tarinee* v *Dwarka*, 15 W. R 451.

Where a defendant's written statement is referred to as evidence in plaintiff's favour, the whole of it becomes evidence in the suit. and the Court can, in its discretion, attach thereto, or to any portion thereof, so much value as seems to it fit.—*Radhachurn* v. *Chunder Monee*, 9 W. R. 290.

If a party makes a qualified statement, that statement cannot be used against him apart from the qualification, but if a man makes a series of independent unqualified statements, those statements can be used against him; *Baikanta* v. *Chandra*, 1 B L R 133 10 W R 190; *Sooltan* v. *Chand Bibee*, 9 W. R 130; *Judoo* v *Buroda*, 22 W R 220; *Devidas* v. *Manooji* 20 N. L. R 7.

Express admissions of a party to a suit, or admissions implied from his conduct are strong evidence against him, but he is at liberty to prove that such admissions were mistaken and untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition, when he is estopped from disputing their truth as against that person (and those claiming under him) but as to third parties he is not bound; *Chandra Kunwar* v. *Chaudhri Narpat Singh*, 29 A. 184, P. C.: 5 C. L J. 115 11 C. W. N 321 17 M L J. 103. 9 Bom L. R. 267.

When a defendant admits any one fact contained in the written statement of the plaintiff, and thereby excludes independent evidence thereof

he is not entitled to say that the plaintiff has relied on his statement as evidence and that he (defendant) is in consequence in a position to claim that the whole of it may be read as evidence in his favour.—*Shurfuraz Mollah* v. *Dhunoo*, 16 W R. 257

In a suit for declaration of title to certain land purchased at a private sale from the wife of the judgment-debtor, the defence was that "even granting that any such deed was executed, this can avail the plaintiff nothing, as the deed was fraudulent" *Held* that there was no such admission on the part of the defendant as shifted the burden of proof upon him.—*Hurish Chunder* v. *Radha Nath*, 11 W R 328.

In a suit for specific performance the defendant, admitted in his written statement the terms of the agreement and its execution: *Held*, that the plaintiff need not prove the execution of the agreement, or put it in evidence; *Burjorji Cursetji* v. *Muncherji Kuverji*, 5 B. 143.

The written statement of the defendant filed in a previous suit brought by the plaintiff, was treated as an acknowledgment, under s. 19 of the Limitation Act, 1877, from the date of which the period of limitation should be calculated —*Venkataratnam* v *Ramaraju*, 24 M. 361. *See* also, *Shrinivas Krishna* v *Narhan Khando*, 10 Bom L R. 374.

A written statement is not legal evidence in the defendant's favour, although the same penal consequences may follow if it is false, as from a false deposition —*Ijjutoolah Khan* v. *Ram Churn*, 12 W. R. 39. *See* also, *Mookta Keshee* v *Koylash Chunder*, 7 W R 493.

A party is not concluded by his own representations unless they have been acted upon by the opposite party, if treated merely as admissions not acted upon, it may be shown by the party who made them that they were not true —*Brojendro Coomar* v *Chairman of Dacca Municipality*, 20 W. R. 223 *See* also, *Janan Chowdhry* v *Doolar Chowdhry*, 18 W. R. 347.

Held that the plaintiffs, having failed to prove the averments on which their suit was based, were not entitled to any relief in respect of that portion of the property in suit of which the defendants admitted their possession as mortgagees —*Ratan Kuar* v *Jivan Singh*, 1 A. 194.

"Except as against a person under disability."—The scope of Or. VIII, r 5 is only this, that the omission to deny an allegation of fact in the plaint is not to be taken as an admission in the case of minor defendants and the rule has nothing to do with the conduct of the suit afterwards; *Nagappa* v *Siddalingappa*, 35 M. L J. 372: 47 I. C. 589.

Effect of Admission of One Co-sharer.—In a suit for rent against two joint tenants, one of them filed a petition, admitting the correctness of the amount claimed by the plaintiff. *Held* that the admission of one defendant did not bind the other —*Chunderreshure Narain* v. *Chuni Ahir*, 9 C. L. R. 359. *See* also, *Kali Kishore* v *Gopi Mohan*, 2 C. W. N. 166, where it has been held that an admission by a co-tenant as to who is the landlord of the holding is not binding on the other co-tenants.

Admission made by one co-sharer in a suit for rent was held admissible against the others.—*Kowsulliah Sundari* v. *Mukta Sundari*, 11 C. 588; followed in *Meajan* v. *Alimuddin*, 20 C. W. N. 1217.

A defendant's admission, if taken at all must be taken as a whole, but it cannot bind co-defendants —*Niamutoollah* v. *Himmut Ali*, 22 W. R. 519.

In the Courts of law in India, where the pleadings are less technical, an admission of a fact on the pleadings by implication is not an admission for any other purpose than that of the particular issue, and is not tantamount to proof of the fact. An admission or even a confession of judgment by one of several defendants in a suit is no evidence against another defendant; *Amrito* v *Rajonee*, 15 B. L. R. 10: 23 W. R. 214, P. C., followed in *Luchman* v. *Tansukh*, 6 A. 395, and *Azizullah* v. *Ahmed Ali*, 7 A. 353.

"**Provided that the Court may in its discretion, etc.**"—Under Or. VIII, r. 5, when the defendant does not appear at all, he must be taken to have admitted all the allegations in the plaint. Therefore ordinarily, in an *ex parte* case, no issue arises at all and there is nothing for the plaintiff to prove. But by the proviso to Or. VIII, r. 5 it is left to the discretion of the Court to select some of the facts which, under the rule itself, must be regarded as admitted and to say that the plaintiff must prove them, in spite of the implied admission.—*Mt. Bhuriba* v. *Ishak Hussain*, 69 I. C. 619 A. I. R. 1923 Nag. 83.

The discretion under Or. VIII, r. 5 should usually be exercised by the Court of first instance in those cases where it suspects on *prima facie* grounds that an admission was made collusively or in order to evade a rule of policy; *Venkata Reddi* v. *Muthu Pambulu Naick*, 39 M. L. J. 463: (1920) M. W. N. 512.

Particulars of set-off to be given in written statement

6. (1) Where in a suit for the recovery of money, the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

Effect of set-off.

(2) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off: but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree. [S. 111.]

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

[New.]

he is not entitled to say that the plaintiff has relied on his statement as evidence and that he (defendant) is in consequence in a position to claim that the whole of it may be read as evidence in his favour.—*Shurfuraz Mollah* v. *Dhunoo*, 16 W. R. 257.

In a suit for declaration of title to certain land purchased at a private sale from the wife of the judgment-debtor, the defence was that "even granting that any such deed was executed, this can avail the plaintiff nothing, as the deed was fraudulent" *Held* that there was no such admission on the part of the defendant as shifted the burden of proof upon him.—*Hurish Chunder* v. *Radha Nath*, 11 W. R 328

In a suit for specific performance the defendant, admitted in his written statement the terms of the agreement and its execution: *Held*, that the plaintiff need not prove the execution of the agreement, or put it in evidence; *Burjorji Cursetji* v. *Muncherji Kuverji*, 5 B. 143.

The written statement of the defendant filed in a previous suit brought by the plaintiff, was treated as an acknowledgment, under s. 19 of the Limitation Act, 1877, from the date of which the period of limitation should be calculated —*Venkataratnam* v. *Ramaraju*, 21 M. 361. *See* also, *Shrinivas Krishna* v. *Narhar Khando*, 10 Bom. L. R. 374.

A written statement is not legal evidence in the defendant's favour, although the same penal consequences may follow if it is false, as from a false deposition —*Ijjutoolah Khan* v. *Ram Churn*, 12 W. R. 39. *See* also, *Mookta Keshee* v *Koylash Chunder*, 7 W R. 493.

A party is not concluded by his own representations unless they have been acted upon by the opposite party: if treated merely as admissions not acted upon, it may be shown by the party who made them that they were not true —*Brojendro Coomar* v. *Chairman of Dacca Municipality*, 20 W. R. 223 *See* also, *Janan Chowdhry* v *Doolar Chowdhry*, 18 W. R. 347.

Held that the plaintiffs, having failed to prove the averments on which their suit was based, were not entitled to any relief in respect of that portion of the property in suit of which the defendants admitted their possession as mortgagees —*Ratan Kuar* v. *Jivan Singh*, 1 A. 194.

"Except as against a person under disability."—The scope of Or. VIII, r. 5 is only this, that the omission to deny an allegation of fact in *the plaint is* not to be taken as an admission in the case of minor defendants and the rule has nothing to do with the conduct of the suit afterwards; *Nagappa* v. *Siddalingappa*, 35 M L. J. 372: 47 I. C. 589.

Effect of Admission of One Co-sharer.—In a suit for rent against two joint tenants, one of them filed a petition, admitting the correctness of the amount claimed by the plaintiff. *Held* that the admission of one defendant did not bind the other.—*Chunderreshure Narain* v. *Chuni Ahir*, 9 C. L. R. 359. *See also*, *Kali Kishore* v *Gopi Mohan*, 2 C. W. N. 166, where it has been held that an admission by a co-tenant as to who is the landlord of the holding is not binding on the other co-tenants

Admission made by one co-sharer in a suit for rent was held admissible against the others.—*Kowsulliah Sundari* v. *Mukta Sundari*, 11 C. 588; followed in *Meajan* v. *Alimuddin*, 20 C. W. N. 1217.

which they would have had independently of that section. And such rights exist not only in cases of material debts and credits, but also where cross-demands arise out of the same transaction, or are so connected in their nature and circumstance as to make it inequitable that the plaintiff should recover, and the defendant should be driven to a cross suit.—*Clark* v. *Ruthnavaloo Chetti*, 2 M. H. C. 269; *Kistnasamy Pillai* v. *Municipal Commissioners of Madras*, 4 M. H. C. 120; *Kishor Chand Champa Lal* v. *Madhowji Visram*, 4 B. 407; *Bhagbat Panda* v. *Ramdeb Panda*, 11 C. 557; *Pragi* v. *Maxwell*, 7 A. 284; *Chisholm* v. *Gopal*, 16 C. 711; *Fakir* v. *Gisborne & Co*, 8 C. W. N. 174; *Brojendra* v. *Budge-Budge Jute Mill Co*, 20 C. 527; *Naiz Gulkhan* v *Durga*, 15 A 9; *Nandram* v. *Ram Prasad*, 27 A 145; *Kalanund* v *Sri Prasad*, 17 C. W. N. 1060; 19 C. L. J. 152; *Ramdhari* v. *Permanand*, 19 C. W. N. 1183.

An equitable set-off can be pleaded in Indian Courts, which means that if the defendant's claim is for an *unascertained* sum, but has arisen *out of the same transaction as the plaintiff's claim*, the defendant can set off such demand against the plaintiff's claim. This he can do, not by virtue of the provisions of this rule which is confined in its application to *legal* set-off, but in the exercise of the general right of a defendant to plead a set-off whether legal or equitable But equitable set-off cannot be allowed if the cross-demand relates to a different transaction.—*Ramdeo* v. *Pokhiram*, 21 C 419; *Dhundiraj* v. *Ganesh*, 18 B. 721; *Dobson* v. *Bengal Spinning Co.*, 21 B. 126; *Vithal Das* v. *Hyderabad Spinning and Weaving Co Ltd.*, 74 B 182 A. I. R. 1923 Bom. 24: 67 I. C. 326; *Kallu Mal* v. *Partab Singh*, A I. R. 1926 Oudh 301 92 I. C. 787 In a suit by a servant against his master for arrears of salary, the defendant is competent to set off a certain sum, being the loss sustained by him by reason of neglect and misconduct on the part of the plaintiff as his servant; *Chisholm* v *Gopal*, 16 C 711; but see, *Victoria Mills Co. Ltd.*, v. *Brij Mohan Lal*, 39 A 362 Similarly, in a suit by the plaintiff to recover from the defendant a certain sum of money due under a contract, the defendant is entitled to set off, against the plaintiff's demand, several sums of money alleged to be due to him as damages sustained by him by reason of the plaintiff's breach of the terms of the contract —*Kistnasamy* v. *Municipal Commissioners of Madras*, 4 Mad. H C. 120, *Pragi Lal* v. *Maxwell*, 7 A. 289.

Requisites for a Plea of Set-off under this Rule.—(1) That the matter of set-off must be an ascertained sum legally recoverable by the defendant from the plaintiff, and (2) that the character in which the debt is claimed by, and from the plaintiff must be the same.—*Chennappa* v *Raghunatha*, 15 M. 29, p. 31.

It is essential to the validity of a set-off that the debts should be mutual and opposing, due from and to the same parties and in the same right; *Bhoirub* v *Hafizunnissa*, 2 C L. R 414, *Huree* v. *Hur Kishore*, 23 W R. 134.

"In a suit for recovery of money."—A widow, administering her husband's estate, sued to recover certain moveable property wrongfully appropriated by her son, who pleaded a set-off on account of a claim against his father *Held*, that the defendant was rightly referred to a separate suit.—*Manby* v. *Manby*, 14 W. R 136.

A suit for dissolution of partnership, with a prayer for recovery of money that may be found due to the plaintiff upon taking the partnership accounts, is a suit for money within the meaning of this section, and a plea of set-off may be raised in such suit; *Ram Jiwan* v. *Chand Mal*, 10 A. 587. But in a suit for an account only, and not for the recovery of money, it is doubtful whether a set-off can be pleaded; *Nankaray* v. *Ko Htaw*, 13 C. 124, P. C.

Where the suit was for enforcement of a mortgage security only and not for recovery of money, the right to a personal decree being barred by limitation, no set-off can be claimed; *Fakir* v *Gisborne & Co.*, 8 C. W. N. 174.

Even in cases of set-off not falling within this rule, the cross-claims must both be for money. This is indicated by Or. XX, r. 19, which provides that where a set-off is allowed, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant and shall be for the recovery of any sum which appears to be due to either party; see *Dhundiraj* v *Ganesh*, 18 B. 721.

"Legally recoverable."—For the meaning of the words "legally recoverable," the cases of *Mohan* v. *Bilaso*, 14 A. 513, and *Bageshri Dial* v. *Muhammad Naqui*, 15 A. 331, may be referred to

The words "legally recoverable" in this rule have no reference to the ability of the debtor to pay the demand in full; and a sum is legally recoverable though, in the result, the creditor may be satisfied with a dividend; *Ahmedabad Advance S & Co* v *Laxmisanker*, 30 B 173: 7 Bom L R 246 *See* also, *Subramanian* v. *Muthuswami*, 17 M. L. J 481.

Order VIII, r 6 applies only to a legal set-off and not to any other set-off that a party may be entitled to claim, *Firm of Sheo Prosad Radha Kishen* v *Indore Malwa United Mills*, 62 P R. 1917: 65 P. W. R. 1917.

In a suit for arrears of rent, the defendant, according to the construction of a *kabuliyat*, claimed to set-off a sum which he had paid to the Collector under the Road Cess Act *Held* that, under the terms of the *kabuliyat*, the defendant was himself bound to pay the cesses separately, and, therefore, he was not entitled to the set-off claimed.—*Shumbhu* v. *Hurro Sundari*, 11 C L R. 140 *See* also, *Surnomoyee* v. *Paresh*, 4 C. 576.

A set-off cannot be allowed for costs not actually awarded, as where a decree of the High Court gave the successful appellant costs of that Court and of the lower appellate Court, but omitted to award the costs of the first Court —*Huro Persad* v. *Kishore*, 16 W. R. 308.

Where a receiver sues for the debt due to a person, it is open to the defendant to urge the plea of set-off which he could have urged against the creditor himself. Such a defence is allowable although the sum claimed to be set off is not "legally recoverable" by the defendant from the plaintiff (receiver) within the meaning of this section.—*Subramanian* v. *Muthuswami*, 17 M. L. J. 481.

A claim which has become barred by limitation at the time of filing of the written statement in a suit is not a debt legally recoverable by the

defendant from plaintiff and cannot therefore be allowed to be set-off; *Kanai Lal* v. *Nitai Saru*, 47 I. C. 938; *Subraya Bhandary* v. *Janardhana*, 41 M. L J. 370: 62 I. C. 852; *Narasimha Rao* v. *Srirajah Srinivasa*, 42 M. 873: 37 M. L. J. 193; *Vyravan Chetty* v. *Nataraja*, 39 M. 939: 30 M. L. J. 59. The law in India as well as in England is the same, that limitation applies to a set-off; *Raja Narendra Lal Khan* v. *Tarubala*, 25 C. W. N. 800.

"Any ascertained sum of money."—This expression does not mean a sum admitted by the plaintiff, but a sum the amount of which is known; *Dalgleish* v. *Ramdin*, 14 C. W. N. 170. The words "ascertained sum" are used to exclude such items as unliquidated damages and mesne profits, the amount of which is not ascertainable until the Court determines them; *Har Prasad* v. *Firm Ram Sarup*, 22 A. L. J. 844: 82 I. C. 340: A. I. R. 1924 All. 872; *Edward* v. *Ramdin*, 14 C. W. N. 170: 5 I. C. 67.

Under Or. VIII, r. 6, a defendant is entitled to claim a set-off when it is an ascertained amount and does not apply when his proportionate share out of a joint claim has to be ascertained by calculation and after he has given proof that it was legally recoverable at the date of the institution of the suit; *Bishun Chand* v. *Awadh Behary Lal*, 1 Pat. L. W. 615: 2 Pat. L. J. 451: 40 I. C. 350.

The expression "ascertained" in Or. VIII, r. 6 (1) means beyond challenge and beyond dispute, concluded and conclusive. The right to equitable-set-off is founded on the condition that the set-off arises out of the same transaction out of which the claim in the suit springs. If it is found that the set-off is foreign to the original claim, the set-off will not be allowed; *Diltor Koer* v. *Harkhoo Singh*, 1 Pat. L W. 760: A. I. R. 1917 Pat 225.

Where the defendant's counter-claim is not one for an ascertained sum, he cannot claim as of right to have it investigated in the same suit; *Dobson and Barlow* v. *Bengal Spinning and Weaving Co.*, 21 B. 126.

In a mortgage suit, the amount of compensation claimed by the mortgagor-defendant, for waste committed by the mortgagee, cannot be set off against the mortgage money; *Raghu* v. *Ashraf*, 2 A. 252. But see, *Shiva* v. *Jaru*, 15 M. 290.

In a suit for money, claimed on account of the carriage of goods, in which the defendant pleaded a set-off on account of damages done to the goods. *Held* that the defendant could not answer the claim with the set-off on account of damages; *Scanlan* v. *Herrold*, 10 W. R. 295.

In an equitable set-off, the sum claimed as set-off need not be an ascertained sum; *Ramdhan* v. *Permanund*, 19 C. W. N 1183, *Fateh Mahmud* v. *Ramzan*, 27 I. C. 316.

"The same character."—Illustrations (*a*) and (*b*) of the rule are cases in which the parties do not fill the same character. In a suit by the creditor of a deceased debtor to recover his debt *Held* that an amount due as manager cannot be set off against a personal liability; *Abul Hasan* v. *Zohrajan*, 5 A. 299.

In a suit for money due on an account, defendant claimed to set off the amount of pay due to him by the plaintiff. *Held* that the set-off should

be allowed as the parties filled the same character, *Raghavendra* v. *Yalgurad*, 19 Bom L R 67 41 B 163 · 39 I C. 17.

In an action by a company to recover a sum fraudulently obtained by the defendants, before the liquidation of the company, one of the defendants claimed to set off against the company a debt from the company due to him, incurred prior to the commencement of the winding up. *Held* that the set-off was admissible —*Ahmedabad Advance* v *Luxmishanker*, 30 B 173.

A set-off can be pleaded as a defence and can only be raised when the claim to set off one against the other whether by plaintiff or defendant, exists in the same right In a suit by a shareholder for recovery of dividends declared by the company, it is not open to the directors to claim by way of set-off damages due from plaintiff in respect of alleged breaches of contract, *Vithaldas Gulabdas* v *The Hyderabad Spinning and Weaving Co. Ld.*, 47 B 182 24 Bom L R 328, *Najan Ahmad Haji* v. *Sale Mahamed*, 24 Bom L. R 998

A defendant is entitled to claim, by way of set-off from the plaintiff company under liquidation, the amount due on a fixed deposit even though the deposit had not matured when the winding up commenced; *Mehr Chand* v. *The Amritsar Bank Ld*, (1915) 63 P R 89 P L R : 63 P. W. R

In a suit for rent the tenant-defendant claimed a set-off for costs decreed in his favour in a previous rent suit brought by the *benamidar* of the landlord against the defendant, in which the landlord was made a *pro forma* defendant *Held* that the set-off could not be allowed —*Tiluk Chandra* v. *Jasoda Kumar*, 11 C W N 215

Directors cannot set off money due from the company to them against sums which they may be ordered to refund to the liquidators —*New Fleming Spinning and Weaving Company* v *Kessaup Naik*, 9 B. 373.

In a suit by an *inamdar* for money due from the defendant as *khatedar*, the latter cannot set off his wages due from the plaintiff as a *pujari*; *Madhav Rao* v *Ramavalu*, 39 B 131 16 Bom L R 746

Amount Claimed as Set-off must be Within Pecuniary Jurisdiction of the Court.—A Court cannot entertain a question of set-off, if the amount claimed by the defendant exceeds the amount cognizable by it. When a defendant pleads a set-off, and claims a decree, the subject-matter of the suit is no longer the mere claim of the plaintiff, but the cross-claim of both the parties —*Brojendra Nath* v *Budge-Budge Jute Mill Co.*, 20 C. 527 *Abraham & Co* v *Ebrahim*, 2 Rang 462 84 I C 971 : A I. R. 1925 Rang 65 A plea of payment is distinct from a plea of *res judicata*. Plaintiff sued defendant for Rs. 3,567 in the Court of Small Causes, Rangoon (of which the pecuniary jurisdiction was limited to Rs. 2,000) but admitted receipt of Rs 1,600 and prayed for a decree for Rs 1,967. Defendant admitted the claim for Rs 3,567 but pleaded payment of Rs. 3,000 and claimed a set-off of Rs. 1,573, being the amount due to him by the plaintiff on a promissory note and asked for a decree for Rs. 1,006, it was held that the amount claimed to be set-off being Rs. 1,573, and not Rs. 4,573 (Rs 3,000 *plus* Rs. 1,573), was within the jurisdiction of the Court; *Hoe Moe* v. *Seedat*, 2 Rang. 349 84 I C. 956: A. I R. 1925 Rang. 22. *See* also, *Ramdeo* v. *Pokhiram*, 21 C 419, and *Ram Lal* v. *Lancaster*, 3 N. W. 114.

A Court of Revenue cannot entertain a claim of set-off unless such claim, if made the subject of a suit, would fall within its jurisdiction.—*Beni Madho* v. *Gaya Prasad*, 15 A. 404.

A Revenue Court has jurisdiction, under Act X of 1859, to allow a set-off for any sums which the agent might either have paid to his principal directly, or used for the benefit of his principal with his sanction and authority.—*Mohima Runjun* v. *Nobo Coomar*, 18 W. R. 339.

Section 35 of the Provincial Small Cause Courts Act (IX of 1887) precludes a Sub-Judge invested with Small Cause Court powers from entertaining a counter-claim beyond the pecuniary limits of his Small Cause Court jurisdiction.—*Barote Gaga* v. *Panju Ramjan*, 14 B. 371. But see *Ram Pratap* v. *Ganesh Rangnath*, 12 B. 31, where it has been held that the plea of set-off might be pleaded by the defendant. The Judge should exercise his Small Cause Court jurisdiction in trying the plaintiff's claim and his ordinary jurisdiction in trying the defendant's plea of set-off.

Plea of Set-off When Admissible.—In a suit for contribution for satisfaction of a decree for arrears of *ijara* rent against several co-sharers, *held* that the defendants' claim for the share of rents paid by them on account of the same *ijara* in previous years might properly be treated as a set-off; *Bhagwat* v. *Ramdeb*, 11 C. 557. *See* also, *Udai* v. *Jagannath*, 1 A. 135 and *Gogun* v. *Hari*, 12 C. L. R. 539.

In a suit for arrears of salary, defendant may set off loss occasioned to his property in charge of the plaintiff as such servant through negligence; *Chisholm* v. *Gopal*, 16 C. 711. *See* also, *Maiden* v. *Bhondu*, 7 I. C. 1006.

In a suit to recover wages, the plaintiff alleged that the defendant had engaged him to sell his cloth at a monthly salary. *Held* that the defendant was entitled to set off the price of cloth which, he alleged, the plaintiff had sold on his account on commission.—*Amir Zama* v. *Nathu Mal*, 8 A. 396.

A widow is liable for a debt contracted by her husband. Such debt might be set off against a debt due to her.—*Grish* v. *Koomaree*, 1 W. R. Mis. 23.

In a suit for mesne profits against a Hindu widow by her adopted son, she is entitled to set off her claim for maintenance and the amount spent by her on funeral ceremonies of her late husband.—*Dabé Kunwar* v. *Ambica Partap*, 26 A. 266.

A liquidated sum due on a bond is capable according to law, even without an agreement to that effect, of being set-off against sums due for rent; *Watson & Co.* v. *Brojosoondurce*, 16 W. R. 225.

In a suit for arrears of rent, where the defendant pleaded that, under an arrangement, payment had been made in cash or in kind, and asked for an account. *Held* that the Court was bound to go into the question of set-off, and to take account.—*Roy Nundcoput* v. *Stewart*, 23 W. R. 20.

In a suit to recover money payable under an arbitration award, the defendant desired to set off certain debts which were payable under the award by the parties jointly, and which he alone had satisfied. *Held* that the set-off was admissible; *Gouri Sahai* v. *Ram Sahai*, 7 N. W. P. 157.

be allowed as the parties filled the same character; *Raghavendra* v. *Yalgurad*, 19 Bom L. R 67 · 41 B 163 · 39 I C. 17.

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fore inadmissible.—*Raja Baikunto Nath* v. *Uday Chand*, 2 C. L. J. 311 (29 C. 537 *followed;* 12 C. 213 *distinguished*).

A decree for arrears of rent obtained by a *lambardar* against co-sharer could not be set off against a claim for profits by an assignee from the co-sharer; *Govindram* v. *Kunj Behari Lal*, 22 A. L J. 217: L. R. 5 A. 65 (Rev.).

In a suit against the acceptor to recover the amount due upon several bills of exchange, the defendant sought to set off a claim for unliquidated damages unconnected with the bills of exchange. *Held* that the defendant had no right to set-off; *Clark* v. *Ruthnavaloo Chetti*, 2 M. H. C. 296.

In a suit by Government against the representatives of a lessee of a bridge for balance of account, the plea of set-off, raised by the defendants, on account of seizure by Government of stocks and materials, was not allowed; *Secretary of State* v. *Madari Lal*, 13 A. 296.

It is not equitable to allow a set-off against a claim relating to a particular account stated of a matter of another nature altogether.—*Kalee Koomar* v. *Huro Chunder*, 17 W. R 177.

A had dealings with a firm consisting of a father and two sons, who carried on business jointly. After the father's death, the brothers separated, and A dealt with each separately. A could not set off against a claim, made by one of the brothers, in respect of the separate dealings between himself and A, a debt due to himself from the former joint concern.—*Dhunput Singh* v. *Forbes*, 1 Ind Jur. N S. 354.

The defendant was not entitled to set off the plaintiff's share of the Government revenue of the whole estate which had been paid by the defendant for the period for which the arrears of rent were alleged to be due to the plaintiff; *Hosseina Bibi* v. *Smith*, 13 B. L. R. 440: 22 W. R. 15.

Counter-claim.—Though there is no provision in the Code for counter-claims, a Court is competent to treat the counter-claim as a plaint in a cross-suit, and to hear the two suits together, provided that the necessary Court-fee on the counter-claim has been paid; *Saya Bya v Maung Kyaw Shun*, 2 Rang. 276: 82 I. C. 721 A. I. R 1924 Rang. 346

Court-fee.—A written statement, containing a claim of set-off, is chargeable with the Court-fee which would be payable on a plaint of that nature. An Appellate Court is competent to levy the deficiency of Court-fee; *Chinnappa* v. *Raghunatha*, 15 M 29; *Amirzama* v. *Nathu Mal*, 8 A 396; *Bai Shrimajirajbai* v. *Narotam Hargovan*, 13 B 672; *Pragi Lal* v *Maxwell*, 7 A. 284; *Guise* v. *Anantharam*, 10 C. W. N. 199; *M. E Pillai* v *Vunuka Tathayya*, 10 Bur. L. T. 242: 36 I C. 957. In *Fakir Chand* v *Gisborne & Co.*, 8 C. W. N. 174, it has been held that written statement not strictly one of set-off is not chargeable with Court-fee. The same view has been taken by the Madras High Court in *Subramanian* v. *Muthusawmi*, 17 M. L. J. 481. These conflicting decisions led to a Full Bench reference of the Calcutta High Court, *Abdul* v. *Razak*, 17 C. L. J. 865, but the question was considered unnecessary in that appeal. The matter has now been set at rest by the amendment of the Court Fees Act (*see* Sch. IV of the Code of Civil Procedure, 1908), requiring all written statements pleading a

set-off or counter-claim to be stamped as a plaint. When a set-off is pleaded, Court-fee is payable only on the amount claimed in excess of that claimed by the plaintiff, and only if the defendant wants a decree for the excess; *Ramangir* v *Achharam*, 97 I C 916.

Limitation.—The law of limitation applicable to the set-off is Article 83, Schedule II of the Limitation Act (XV of 1877); the limitation should run from the time when the plaintiff is actually damnified, and should be reckoned to the date of the institution of the suit, and not to that of claiming the set-off, *Pragi Lal* v *Maxwell*, 7 A. 284

A defendant can raise the plea of equitable set-off, even if his claim be barred by limitation —*Gajadhar Matho* v *Raghubar Gope*, 12 C. W. N. 60. *See* also, *Sheo Saran* v *Mohabir Pershad*, 32 C. 546: 2 C. L J. 73, *Ramdhan* v *Permanund*, 19 C W N 1183, *Dalgleish* v. *Ramdin*, 14 C. W. N. 170

A sum of money recoverable under the Punjab Loans Limitation Act (I of 1904), can be set off in the U P, although a claim to the sum would be barred under the Limitation Act, *Bachchan* v *Banarsi*, 35 A 238.

Apart from special cases like those of mortgagor and mortgagee, or trustee and *cestui que trust*, a claim which is barred cannot be the subject of equitable set-off, *Vyravan* v *Nataraja*, 39 M 939 · 30 M. L J. 59

Defence or set-off founded on separate grounds.

7. Where the defendant relies upon several distinct grounds of defence or set-off founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly. [New.]

This rule is new It has been borrowed from English Or. XX, r. 7, and is similar to Order VII, rule 8 of this Code

New ground of defence.

8. Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off may be raised by the defendant or plaintiff, as the case may be, in his written statement. [New.]

COMMENTARY.

This rule is new There are cases where the Court will take notice of events which have happened subsequent to the institution of the suit; *see* 6 C. L J 74, 92, 102; *see* also, *Shyama* v *Mokhda*, 15 C W N. 703: 13 C. L J. 481

Subsequent pleadings.

9. No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same. [S. 112.]

COMMENTARY.

The defendant is not entitled to file any supplemental written statement after the plaintiff's case is closed.—*Haji Sahoo* v. *Ayeshabai*, 27 B. 485, P. C.

Supplemental written statements cannot be filed after the parties have entered upon their case at the hearing.—*Munchershaw Bezonji* v. *New Dhurumsey Spinning and Weaving Company*, 4 B. 576.

A written statement which was in explanation of the plaint, and not starting a new case, was allowed to be put in by the plaintiff after evidence was taken, the defendant not being prejudiced by its admission.—*Lall Mahomed* v. *Dhoolee Ram*, 22 W. R. 377.

An additional written statement, though filed long after the fixed date, cannot be removed from the record unless the opposite party takes immediate steps for its removal.—*New Fleming Spinning and Weaving Company* v. *Kessowji Naik*, 9 B. 373 (381).

If the pleadings of either party be too vague, the Court may require him to file a further and fuller statement under this rule.—*Ali Kader* v. *Govind*, 17 C. 840, p. 848.

Procedure when party fails to present written statement called for by Court.

10. Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit. [S. 113.]

COMMENTARY.

The words "*may pronounce a judgment*" have been substituted for "*pass a decree.*"

In the event of a defendant's neglecting to furnish a written statement, the Court will examine him as to the grounds of his defence, and, should it appear desirable that a written statement should be put in, the case should be adjourned for that purpose at his expense.—*Ram Rutton* v. *Oriental Inland Steam Navigation Co*, 2 Hyde 89

A Court has no authority to receive a written statement from one who is not a party, or to permit such person to appear at the hearing; *Surnomoye* v. *Bykunt*, 25 W. R. 17. *See* also, *Denomoye* v. *Tara*, Bourke O. C. 153.

This rule empowers the Court to pronounce "judgment" as defined in s 2 (9), and a mere order decreeing the plaintiff's claim is not warranted by it; *Nanki* v. *Tesadduq*, 15 O C. 78: 15 I. C. 212.

Under the rules of the Bombay High Court, a defendant who has not filed a written statement may defend the suit; *Jayantilal* v. *Nagnath*, 15 Bom. L. R. 126.

Where the plaintiffs who were directed by the Court to put in further *written statement under r. 9, filed a statement* as to their inability to supply the particulars called for by the Court. *Held* that the order having been practically complied with, they could not be regarded as having " failed to present " a statement within the meaning of this rule In acting under this rule the Court may pass a decree if the circumstances admit of any decree being passed, but an order merely dismissing a suit under the rule, without any adjudication upon any right claimed or defence set up, is not a decree; and an appeal from such an order is to be treated as an appeal from order under s. 588, C P Code, 1882 (s 104, Or. XLIII, r. 1).—*Orr* v. *Nagappa Chetty*, 16 M L J 30

Appeal.—An order under this rule, pronouncing judgment against a party, is appealable under Or XLIII, r. 1 (*b*).

ORDER IX.

APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE.

Parties to appear on day fixed in summons for defendant to appear and answer.

1. On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court. [S. 96.]

Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs.

2. Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the Court-fee or postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed:

Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent. [S. 97.]

COMMENTARY.

This words "*or postal charges (if any)*" are new. This rule is to be read with Or. XLVIII, r. 1.

"**In consequence of the failure of the plaintiff to pay.**"—An order of dismissal previous to the day of hearing is irregular, and does not bar a fresh suit.—*Gulab* v. *Jivan Ram*, 2 A. 318.

A Court cannot dismiss a suit for failure to deposit process fee, unless it fixes a time for such deposit.—*Lala Prasadi Lal* v *Lala Ambika Prasad*, 3 B. L. R. Ap. 25. 11 W. R. 290.

If it appears on the day fixed for hearing that summons has not been served on the real defendants, but has been served on a wrong person who, appearing, denies liability, the suit ought to be dismissed with costs.—*London, Bombay and Mediterranean Bank* v. *Mahomed Ibrahim*, 4 B. 619.

Where the Court ordered a co-defendant to be joined in the suit, but the plaintiff failed to deposit the costs of issuing a notice on the *defendant*, the suit was dismissed on account of plaintiff's failure to make the deposit.—*Abas* v. *Ibrahimji*, 5 Bom. H. C. 118.

A suit is liable to be dismissed for failure to pay the costs of service of summons on substituted defendants, *Bissessur* v. *Murli*, 10 C. 103.

Plaintiff failed to file affidavits of service of summons upon the guardians of the two minor defendants and the minors, and the Court passed an order dismissing the suit refusing to grant further time. *Held* that the Court could not dismiss the suit as against the major defendants; *Surendra* v. *Genasardar*, 1 Pat L T. 125 55 I. C. 826; *Ramanand* v. *Chandrama*, 2 Pat. L T. 256 · 60 I C 377

Where a plaintiff has made default in paying process fee for service of summons on the defendant but notwithstanding this the defendant applies to the Court to file written statement, the filing of such an application amounts to an appearance under Or. IX, r. 8, and the Court would not be justified in dismissing the suit under Or. IX, r. 2; *Musst. Golab Kuar* v *Bibi Salra*, 53 I. C 41.

Where the plaintiff had paid the process fee on such a date when there was sufficient time for the service of summons being effected before the date of hearing, the suit cannot be dismissed under Or. IX, r. 2, C. P. Code. The High Court can interfere in revision and set aside the dismissal even though the plaintiff can sue afresh; *Ralla Ram* v *Mt. Raj*, 4 Lah. L. J. 71: A. I. R. 1922 Lah 63

Appeal.—An order under this rule, dismissing a suit for plaintiff's failure to deposit costs for service of summons on defendant is not appealable; *Lucky Churn* v *Buddurrunnissa*, 9 C. 627 12 C. L. R. 484; *Lachmi* v. *Darbari*, 38 A 357 · 14 A L J. 347.

Revision.—Where the plaintiff duly paid the Court-fee for service of process but the office failed to issue it in time, and the suit was dismissed by the Court under this rule, *held* that the High Court had power to set aside the order in revision; *Ralla Ram* v. *Raj*, 4 Lah. L. J. 71: A. I. R 1922 Lah 63 · 67 I. C. 945.

Where neither party appears, suit to be dismissed.

3. Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed. [S. 98.]

COMMENTARY.

Appears.—*See* notes under rr. 9 and 13, *post*.

"Where neither party appears."—Where in a suit one of the two defendants only was present on the day of hearing, but the plaintiff and the other defendant were absent, and the Court passed an order dismissing the suit, *held* that the order of dismissal as between the plaintiff and the absentee defendant was an order under this rule; but as between the plaintiff and the defendant who was present, the order was under r. 8; *Damu* v. *Vakrya*, 44 B. 767: 56 I. C 455; *Makundi Singh* v. *Parbhu Dayal*, 24 A. L. J. 97: A. I. R. 1926 All. 169.

Where an application for a final decree in a mortgage suit is dismissed for default of appearance of both parties, a fresh application can be made; *Ahmad Khan* v. *Gaura*, 40 A. 235: 16 A. L. J. 143.

An order to strike off the case on neither party appearing was held illegal; the proper order should have been an order of dismissal.—*Alwar* v. *Seshammal*, 10 M. 270. *See* also, *Khoob Lall* v. *Toolsee Singh*, 17 W. R. 219, and *Uluck Monee* v. *Panch Coomar*, 21 W. R. 124.

On the day fixed for the hearing of a suit, neither the plaintiff nor his pleader was present; the defendant not having been served, was also absent. Plaintiff's pleader sent intimation to the Court in writing that as he had been appointed to act as a Sub-Judge, he was unable to attend the Court, and therefore requested the Court to adjourn the case. *Held* that the suit should not have been dismissed, but adjourned for a reasonable time.—*In re Narayen Sadashiv* v. *Kolee*, 23 B. 657.

A case was remanded to the first Court, which dismissed the suit for default of parties. *Held*, that some date should have been fixed for re-hearing, giving the parties opportunity to appear and take steps to carry on the suit; *Haradhun* v. *Protap Narain*, 14 W. R. 401.

An application under Or. XLI, r. 10, praying that an appellant might be required to give security for costs of the appeal, was dismissed for absence of counsel, and an application for restoration was subesquently made. *Held* that this rule, with s. 141, read with is made applicable to proceedings other than suits, and, further, that an absence of counsel for fifteen minutes was not enough to preclude the Court from restoring the petition; *Lachmi Chand* v. *Gutto Bai*, 7 A. 542.

Appeal.—An order of dismissal is not appealable. Nor is it open to review when the plaintiff neglects to make an application under the next rule within 30 days, *Koilash* v. *Nabadwip*, 2 C. W. N. 318; *Inder Singh* v. *Ram Singh*, (1909) 33 P. R. 1909: 44 P. L. R. 1909: 31 P. W. R. 1909. But see, *Raj Narain* v. *Ananga*, 26 C. 598.

Plaintiff may bring fresh suit or Court may restore suit to file.

4. Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his not paying the court-fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit. [S. 99.]

COMMENTARY.

This rule corresponds to s. 99 of the Code of 1882 The important changes are the addition of the words "*and postal charge (if any)*" after the word " Court-fee," and the substitution of the words " *within the time fixed before the issue of the summons* " for the words " within the time allowed for the service of the summons."

" We have struck out the provisions about limitation contained in this rule. These provisions will be incorporated in the Limitation Act."—*Report of the Select Committee.*

" **Sufficient cause.**"—The plaintiff came from a long distance to attend the Court, but not having found the name of his case in the Cause-list went to another Court, thinking that his case might be before another Court, and not finding it even there, returned to the first Court and found that his case had been dismissed under Or IX, r 3. *Held* that the case should be restored; *Nanhum* v *Jumma*, 96 I. C 881 · A. I. R. 1926 Lah. 634.

Notice to Defendant, if Necessary.—On an application under Or. IX, r. 4, notice to a defendant is unnecessary, *Ramjilal v. Kesho Ram*, A. I. R. 1923 Oudh 55. 64 I. C. 767.

Proper Forum for Application to Set Aside Order of Dismissal.—An order of dismissal for default can, under Or IX, r 4, be set aside only by the Court which passed the order, *Luckman Das* v *Devi Dyal*, 100 P. L. R. 1920: 2 Lah. L J. 48 56 I. C 885

Limitation.—The period of limitation for an application under this rule is 30 days from the date of dismissal *See* Art. 163, Limitation Act (IX of 1908)

A decree passed in a restored suit pending appeal against the order of restoration was held valid —*Alwar* v *Seshammal*, 10 M. 290.

A Judge, when restoring a suit to the file under this section has no jurisdiction to pass at that time any order as to the general costs of the suit.—*Krishna Vithal* v. *Ganesh Bhasker*, 26 B 201.

A Court of Small Causes can, during the same day and at the same sitting of the Court, *ex parte*, restore a case struck off for default of parties, though the order for striking off may have been duly recorded.—*Sib Chunder* v. *Kissen Dyal*, 1 C 476

When a suit is restored it must be held as instituted on the date when the plaint was originally filed and not on the date of its re-admission; *Dhirta* v. *Kesri*, (1909) 31 P. R. 36 P. W R 1909. 49 P. L. R. 1909.

There is no appeal from an order setting aside a dismissal under this rule; *Alwar* v. *Seshammal*, 10 M. 270. *See* also *Wahidunnisa* v. *Kundanlal*, 35 A. 427.

An order under this rule refusing to restore a suit is not appealable; *Shadilal* v. *Karamdin*, (1911) 250 P. W .R.

A suit was dismissed for default, both parties being absent and an application for restoration of the suit was also dismissed for default of both parties An application for setting aside the order of dismissal of the application for restoration was rejected. *Held* that no appeal lay from the order of rejection; *Faridbi* v. *Mohammad Amin*, 9 N. L. R. 83: 19 I. C. 77.

Remedies Available to Plaintiff.—The plaintiff may apply for an order to set the dismissal aside and may also bring a fresh suit. If he

chooses to avail himself of one remedy, he is not debarred from availing himself of the other; *Dayashankar* v. *Rajkumar*, 20 O. C. 66; *Bhudeo* v. *Baikunithi*, 63 I. C. 239.

Dismissal for Default of Application to Set Aside Dismissal of Suit for Default—Fresh Application, If Maintainable.—When an application under Or. IX, rr. 4 and 9, C. P. Code, for the restoration of a suit dismissed for the plaintiffs' default, is again dismissed for the default of the applicant (the plaintiff), the latter has the right to apply again under Or. IX, r. 4, for the re-hearing of that application; *Bipin Behari* v. *Abdul Barik*, 44 C. 950: 21 C. W. N. 30: 24 C. L. J. 446 (19 C. W. N. 758 *folld.*); *Kirpu Singh* v. *Mula Singh*, 1 P. L. R. (1919): 50 I. C. 401; *Abdul Rahman* v. *Shahana*, 1 Lah. 339. 58 I. C. 748; *Firm Piare Lal* v. *Haider*, 27 P. L. R. 564: 99 I. C. 80: A. I. R. 1927 Lah. 71.

The mere fact that a case had been previously dismissed for default is no reason for refusing to restore it after a second dismissal, *Ramjidas* v. *Bhagwandas*, 43 I. C. 180.

Appeal.—There is no appeal from an order setting aside a dismissal under this rule; *Alwar* v *Seshammal*, 10 M. 270. *See* also, *Wahidunnissa* v. *Kundun Lal*, 35 A. 427; *Ram Nandan Prasad* v. *Rama Chandra*, 2 Pat. L. W. 172: 42 I. C. 613; *Pitambar* v. *Rai Baidynath*, 27 C. L. J. 117; *Ramaji Das* v. *Bhagwan Das*, 43 I. C. 180.

Whether R. 4 Applies to Execution Proceedings.—Or. IX, r. 4 is not applicable to proceedings in execution by reason of the provisions of s. 141. Where an application under Or. XXI, r. 90 to set aside an execution sale, was dismissed for default and a second application was then made for the restoration of the first application under Or. IX, r. 4, it was held that the second application for restoration under Or. IX, r. 4, could not be entertained; *Basaratulla* v. *Reazuddin*, 53 C. 679: A. I. R. 1926 Cal. 773. *See*, notes to r 9 under the same head.

Or. IX, R. 4 and Or. XXI, R. 100.—An application under Or. XXI, r. 100, is not an application in execution, the proceedings being in the nature of a summary suit Although the provision of Or. IX, r. 4, does not apply to an application under Or XXI, r 90, it can well apply to proceedings under Or. XXI, r. 100; *Sheo Nandan* v. *Debi Lal*, 4 Pat. L. T. 93: A. I. R. 1923 Pat. 78: 1 Pat. L. R. 134: 2 Pat. 372.

Dismissal of suit where plaintiff, after summons returned unserved, fails for 3 months to apply for fresh summons.

5. (1) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of three months from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by serving officers, to apply for the issue of a fresh summons, the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that—

(a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served, or

(b) such defendant is avoiding service of process, or

(c) there is any other sufficient cause for extending the time,

in which case the Court may extend the time for making such application for such period as it thinks fit.

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit. [S. 99-A.]

COMMENTARY.

Amendment of Sub-rule (1).—This rule as it at present stands was substituted for sub-rule (1) of r. 5 of Or. IX of Act V of 1908 by the C. P. Code Amendment Act XXIV of 1920 The most important change made by the Amendment Act of 1920 is the substitution of the words " for a period of three months " for the words " for a period of one year " which occurred in sub-rule (1) of r. 5 of Act V of 1908. The words " he has failed after using his best endeavours " in cl. (1) (a) of the present rule have been substituted for the words " he has used his best endeavours " which occurred in cl (1) of Or. IX, r 5 of Act V of 1908. The words in sub-clause (c), " there is any other sufficient cause for extending the time " as well as the concluding words of the rule, *viz.*, " in which case the Court may extend the time for making such application for such period as it thinks fit " are new additions made by the Amendment Act of 1920.

" For a period of three months."—These words have been substituted for the words " for a period of one year " which occurred in the original sub-rule. The effect of this substitution is that the plaintiff must now apply for issue of fresh summons within three months from the date of return made by the officer ordinarily certifying to the Court returns made by the serving officers .

Where the plaintiff showed due diligence, the Court has no jurisdiction to reject an application for fresh summons before the lapse of one year; *Rameshwar* v. *Soni*, 13 C W. N. 75-n.

When a suit is dismissed under this rule, plaintiff may bring a fresh suit subject to the law of limitation; *Sita Ram* v *Pokhpal*, 28 A. 749.

This rule is applicable to proceedings in appeal; a Court cannot dismiss an appeal for failure to take out fresh process, before the expiry of one year from the date of the return of non-service; *Gopisetti* v. *Mamburi*, 25 M. L. J. 451. But see, *Jaisari* v. *Jaisari*, 17 I. C. 294.

Dismissal under this rule does not release the defendant from liability; *Shaik Ali* v. *Mahomed*, 14 B. 267. Striking out the name of the principal debtor, as summons could not be served upon him, does not justify dismis-

sal against surety, a co-defendant; *Nathabhai* v. *Ranchhod*, 39 B. 52: 16 Bom. L. R. 696.

"From the date of the return made by the officer ordinarily certifying."—These words have been added to the present rule to give effect to the decision in 13 B. 500 (*Parsotam* v *Abdul*) decided under the old Code, where it was held that the period of one year is to be calculated not from the date of the return made by the serving officer, but from the date of the return made by the officer whose duty it is to certify to the Court returns made by the serving officer.

"May make an order that the suit be dismissed."—These words have been substituted for the words "may dismiss the suit," which occurred in the old Code, in order to make it clear that a dismissal under this rule is not appealable, being an order and not a decree.

Procedure when only plaintiff appears.

6. (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then—

When summons duly served.

(*a*) if it is proved that the summons was duly served, the Court may proceed *ex* parte;

When summons not duly served.

(*b*) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;

When summons served but not in due time.

(*c*) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement. [S. 100.]

COMMENTARY.

This rule corresponds to s. 100 of the old Code, with some additions and alterations. The words "*when the suit is called on for hearing, then*" have been substituted in sub-rule (1) for the words "procedure shall be as follows": and the words "*was not duly served*" have been added after the word "summons" in sub-rule (2).

Appears.—*See* notes to rr. 9, 13.

"The Court may proceed ex parte."—In dealing with a suit *ex parte*, a Court is bound to see that the plaintiff's case is *prima facie* proved.

The mere absence of the defendant does not raise a presumption that the plaintiff's case is true, *Amrit* v. *Roy Dhunput*, 15 W. R. 503; *Satyendra* v. *Narendra*, 39 C L J. 279. 81 I C 867: A. I. R. 1924 Cal. 806; *Monmotha* v *Jasoda*, 28 C W N. 300 77 I C. 511. A. I. R. 1924 Cal. 647; *Ghulam Hussain* v *Singer Sewing Machine Co*, 91 I. C. 110: A. I. R. 1926 Oudh 192

Or. IX, r 6 is not limited in its application to defendants residing within British India; *Fakhruddin* v *Ghafurddin*, 23 A. 99.

Plaintiff cannot obtain an *ex parte* decree before the returnable date mentioned in the summons; *Dhirajlal* v *Hormusji*, 32 B. 534.

The Court may proceed *ex parte*, whether the defendant has been summoned only to appear and answer the claim, or has, in addition, been summoned to attend and give evidence; *Taruck* v. *Jeamat*, 5 C. 353.

No legal decree can be passed *ex parte* without a Court being satisfied of the due service of the summons From the mere fact of the plaintiff obtaining an *ex parte* decree, it is not to be presumed that the service of summons was proved, *Ram Lochun* v *Nittya Kallee*, 12 W. R 211.

If it appears that sufficient time has not been allowed to the defendant t appear and answer to the suit, the Court should postpone the hearing even if he appears, *Abdul Kureem* v. *Awlad*, 19 W R. 141.

A suit having been dismissed for plaintiff's default, he applied for restoration, but the application for restoration was rejected for his failure to serve notice upon the defendant The plaintiff thereupon applied for issue of fresh notice, but the application was rejected. *Held* that the Court was bound to issue a fresh notice under this rule read with section 141; *Lallubhai Vajeram* v. *Bai Mangangavri*, 18 B. 59

If a defendant appears at the first hearing and files a written statement, he should not be placed *ex parte* A defendant against whom an *ex parte* decree has been passed, and who has not adopted the procedure under Or. IX, r. 13, can appeal from such decree; *Annathanama* v. *Madhava*, 3 M. 264.

No decree can be legally given without evidence in a case where the defendant is *ex parte* or does not choose to contest, except in suits on negotiable instruments under Or. XXXVII, r. 2. The words "proceed *ex parte*" in this rule mean "proceed to determine in defendant's absence by the taking of evidence." Verification is not evidence on which a decree can be founded in a civil suit, *Ross & Co* v. *Scriven*, 43 C. 1001: 20 C. W. N. 1192

Applicability of the Rule to Adjourned Hearings.—Or. IX, r. 6, by itself is not applicable if the defendant after having appeared in answer to the summons fails to appear at an adjourned hearing; *Enatulla* v. *Jiban Mohan*, 41 C. 956: 18 C. W. N. 775.

Or. IX, R. 6 and Or. XVII, R. 2.—Both under Or. IX, r. 6 and Or. XVII, r. 2, the procedure is the same where the defendant fails to appear at the first hearing, whether that hearing takes place on the day fixed in the summons as contemplated by Or. IX, r. 6, or at a later date to which the

hearing may be adjourned, which is contemplated by Or. XVII, r. 2; *Mahant Damodar Das* v. *Raj Kumar Das*, 1 Pat. 188: A. I. R. 1922 Pat. 485.

Procedure where defendant appears on day of adjourned hearing and assigns good cause of previous non-appearance.

7. Where the Court has adjourned the hearing of the suit *ex parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance. [S. 101.]

COMMENTARY.

"At or before such hearing appears."—Where on the date fixed for the first hearing, the defendant did not appear and the Court declared him *ex parte*, it is open to him to appear on a subsequent hearing and to ask for leave to file written statement and to examine witnesses; *Bhagwat Prasad* v. *Mohomed Shibli*, 20 A. L. J. 270: A. I. R. 1922 All. 110; *Mannu* v. *Tulsi*, 20 A. L. J. 39: A. I. R. 1922 All. 33; *Satyendra* v. *Narendra*, A. I. R. 1924 Cal. 806. If the defendant does not appear, and so long as he is absent, the proceedings must necessarily be *ex parte;* and r. 6 empowers the Court to proceed, notwithstanding that he may be absent Should the defendant appear in the middle of the proceedings, by the very fact that he is present, the proceedings cease, thenceforth, to be *ex parte*. What r. 7 requires is that if sufficient cause is shown for non-appearance, the defendant may, on terms, be placed in the same position retrospectively, as if he had appeared at the proper time, *e.g.*, in regard to right to cross-examine a witness who may have been examined in his absence; *Kalla Gella* v. *Shivji*, 92 I. C. 493: A. I. R 1926 Sind 181; *Venkata Subbiah* v. *Lakshmi Narasinham*, 49 M. L. J. 273: 92 I. C. 545: A. I. R. 1925 Mad. 1274.

Remedy where Defendant's Application to Appear and Defend under This Rule Rejected.—A defendant whose application under this section to be heard in answer to the suit was rejected, and a decree was passed *ex parte* against him, and who has not appealed against the order under this section, can apply under s. 108, C P Code, 1882 (Or IX, r. 13), to set aside the *ex parte* decree, *Sankaralinga Mudali* v *Ratnasabhapati Mudali*, 21 M. 324.

Defendants who put in no appearance at the first hearing, and who have subsequently been refused leave to appear and defend, are at liberty, when an *ex parte* decree has been passed against them, to appeal to a higher Court without taking steps to set aside the *ex parte* decree.—*Ashruffunnissa* v. *Leharcaux*, 8 C. 272: 10 C. L. R. 502; *Karuppan* v. *Ayyathorai*, 9 M. 415 (4 A. 387 *dissented from*).

8. Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim or part thereof, in which case the Court shall pass a decree against the defendant upon such admission and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder. [S. 102.]

Procedure where defendant only appears.

COMMENTARY.

This rule corresponds to section 102 of the C. P. Code, 1882, with some additions and alterations. The words "*when the suit is called on for hearing*" have been added after the words "does not appear."

"**Appears.**"—See, notes under rules 9 and 13.

A plaintiff fails to appear within the meaning of this rule when his pleader declines to go on with the suit; the presence of the party himself in Court, makes no difference; *Gopal* v. *Maria*, 30 M. 274: 17 M. L J 225. *See* also, *Lalji Saha* v. *Lachmi Narain*, 3 Pat. L. J. 355: 47 I. C. 27 The Bombay High Court has taken a contrary view in *Esmail* v. *Haji*, 33 B. 465.

This rule does not apply where the main issue in the case has been decided on its merits and there has been a subsequent default in appearance; *Kanhaya Lal* v. *National Bank*, 37 C. 426 P C. : 14 C. W. N. 594.

This rule does not apply to non-appearance by reason of death of a sole plaintiff. Where the Court not being aware of the plaintiff's death dismissed the suit under this rule, the dismissal should be set aside under the inherent powers of the Court, on the application of the legal representatives within six months of the date of the plaintiff's death; *Raja Debi Baksh* v. *Habib Shah*, 35 A 331, P C 17 C W. N. 829: 40 I. A. 150.

This rule cannot be intended to apply in any case when there is a defective suit, and there is known to be no person in the position of the plaintiff who has any right or duty to appear So when a suit was called on for hearing, the defendant only appeared and the plaintiff did not appear as he had already been adjudged an insolvent, the proper procedure for the Court is not to dismiss the suit for default but to call upon the Official Assignee to state whether he intended to continue the suit, and if he decided to do so, to make an order that he should give security for costs of the suit within a fixed time; *Kissen Gopal* v. *Suk Lal*, 31 C. W. N. 22: 53 C. 844.

Where an order purported to be passed under Or. IX, r. 8 but in fact the plaintiff was dead on that date though neither the Court nor any of the parties was aware of it, *held* that the order passed was a nullity; *Trilochan Prasad* v. *Bhagwati*, 73 I. C. 230

Where a suit was dismissed for failure to pay Commissioner's fees, the dismissal was not under this rule; *Sheik Saheb* v. *Mohomed*, 13 M 510.

The Court would not be justified in dismissing a suit under this rule, when the plaintiff has adduced all the evidence on which he intended to rely but neither he nor his pleader were present on the subsequent hearing; *Ningappa* v. *Govindappa*, 7 Bom. L. R. 261; such a dismissal is appealable; *Raichand* v *Mathura*, 3 A. 292. *See*, Or. XVII, rr. 2, 3, *post*.

Where a suit was dismissed for want of evidence the decision was on the merits and not for default under this section; *Kartick* v. *Sridhar*, 12 C. 563.

"And the plaintiff does not appear."—An application by a pleader, who is instructed only to apply for an adjournment, which is refused, is not an apperance within the meaning of the Code of Civil Procedure; *Satis* v. *Apara Pershad*, 34 C. 403 F. B. : 11 C. W. N. 820: 5 C. L. J. 247.

"When the suit is called on for hearing."—The date fixed for the settlement of issues is a date fixed for the hearing of the suit within Or. 9, r. 8 C. P. Code; *Firm of Harchand Rai Anand Ram* v. *Ram Bahadur Singh*, (1919) Pat. 32: 48 I. C. 102.

When a party applies for amendment of issues and a day is fixed for that purpose and neither party appears on the day fixed, the application for amendment is liable to be dismissed but not the suit; *Sukhdeo Pattak* v. *Judagi Mian*, 6 Pat. L. J. 331: 2 Pat. L. T. 700.

"Shall make an order."—The Court has no option as it apparently has under r. 3. See, *Shakharam* v. *Naro-Ganesh*, 7 Bom. L. R. 999; *Mata Bux Lal* v. *Brij Mohan*, 55 I. C. 906.

Where the plaintiff does not appear, the defendant has no right to adduce evidence and the Court cannot examine the merits of the case; *Keshri* v. *National Jute Mills*, 40 C 119; 16 C. W. N. 908; *Parbati* v. *Tulsi*, 18 C. L. J. 128: 18 C. W. N. 604; *Phul Kuar* v. *Hashmatullah*, 37 A. 460: 13 A. L. J. 679.

Or. IX, r. 8 and Or. XVII, r. 2.—Where the plaintiff and his pleader are both absent on the date of an adjourned hearing, the Court cannot hear the case on the mertis under Or. XVII, r. 2. It can only dismiss the case under Or. IX, r. 8 or postpone the hearing under Or XVII, r. 2; *Rukam* v. *Tarachand*, 20 A. L. J. 123; 69 I. C. 775.

Effect.—The effect of an order of dismissal under this rule is to bar under r. 9, a fresh suit on the same cause of action; *Kalyan* v. *Ram Gulam*, 29 I. C. 902; but does not operate as *res judicata*; *Chand Kour* v. *Partab Singh*, 16 C. 98 P. C.; *Sankar* v. *Madan*, 14 C. W. N. 40: 11 C. L. J. 61. *See* also notes under r. 9, "FRESH SUIT BARRED."

Remedy.—An order of dismissal under this rule is not a decree and is not appealable. The fact that a decree was drawn up cannot alter the nature of the order made; *Parbati* v. *Tulsi*, 18 C. L. J. 128: 18 C. W. N. 601: *Rukmini* v. *Paran*, 30 C. 341: 15 C. L. J. 834

A decree for part of a claim which alone was admitted by the defendant and dismissal of the rest as the plaintiff was in default, is a decree, and the part dismissal also is appealable; *Munisami* v. *Junjadu*, 35 I C 65. *See* also, *Maharaja of Burdwan* v *Rakhal*, 16 C. L. J. 559.

An order dismissing a suit for want of evidence is not an order under Or. IX, r 8. It is open to the party either to appeal or to apply for review: *Madhu Sudan* v *Krishna Prasad*, 3 Pat. L. J. 428. 1 Pat. W. N. 790.

An appeal lies from an order dismissing a suit for default when part of the claim is rejected, *Kanhaiya Lal* v *National Bank*, 49 M L. J. 499: 25 Bom. L. R. 1248 50 I A 162 P. C

After dismissal, plaintiff may apply for a review without any previous application under the next rule; *Rajnarain* v. *Ananga*, 26 C. 598; *Pandurang* v. *Mohan Chhatra*, A. I. R. 1923 Bom 295.

Where an application under r. 9 for setting the dismissal aside would be barred by limitation, no review of the order of dismissal should be entertained; *Koilash* v. *Nabadwip*, 2 C. W. N 818; followed in *Deodip* v. *Gopal*, 1 Pat. L. J 547.

Decree against plaintiff by default bars fresh suit.

9. (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

[S. 103.]

COMMENTARY.

Alterations.—This rule corresponds to s. 103 of the old Code with some alterations. The words "*if he satisfies the Court that there was sufficient cause for his non-appearance*," have been substituted for the words "if it be proved that he was prevented by sufficient cause from appearing." The words "*he was prevented*" which occurred in the old section, meant, if he was obstructed by something unexpected or by some accident, as for instance, sudden illness, or stoppage of communication, etc, etc. The meaning of the word "*prevented*" has been clearly explained in 13 B. 12. But the present rule has been so framed as to include any cause, which may appear to the Court sufficient; as for instance, the illness of the husband, wife, or any other relation, inability to give instruction to pleader or the absence of the pleader on account of illness etc., etc, may be sufficient under the present rule for the restoration

of the case, if the Court is satisfied, on the evidence that there was sufficient cause for plaintiff's non-appearance. The present rule is certainly an improvement upon the old section.

It should also be noted that the same word "*prevented*" which occurred in s. 108, C. P. Code, 1882 has not been changed but retained in Or. IX, r. 13. By the change in the language of this rule, indulgence has been shown to the plaintiff, but by retaining the word "*prevented*" in rule 13, no indulgence has been shown to the defendant applying to set aside an *ex parte* decree

Remedies in case of Dismissal under R. 8.—A plaintiff whose suit is dismissed under rule 8 for default of appearance, has two remedies open to him: (1) He may apply for a review of the order of dismissal under Or. XLVII, r. 1; *Raj Narain* v. *Ananga*, 26 C. 598; or (2) he may apply under this rule for an order to set the dismissal aside. As regards the first remedy, it has recently been held by the High Court of Bombay, in *Mahadev* v. *Lakshmi Narain*, 49 B. 839: 90 I. C. 610: A. I. R. 1925 B 521, that, since the decision of the Judicial Committee in *Chajju Ram* v. *Neki*, (49 I. A. 144: 79 I. C. 945: A. I. R. 1924 Lah. 730), a plaintiff whose suit has been dismissed under r 8 has no remedy by way of review. It is not necessary that before applying for review, he should apply for setting aside the dismissal under this rule; *Raj Narain* v. *Ananga*, 26 C. 598. The remedy of review is open to any plaintiff whatever the ground of dismissal may be, whether for default of appearance at the hearing or after the hearing on the merits But the remedy provided by this rule, *viz.*, applying for setting the dismissal aside, can only be availed of by the plaintiff whose suit is dismissed for default of appearance at the hearing under r. 8.

Appearance.—The word "appears" occurs in all the rules of this order and in various other parts of the Code. The meaning is the same everywhere. The leading case on the point is *Soonderlal* v. *Goorprasad*, 23 B. 414. The referring orders in the Full Bench case of *Satish* v. *Apara*, 34 C. 403, are also very instructive where all the earlier cases have been fully considered. 'Appearance' means the actual attendance at the hearing either of the *party* himself, or his *pleader*, or *recognized agent* or a *co-party*. Where, however, a party is ordered by the Court to attend in person, under the proviso to Or. III, r. 1, 'appearance' can be effected only by personal attendance (Or. IX, r. 12).

Where a *party is* present in person in Court at the hearing, it amounts to "appearance" and it is immaterial for what purpose he has appeared or what action he takes on appearance Thus a party who is himself present must be deemed to have appeared, even if he withdraws from Court, on his application for adjournment being refused; *Soonderlal* v *Goorprasad*, 23 B. 414 Where however, a party was merely within the precincts of the court-house on the day of hearing but did not at all appear in Court when the case was called out, it cannot be said that he appeared; *Manilal* v. *Virchand*, 13 Bom L. R. 1222.

The case of appearance by a *pleader* is different. Mere presence of the pleader is not appearance; he must *also* be duly instructed and able to answer all material questions relating to the suit. Thus where a pleader attends at the hearing and states that though he has filed his

vakalatnama he has no instructions with regard to the case, there is no "appearance." Nor is there any "appearance" when the pleaders' only instructions are to apply for an adjournment and which being refused, he retires stating that he has no further instructions; *Soonderlal* v. *Goorprasad*, 23 B. 414, *Laltaprasad* v *Nandkishore*, 22 A. 66: *Satis* v. *Apara*, 34 C. 403 F. B. ; *Gopala* v. *Marid*, 30 M. 274; *Gurdit* v. *Sohan*, (1905) 34 P. R. ; *Krishna Das* v *Ram Ugrah*, 21 A L. J. 500: 74 I. C. 845: A. I R. 1923 All. 549; *Manickam* v. *Mahudum*, 47 M 819: 82 I. C. 102: A I. R. 1925 M 21 F B ; *Ram Kishan* v *Jatadhari*, 3 Pat. L. J. 481. 46 I. C. 488.

If, however, in the above cases the *party* himself is also present along *with his pleader*, the Madras High Court has held that there is no appearance; *Gopala* v. *Maria*, 30 M 274 The Patna High Court has taken the same view in *Lalji Saha* v. *Lachmi Narain*, 3 Pat. L. J. 355: 47 I. C. 27; *Shaikh Mahammad* v. *Chulhai*, 4 Pat. L. J. 712: 52 I. C. 290; *Mahant Damodar* v *Kumar*, 1 Pat. 188· A I R. 1922 Pat. 485: 69 I. C 837 But the Bombay High Court, in *Esmail* v. *Haji Jan*, 33 B. 475. 3 I. C. 992, held that in such a case, he must be deemed to have appeared. In a recent case, however, the same High Court has held that even when he is present in person, he cannot be deemed to have appeared, if he is accompanied by a pleader who is not duly instructed; *Moti Lal* v. *Nandram*, 25 Bom L R 1222; 82 I. C. 124: A I. R. 1924 B. 139.

The mere presence of a *recognized agent* in Court at the hearing is not necessarily an appearance of the party. It must be determined whether he intended to appear and did, in fact, appear for the party under Or. III, r 1. The case of appearance by a *co-party* also stands on the same footing; he must be duly authorized in writing under Or. I, r. 12, and it is a question of fact whether he did appear for his co-party or not.

These observations apply equally to a plaintiff or a defendant. The case of a defendant in default, will be more fully considered under r. 13 *post* As to the applicability of Or. IX to adjourned hearings, *see* notes under Or. XVII, r. 2.

"Shall be precluded from bringing a fresh suit."—The dismissal of a suit under Or. IX, r 8 precludes a fresh suit in respect of the same cause of action A difference in the mode of relief in the two suits does not affect the identity of the cause of action —*Shankar Baksh* v. *Daya Shankar*, 15 C. 422 P C , *Asia Bibi* v. *Seha Mahomed*, 39 M. L. J. 412

Where the causes of action in the two suits are not identical but different, there is no bar under this rule A dismissal under r. 8 does not operate as *res judicata; Chand Kour* v. *Partab*, 16 C. 98. P. C. *See* also, *Ramchandra* v. *Khatal*, 60 B. 28; *Gobind* v. *Afzul*, 9 C. 426; *Sankar* v. *Madan*, 14 C. W. N. 298: 11 C L. J. 61; *Bindrabun* v. *Moti*, 12 A. L. J. 53.

The operation of Or. IX, r. 9 is confined to those cases only where a second suit is brought for the same object and on the same cause of action as the suit which was dismissed; *Balkishan* v. *Raghubar Dayal*, 45 A. 81: 74 I. C. 991.

In order to determine the identity of the cause of action the Court may refer to the issues in the previous suit; *Naganada* v. *Krishnamurthi*, 34 M. 97 p. 107.

Where the plaintiff in the fresh suit was a contesting defendant in the former suit, he cannot be said to have been represented by the plaintiff in the former suit, and a fresh suit is not barred; *Ottappurakal* v. *Cherichil*, 33 M. 31.

The disability is only against the defendant who was actually present at the hearing of the former suit, and not against those who were absent The dismissal against these latter must be regarded as one under r. 3, and r. 4 does not preclude a fresh suit against them; *Bukharam* v. *Ramji*, 10 N. L. R. 39: 23 I. C. 878.

A fresh suit is barred only when the previous suit was *rightly* dismissed under r. 8; *Kanji* v. *Habib*, 2 Bom L. R. 206.

This rule does not bar a partition suit dismissed for default; *Bisheshar* v. *Ram*, 28 A. 627; *Madon* v. *Baikanto*, 10 C. W. N. 839.

Gross negligence on the part of the minor's next friend prevents the effect of the bar to the institution of a fresh suit by minor, after attaining majority; *Sheo Churn* v. *Ramnandan*, 22 C. 8. *See* also, *Hanmantapa* v. *Jivubai*, 24 B. 547; *Gurdevi* v. *Raman*, 99 P. L R. 1910.

"**Sufficient cause.**"—This rule makes it compulsory on a Court to set aside a dismissal under r 8, where the plaintiff satisfies the Court that there was sufficient cause for his non-appearance. But it does not take away the inherent power of the Court to restore the case for any other valid reason, the merits of the case forming an important element. See, *Lallaprasad* v. *Ramkaran*, 34 A. 326, *Mg Po Thu* v *Chaung*, 5 Bur. L. T. 72; *Gardit* v. *Sohan*, 46 P R. 1905; *Somayya* v. *Subbamma*, 26 M. 599. *Bilasirai Luxmanram* v. *Cursondas*, 44 B. 82: 21 Bom. L. R. 952. In *Usto* v. *Ghulam*, 8 S. L R. 241: 27 I. C. 924, a country view has been taken; *see* also, *Charu* v. *Chandi*, 19 C. W. N. 25.

Serious illness in the family is a sufficient cause, but not failure to be in time to catch a train in order to attend the case; *Kali* v. *Prayag*, 19 I. C. 334. But late arrival of a train, which prevented a party from appearing in Court, which in ordinary circumstances would have arrived in time, is sufficient cause; *Amir Chand* v. *Karam Chand*, A. I. R. 1927 L. 40: 98 I. C. 868.

Illness of plaintiff is sufficient cause, *Lachmandas* v. *Ramjidas*, 95 I. C. 240: A. I R 1926 L 541; but illness of a brother was held not a sufficient cause to set aside a dismissal; *Rambhanjan* v. *Pashupat*, 2 Pat. 784: 74 I. C. 847.

The plaintiff, who was a female, and her vakil were both absent when the case was called on for hearing. Her husband who was present in Court went to call the vakil and the suit was dismissed for default. The plaintiff then applied for restoration *Held*, that the suit should be restored; *Pallammai Ammal* v. *Malaimmai Ammal*, 23 L. W. 430: 93 I C. 211. When the case was called, plaintiff ran away to call his pleader and returned a few minutes after the suit was dismissed. *Held* that this is sufficient cause; *Bhaical* v. *Mohla*, 96 I. C. 821: A. I. R. 1926 L. 650.

Gross negligence of the next friend of a minor in making default is a sufficient cause: *Adayapadı* v *Krishna*, 27 M. L. J. 167.

It is not the duty of the officers of Court to call upon the pleaders to sign the orders issued, or to inform the nature of the orders passed. It is for the pleaders to make themselves acquainted with the orders passed; *Robert Watson* v *Ambika Dasr*, 4 C W N 237 (238)

Where plaintiff or counsel is not informed about the adjournment, and consequently there is default in appearance on the adjourned date, the dismissal of the suit must be set aside, as plaintiff has under the circumstance sufficient cause for non-appearance within this rule; *Ishar Singh Dharam Singh* v *Ramdas Karam Chand*, 96 I. C. 245

Where it appeared that the plaintiff was not aware of the date of the last hearing and even if he had known about it he had no intention to appear. *Held* that the order refusing to restore the suit was right under the circumstances of the case, *Rama Chandra* v *Vythianathan*, 13 L. W. 834: 62 I C 378.

The plaintiff attended the Court on the day fixed for hearing, but, seeing that the Judge was engaged with other work, left the Court-house. After returning he found that his suit had been dismissed for default On an application to set aside the dismissal *Held* that there was no sufficient cause for plaintiff's non-appearance He was not taken unawares. He was under no compulsion to leave the Court, nor was his absence due to any weighty cause; *Mani Lal* v *Gulam*, 13 B. 12. *See* also, *Toolsy Money* v *Prosad Money*, 2 C W N 490, *Charu* v *Chandi*, 19 C. W. N. 25.

Where the plaintiff was present in Court on the day when his suit was called on, but had to be unavoidably absent at the particular time when it was called, and where he put in an application on the same day, *held*, that under these circumstances the suit should be restored; *Hakim Rai* v *Rahim Baksh*, 27 P. L R 431 8 Lah L. J 422: 96 I. C. 402.

"Suit."—An application under s. 158 of the Bengal Tenancy Act 1885, is not a suit either under this rule or under rule 8; *Janki* v. *Raja Kalanand*, 2 Pat. 192 A I R 1923 Pat 381 74 I C 464.

Or. IX, r. 9 and Or. XVII, r. 3.—On the day fixed for hearing, plaintiff's pleader applied for an adjournment on the ground of plaintiffs' inability to attend owing to his illness, and the Court rejected the application and dismissed the suit Subsequently an application was made to set aside the dismissal under Or. IX, r 9, which was also rejected without taking evidence on the ground that Or XVII, r 3, applied to the case *Held* that Or XVII, r. 3, had no application to the case as no evidence had been recorded and no pleadings had been opened and that the application was under Or. IX, r. 9; *Durga Kanta* v *Anta Koch*, 22 C W N 671; *Ratanbai Shivlal* v. *Shankar Deo Chand*; 24 Bom L R 775

Applicability.—This rule applies to proceedings under s 9 of the Specific Relief Act, which only bars a review; *Anthony* v *Dupont*, 4 216 also to an application for revision; *Jimani* v. *Bhagel*, (1907) 97 P

Where, after a reference under the Land Acquisition Act, the proceedings are dismissed for want of prosecution, the proper course for the part

is to revive the proceedings under this rule. A separate suit for trial of the questions involved in the reference is barred.—*Bandi Singh* v. *Ramadhin*, 2 C. L. J. 359: 10 C. W. N. 991: *Behari* v. *Nanda*, 11 C. W. N. 480.

An executor applying for probate cannot be regraded as a plaintiff suing in respect of some cause of action and this rule does not apply and the will may be again probounded; *Ramani* v. *Kumud*, 14 C. W. N. 924:

This rule applies in the case of an application for probate; *Rallabandi Veeramma* v. *Rallabandi Subba Rao*, 52 I. C 639.

Whether Rule 9 Applies to Execution Proceedings.—The question whether the provisions of Or. IX are extended to execution proceedings by s. 141 of the Civil Procedure Code, has been the subject of much diversity of judicial opinion It was held in the following cases that s. 141 was applicable to execution proceedings.—*Krishna Chandra* v. *Pratap Chandra*, 3 C. L. J. 276; *Safdar Ali* v. *Kishun Lal*, 12 C. L J. 6; *Diljan Nichha Bibi* v *Hemanta*, 19 C. W. N 758; *Bhuban* v. *Dhirendra*, 20 C. W. N 1203, *Bepin Behari* v *Abdul Barik*, 21 C. W N. 30: 44 C. 950: 24 C. L. J 446. On the other hand it was held by the Judicial Committee, in *Thakur Prasad* v *Fakirullah*, 17 A. 106, and in the following cases, that s. 141 was not applicable to execution proceedings —*Asim Mandal* v. *Raj Mohan*, 13 C L J. 532; *Hari Charan* v *Manmatha*, 41 C 1: 18 C. W N. 343, *Charu Chandra* v. *Chandi*, 19 C W. N. 25, *Bala Subramania* v. *Swarnammal*, 38 M. 199: 25 M L. J 367; *Hajrat Akramanessa* v. *Valiulnessa*, 18 B 429; *Bhubaneswar* v *Tilak Dhari*, 4 Pat. L. J. 135. The same view has also been taken in the recent case of *Basarutulla* v. *Reazuddin*, 53 C 679 A I R. 1926 C 773, in which an elaborate research into the history of s. 141 and an exhaustive analysis of the case-laws bearing on it will be found: "There is no substantial difference between the terms of s 647 of the Code of 1882 in its original form and s. 141 of the Code of 1908, and, in my opinion the broad and general proposition may be laid down that *none of the provisions of the Code are made applicable to execution proceedings by reason of the provisions of s.* 141 " (*Per* Page, J) The matter may now be considered to be concluded by the Privy Council decision in *Thakur Prasad* v *Fakirullah*, 17 A. 106 P C

The following cases in which it was decided that Or IX applies to execution proceedings, are no longer good law; *Bhuban* v *Dhirendra*, 20 C. W. N 1203; *Kali Kanta* v. *Shyam Lal*, 25 C. L J 163; *Diljan Nichha Bibi* v. *Hemanta*, 19 C. W N. 758, *Safdar Ali* v *Kishan Lal*, 12 C. L. J. 6.

Dismissal for Default of Application for Restoration of Suit.—Rule 9 provides for the revival of a suit dismissed for default Does it apply where an application to set aside the dismissal of a suit is itself dismissed for default? There has been a conflict of judicial opinions on this question. In *Bipin Behari* v. *Abdul Barik*, 44 C. 950 21 C. W. N. 30: 24 C. L. J. 446, where an application for the restoration of a Small Cause Court suit under Or IX, rr. 4 and 9, was in its turn dismissed for default, it was held that an application under Or IX, r. 9 for the revival of that application lay by virtue of the provisions of s. 141 In *Pitamber* v. *Dodee Singh*, 46 A. 310: A. I. R. 1924 A. 603, it was held that the

revival application under rule 9 may itself be treated *as an application to restore the suit*, provided it is made within the period prescribed for the original application The Rangoon High Court took the same view in *Menon* v. *Lafon*, 3 Rang 504 The same question again came up for C. W. N. 576. A. I R 1927 C 534; and it was there held that when a decision in the recent case of *Sarat Krishna* v. *Bisweswar*, 54 C. 405: 31 C W. N 576: A I. R 1927 Cal. 534 and it was there held that when an application under Or IX, r 9 for restoration of a suit dismissed for default is itself dismissed for default under r. 4 of that order, no application lies under Or IX, r. 9 for setting aside that order of dismissal and for restoration and re-hearing of the former application under Or. IX, r. 9, but the second application may be treated as an application to restore the suit and not to restore the first application, and if it is within time, there can be no bar to its being dealt with as an application under Or. IX It was further held that if it is not within time, s. 151 may be invoked in proper cases to restore the suit. *See* also *Gonesh Prasad* v. *Bhagelu*, 47 A. 878· A I R 1925 A. 773, *Ram Gulam* v. *Sheo Deo Narain*, 4 Pat L J 287

Limitation.—30 days under Art 173, Limitation Act. This cannot be avoided by making an application for review; *Deodit* v. *Gopal*, 1 Pat L. J. 547 3 Pat L W 66, *Sheorajnandan* v. *Girija*, 1 Pat. L. T. 573. But see, *Lala Chet Narain* v. *Rampal*, 16 C. W. N. 643, where it was held that a defendant can apply for review under Or. XLVII, r. 1, even after the expiration of 30 days allowed by law to apply for setting aside the dismissal under this rule

Where no application to set aside a dismissal is made within the period of limitation, the Court has no inherent power under s. 151 to set aside the dismissal after the expiry of the period; *Duni Chand* v. *Pritamdas*, 7 Lah L. J 13 86 I C 256: A. I. R. 1925 L. 321; *Ajodhya* v *Musst Phul Kuer*, 1 Pat. 277: 65 I. C. 844: A. I. R. 1922 Pat. 479.

Appeal.—An appeal lies from an order *refusing* to set aside the dismissal of a suit, under this rule [Or. XLIII, r. 1 (c)], but no appeal lies from an order *granting* restoration, *Hirdhmun* v. *Jinghhor*, 5 C. 711; *Maharaj Shibcharan* v. *Mahomend Zahua*, 57 I C. 245.

No appeal lies against an order rejecting an application under this rule for reviving an application under Or XXI, r. 90, which has been dismissed for non-appearance of the judgment-debtor; *Jung Bahadur* v. *Mahadeo*, 31 C. 207: 8 C. W. N. 160 (10 B. 433, 11 M. 319, 19 W. R. 122 *followed*). Followed in *Brojo* v. *Moti*, 14 C. W. N. 573· 13 C. L. J. 153; *Kalikanta* v. *Shyamlal*, 25 C. L. J. 163; *Mrinalini* v. *Benode*, 6 I C. 148; *Ghasiti* v. *Abdul*, 29 A. 596 (application under Or. XXI, r. 89). *See* also *Charu* v. *Chandi*, 19 C. W. N. 25, where it has been held that Or. XLIII, r. 1 (c) does not apply to such an order.

No appeal lies from an order rejecting an application under Or. IX, r. 9 to restore a former application which is dismissed for default; *Lok Nath* v. *Mt. Satan Bai*, 73 I. C. 821.

Where an application under Or. XXI, r. 69 has been dismissed for default, the Court may entertain a second application treating it as one for review; *Swaminatha* v. *Paul*, 22 M. L. J. 148: 10 M. L. T. 589.

Where an application for setting aside the dismissal of a suit has, in its turn, been dismissed for default, an application under Or. IX, r. 9 for revival of that application lies under s. 141 read with this rule; an *alternative* remedy under the review section also lies; *Bepin* v. *Abdul*, 20 C. W. N. 30: 24 C. L. J. 446; *Loknath* v. *Mt. Sattan Bai*, 73 I. C. 821. But see *Ram Ghulam* v. *Sheodeo Narain*, 4 Pat L. J. 287; *Manke* v. *Walwekar*, A. I. R. 1923 B. 386. It also seems that dismissal for default of the original application under Or. IX, r. 9 would amount to an order rejecting the original application and as such would be appealable under Or. XLIII, r. 1 (c). *See* the analogous case under Or. IX, r. 13, *Kumud* v. *Hari*, 21 C. L. J. 628.

An order by a Judge on the Original Side of the High Court, refusing to set aside a dismissal for default is a "judgment" within the meaning of cl. 15 of the Letters Patent and is appealable thereunder; *Mathura* v. *Haran*, 43 C. 857: 20 C. W. N. 594: 23 C. L. J. 448.

Revision.—Where a suit was dismissed for default, and the lower Court found that there was no "sufficient cause" under this rule for setting aside the dismissal, but taking into consideration the fact that the suit was for nearly Rs. 10,000, set aside the dismissal as a matter of grace It was held that the order of the Court setting aside the dismissal being wholly without jurisdiction, the High Court was bound to interfere in revision and quash the order; *Manickam* v *Mahudam*, 48 M. L. J. 152: 85 I. C. 499: A. I R. 1925 M 209.

Restoration of Suit on Application by One of Several Plaintiffs, Whether Restoration in favour of All.—An order under Or. IX, r. 9, setting aside an order dismissing a suit for default made on the application of some of several plaintiffs, may operate in favour of all of them as the Court setting aside the order may direct; *Bishwambar Nath* v. *Girdhari*, 23 O. C. 18: 55 I. C. 481.

Grounds for Restoration.—Where a party appears a few minutes after the case has been called on and dismissed during his absence, he should be made to pay the costs of the application to restore the suit and his suit should be restored and heard on the merits, *Irappa* v. *Ningappa*, A. I. R. 1923 Bom. 480. When a suit was called on for hearing, the plaintiff who was present in Court left the Court precincts to fetch his pleader who was engaged in another Court When the plaintiff [illegible] with his pleader, it was three quarters of an hour after the case had been called and dismissed for default. *Held*, that in the circumstances of the cases the suit should be restored; *Behari Lal* v. *Maqsood Ali*, 71 [illegible] 283: A. I. R. 1923 All. 189.

Inherent Power of Court to Restore Suit Dismissed for Default.—Even if there is no "sufficient cause" for the plaintiff's non-[illegible] within the meaning of this rule, a Court has inherent power, [illegible] to restore a suit dismissed for default if there is a just [illegible] cause for such restoration; *Lalta Prasad* v *Ram Karan*, [illegible] I. C. 187; *Bilasi Rai* v. *Cursondas* 21 Bom L. R 952 [illegible] contrary view has however been taken by the Madras [illegible] *Neelaveni* v *Narayana*, 43 M. 94, approving *Venkataram*[illegible] M. L. J. 235 and overruling *Somayya* v *Subamma*, [illegible] It was held that a Court has no power, apart from th[illegible]

rule, to restore a suit dismissed for default, or apart from the provisions of r. 13, to set aside an *ex parte* decree. The Patna High Court has taken the same view as the Madras High Court in *Ajodhya* v. *Musst Phul Kuar*, 1 Pat 277 65 I. C 34: A I. R. 1922 Pat. 479.

Procedure in case of non-attendance of one or more of several plaintiffs.

10. Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit. [S. 105.]

Procedure in case of non-attendance of one or more of several defendants.

11. Where there are more defendants than one, and one or more of them appear and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear. [S. 106]

COMMENTARY.

There is nothing in this rule which conflicts with or limits the operation of Or. IX, r. 13 the application of which is not limited to the case of a sole defendant who has not appeared or where there are more defendants than one and none of them has appeared.—*G. P. Cooke* v *Equitable Coal Co.*, 8 C W. N. 621.

This rule must be read with rule 13 and effect should be given to all the provisions contained in them. Principles which should be applied in determining whether the entire decree is to be set aside or only in so far as it affects the applicant, discussed.—*Jadubansa* v *Mohunt Hari*, 6 C. L J. 226.

Where some defendants do not appear, and the Court deals with the case under this rule, the decree given on a ground common to all the defendants is not in the nature of *ex parte* decree, even as against the absent defendants —*Doorga Churn* v. *Shamanund*, 12 W. R. 376.

As to the effect of setting aside an ex parte decree agains several defendants, on the application of one of them, see notes under rule 13 of this Order.

Consequence of non-attendance without sufficient cause shown, of party ordered to appear in person.

12. Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear. [S. 107.]

COMMENTARY.

"Has been ordered to appear in person."—Or. IX, r. 12 applies to all cases where a party has been ordered to appear in person and is evidently framed for the purpose of dealing with obstructive tactics and of enabling the Court to proceed against any party who does not attend; *Vaiguntathammal* v *Valliammal*, 41 M 250 41 I. C. 710.

The failure of the guardian *ad litem* of a minor defendant to appear in Court in person in obedience to a direction issued by the Court for such appearance authorizes the Court to act under Or. IX, r. 12; *Ayya Nadan* v. *Thenammal*, 27 M. L T 171: (1920) M W. N. 241

Dismissal of Suit on Non-appearance of Plaintiff Ordered to Appear in Person, When Justified.—A Munsif ordered a plaintiff to appear personally on a particular date The case was not taken up on that date. The plaintiff did not appear on the adjourned date and the Court dismissed the suit under Or. IX, r. 12. *Held* that the order was without jurisdiction inasmuch as the order for personal appearance did not remain in force for the adjourned date; *Sundar Nath* v. *Mallu*, 39 A. 476: 15 A. L. J. 522; *Rameswar Baksh* v. *Rasul Beg*, 3 O. L. J. 712: 38 I. C 477.

SETTING ASIDE DECREES EX PARTE.

Setting aside decree ex parte against defendant.

13. In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendants only it may be set aside as against all or any of the other defendants also. [S. 108.]

COMMENTARY.

Alterations.—This rule corresponds to s. 108 of the old Code, with some alterations. The most important changes are the addition of the words "*as against him*" after the words "setting aside the decree," and the addition of the proviso which is entirely new. The object of inserting the words "*as against him*," has been explained in the following report of the *Special Committee*: "The Committee have inserted words to make it clear that a decree can only be set aside in favour of a defendant against whom the decree has been made *ex parte*. There is some conflict of judicial authority upon this point, and the Committee think that the

matter should be set at rest in this sense." The object of the insertion of the proviso has been explained in the following report of the *Select Committee*: "We think it necessary to provide, specially for cases in which it may not be possible, to set aside the decree as against the applicant only." There were conflicting decisions on these points under the old Code, which are noted below, under the heading "As Against Him."

Rent and S. C. C. Decrees.—Section 153-A of the Bengal Tenancy Act (VIII of 1885), as amended by Act I of 1907, B. C., prescribes the mode for applying to set aside an *ex parte* rent decree. It directs the applicant to deposit admitted rent at or before the time when the application is admitted Section 17 of the Provincial S. C. Court Act IX of 1887 also perscribes similar procedure.

Applicability of this Rule.—There can be no *ex parte* proceedings against a defendant who has entered appearance and filed his written statement; *Ramcharan Lal* v *Raghubir Singh*, 21 A. L. J. 495: 45 A. 618.

Applicability of this Rule to Execution Proceedings.—*See* notes to s. 141 and Or IX, r 9 under heading "Whether Rule 9 Applies to Execution Proceedings"

Order IX, C P Code, does not apply to execution proceedings; *Babu Riter Koer* v. *Babu Alakdeo Narain*, 1918 Pat. 265, 4 Pat. L. J. 330. *See* also *Bharat Chandra* v *Tasin Sarkar*, 21 C. W. N 769, *Gunjra Koer* v. *Lakhan Koer*, 35 I C 337 (17 A 106 *folld.*); *Basaratullah* v. *Reazuddin*, 53 C. 679 A. I R 1926 C 773; *Kahakkal* v *Palani Koundan*, 50 M. L. J. 200 92 I C 533 · A I R. 1926 M. 412

Ex Parte.—The expression "*ex parte*" has not been defined anywhere in the Code nor does it appear to have been the subject of any judicial decision for its definition Its accepted meaning, according to Wharton's Law Lexicon is "a proceeding by one party in the absence of the other." Order IX, r 6 lays down that when the plaintiff 'appears' and the defendant does not, the Court may proceed *ex parte*. It is thus necessary to consider what constitutes "appearance" by the defendant. The nature of the defendant's appearance in obedience to the summons is best explained by the language of the form prescribed in the First Schedule, App. B, for summons to a defendant That form directs the defendant to appear in person or by pleader duly instructed and able to answer all material questions relating to the suit or who shall be accompanied by some person able to answer all such questions It also gives him notice that in default of his appearance, the suit will be determined in his absence The test of a defendant's appearance, therefore, is whether such of the requirements of the summons as relate to appearance have or have not been fulfilled

What Amounts to an Ex Parte Hearing.—An appearance by a pleader without sufficient instructions to proceed with the case, as well as non-appearance at an adjourned hearing, amounts to non-appearance within the meaning of Or. IX, r. 6, and the decree passed on such hearing is an *ex parte* one. *See* the following cases; *Ramtahal* v. *Rameshar*, 8 A. 140; *Hiradai* v. *Hira Lal*, 7 A. 538; *Raj Kumar* v. *Jugal*, 18 A. 241;

Shankar v. *Radha*, 20 A. 195, (affirmed in 23 A. 220, P. C.); *Lalla Prasad* v. *Nand Kishore*, 22 A. 66; *Hildreth* v. *Sayaji*, 20 B. 880; *Soonderlal* v. *Goor Prosad*, 23 B. 414; *Jonardun* v. *Ram Dhone*, 23 C. 738, F. B.; *G. P. Cooke* v. *Equitable Coal Co.*, 8 C. W. N. 621; *Satis Chandra* v. *Apara Prosad*, 34 C. 403, F. B.: 11 C. W. N. 829: 5 C. L. J. 247; *Venkatarama* v. *Nataraja*, 24 M. L. J. 235. *See* also, *Gopal Row* v. *Maria Soosaiya Pillai*, 30 M. 274: 17 M. L. J. 235; *Marian Nissa* v. *Ram Kalpa*, 34 C. 235: 5 C. L. J. 260; *Shibendra* v. *Kinoo*, 12 C. 605; *Mahant Domodar Das* v. *Raj Kumar*, 1 Pat 188. *See*, however, *Kador Khan* v. *Juggeswar Prasad*, 35 C. 1023 (distinguished in *Enatulla* v. *Jiban*, 41 C. 956).

A defendant filing a written statement, asked for an adjournment, but his application was rejected and no one appearing for him, the case was proceeded with and decreed in his absence. *Held* that the hearing was *ex parte*; *Administrator-General of Bengal* v. *Lala Dyaram*, 6 B. L. R. 688; *Doyal Mistree* v. *Kupoor Chand*, 4 C. 818: 3 C. L. R. 482; *Krishna Dass* v. *Ram Ugrah Singh*, 21 A. L. J. 500; 74 I. C. 845.

A defendant who had filed a written statement but had not appeared at the hearing is entitled to apply under this section to set aside the *ex parte* decree against him.—*Muniappan* v. *Balayan Chetti*, 31 M. 505.

Where a party applies to set aside an *ex parte* decree, alleging that confession of judgment was obtained by fraudulent personation, the Court is bound to enquire into the truth of the allegation, and if it be established, the decree may be set aside.—*Koroonamoyee* v. *Nobokishore*, 6 W. R. Mis. 36. Followed in *Bholai Naskar* v *Alach Naskar*, 3 C. L. J 158 and *Kunja Behari* v. *Durgamoni*, 3 C L. J. 160

The expression "a decree passed *ex parte*" in s. 17 of the Provincial Small Cause Courts Act (IX of 1887) must be read with Or. IX, r. 13 and can only mean a decree passed *ex parte* against a defendant and does not include cases dismissed for default.—*Mussammat Jamina Bibi* v. *Seri Chand*, 2 C. W N. 693. *See* also *Bepin* v. *Abdul*, 21 C. W. N. 30.

What does Not Amount to an Ex parte Hearing.—The words "if the defendant does not appear" in Or. IX, r. 6 must be understood to apply to the case of a defendant who has not appeared at all, and not to the case of a defendant who, having once appeared, failed to appear at the adjourned hearing; *Zain-ul-Abdin* v *Ahmed Raza Khan*, 2 A. 67, P. C. This case has been distinguished in 23 C. 738, F. B ; in 18 A. 241; in 20 A. 195; in 20 A. 66, and in 23 B. 44. *See* also, *G. P. Cooke*, v. *Equitable Coal Co.*, 8 C. W. N. 621.

An appearance by person or by pleader without putting in any answer or written statement is an appearance within the meaning of this section; and the fact that the defendant did not put in a written statement does not warrant the trial of the suit *ex parte* —*Goluckbur* v. *Bishonath*, Marsh, 52; *Jankee Ram* v. *Chundrabutty*, 7 W. R. 295; *Sivarajadhani* v. *Kuppatulu*, 2 M. H. C. 311; *Raghapa Bin* v. *Parapa Bin*, 1 B. 217.

A decree was obtained upon a *solehnama*, and in execuiton, one of the defendants, appearing, alleged that he had no notice of the original

suit, and that the *solehnama* was a forgery. *Held* that the decree was not *ex parte; Hemmo Moyce* v *Waston and Co*, 14 W. R. 297; but *see* 3 C. L. J. 158, 160

A Court passed a decree in terms of a compromise purported to have been signed by all the defendants, under the impression that all the defendants were before it, and joined in the compromise. *Held* that the decree was not *ex parte, Damodar* v *Hrishi*, 19 C W. N. 118; *Jadunath* v. *Assam*, 27 I C 261

Where the defendants had entered appearance and filed their written statements, but their defence had been struck out under Or. XI, r 21 for failure to file their affidavit of documents, and the suit had been placed in the undefended list of cases, and a decree made therein: *Held* that the decree in suit was not an *ex parte* decree within the meaning of Or. IX, r. 13; *Kesharia* v *Potooah*, 2 C W N 676 *See* also *Chuni* v. *Chumman*, 7 A. 159.

Defendant.—Includes his representative in interest *See* notes to s. 146.

Court which Passed the Decree—Appellate Court.—The mere fact that an appeal against the decree has been *filed*, does not oust the jurisdiction of the Court making the *ex parte* decree, to entertain an application under this rule, *Damodar* v *Sarat*, 13 C W N. 846; *Kumud* v. *Jatindra*, 38 C 394 15 C W N 399 13 C L J 221; *Palaniyappa Chetti* v *Subramaniam Chetty*, 44 M 731 41 M. L J 90.

The Court which passed the *ex parte* decree has no jurisdiction to set it aside under this rule after the decree has been *affirmed* on appeal, *Dhonai* v *Tarak*, 12 C L J 53, *Sankara* v *Subraya*, 30 M. 535: 17 M. L. J 436, *Palakdhari* v *Mankaran*, 7 A L J 588, *Mathura* v. *Ramcharan*, 37 A 208 *See* also *Brijnarain* v *Tejbal*, 32 A. 295 P. C.

Where an applicant for setting aside an *ex parte* decree is no party to an appeal against that decree either as appellant or respondent and the Appellate Court has not adjudicated upon *his* case, he may apply to the Court of first instance for setting it aside, *Gajrajmati* v. *Swaminath*, 39 A 13, 14 A L J 853 *See* also, *Brijlal* v. *Chowdhry*, 17 C. W. N. 133 15 C L J 432, where all the previous cases on the question of merger of decrees have been considered, and *Abdul Ohad* v. *Amdali Gazi*, 48 C. 153.

"That summons was not duly served."—The word "duly" in Or. IX, r. 13 is not equivalent to "personally" The only points open to the Appellate Court to consider under Or IX, r. 13 are whether the summons was duly, that is, *legally* served and whether the defendant was prevented by sufficient reason from appearing, *Doraiswami Ayyar* v. *Balasundaram Ayyar*, A I. R. 1927 M. 507 Where the defendant was aware of the institution of the suit, he having appeared to oppose an application for his appointment as guardian of a minor defendant. *Held* that this did not absolve the Court from serving him with a copy of the plaint and notice of the date fixed for hearing; after the plaint had been admitted; *Gulabchand* v. *Shankar*, 35 A. 163.

The fact that the defendant or his solicitor knew that a suit had been instituted would not dispense with the necessity of proper service of summons; *Kassim Ebrahim* v. *Johurmull*, 43 C. 447: 20 C. W. N. 173: 23 C. L. J. 183.

Where the service is effected by serving summons on the son living in the same house as the *pardanashin* lady, it must be taken to be a proper service on the lady; *Khorshedennessa* v. *Hakkannessa*, 94 I. C. 228. A. I. R. 1926 C. 845.

Decision that Summons was Duly Served When Res Judicata.—A decision that summons was duly served in an application under Or. IX, r. 13, is *res judicata*, and no fresh suit will lie on the ground that summons had been fraudulently suppressed; *Jangal Chaudhury* v. *Laljit*, 1 Pat L. T. 785.

"Prevented by any sufficient cause from appearing."—The Court has to determine the sufficiency of the cause in each particular case which is a question not of law but of fact. The rule should receive a liberal interpretation so as to promote the ends of justice by giving every party an opportunity of being heard. It has been held that the affirmative provisions of this rule as well as r. 9, that the party in default may prove that he was prevented by sufficient cause from appearing do not imply the negative. *See* notes under the heading "Sufficient Cause" in r. 9. A *contrary* view has been taken in *Fakhruddin* v. *Ghafurudin*, 23 A. 99; *Esmail* v. *Haji Jan*, 33 B. 475: *Durga* v. *Mahabir*, 14 O. C. 111; *Venkatarama* v. *Nataraja*, 24 M. L. J 482.

In an application under Or. IX, r. 13, what the Court has to find is not whether the defendant has any good defence on the merits but whether there is proper service, and if there is proper service, whether there was sufficient cause for his non-appearance. Courts even in mofussil ought not to proceed to the trial of a case until at least three services have been taken upon the defendant, which is the practice in the High Court; *Muhammad Sahib* v. *Alagappa Chettiar*, A I. R. 1926 M. 31.

Under Or. IX, r. 13, a Court can restore a suit only when the Court is satisfied that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing and an order of the appellate Court directing the re-hearing of a suit without any finding as to the sufficiency of the cause for the non-appearance of the defendant is illegal and without jurisdiction; *Ramesh Prasad* v *Gulabchaudhury*, 1 Pat. L T. 69: 54 I. C. 955.

On an application to set aside an *ex parte* decree, the question to be considered is whether the defendant honestly intended to be present at the hearing of the suit and did his best to do so Once the Court is satisfied that he did try to be present in Court in time and would have got there in time but for the intervention of an accident for which he was in no way responsible, it is the duty of the Court to set aside the *ex parte* decree, mulcting in proper cases, the defendant in costs The fact that by some human possibility the defendant could have been present in time does not affect his right to have the *ex parte* decree set aside; *Arunachella Iyer* v. *Subaramaiah*, 43 M. L. J. 632: 31 M. L T 257 H. C. (1922) M. W. N. 600.

Where a suit is disposed of *ex parte* on account of the absence of the party or pleader at the time of hearing but later on the pleader turns up in the course of the same day, the Court should after notice to the opposite party, restore the suit to file after imposing such conditions on the defaulting party as might meet the ends of justice: *Sorabji Rustomji* v. *Ramjilal Devjibhai*, 26 Bom L R. 321

Where summons was served only 24 hours before the dated fixed for final disposal and the suit was decreed *ex parte*, *held* that this was a sufficient cause for defendant's non-appearance on the date fixed—*Mc-Carron* v. *F Wells*, 27 A 192

Where the Small Cause Court Bench Clerk gave a wrong date to the petitioner as that on which the case was fixed for hearing and an *ex parte* decree was passed in consequence *Held*, that the procedure in the Small Cause Court under which the clerk fixed dates for cases which are ripe for hearing lends itself to such a misunderstanding as was alleged by petitioner, and the *ex parte* decree should have been set aside; and the High Court accordingly set aside the decree and ordered a re-hearing; *Wazir Chand* v. *B. M. Bharadwaza*, 3 Bur L J 34.

Where a defendant was prevented by the fraud of the plaintiff from appearing on the last day of hearing, the suit was held to have been decided *ex parte*, notwithstanding that the defendant had been represented on the first day of hearing, in *Paroye* v. *Chintamonee*, 18 W. R. 457.

An *ex parte* decree was passed against a mother personally and as guardian of her infant sons The infants subsequently applied to set aside the *ex parte* decree on the ground that summons had not been duly served *Held* that, as the infants were not responsible for their non-appearance, it might be said that they had been prevented by "sufficient cause from appearing," and that the *ex parte* decree might be set aside against them.—*Kesho Pershad* v *Hirdoy Narain*, 6 C. L. R. 69; *Bhuramal* v. *Har Kishen*, 24 A. 383 *See* also, *Jatindra* v *Raja Srinath*, 3 C. W. N. 261. 26 C. 267, *Lala Sheo Churn* v *Ramnandan*, 22 C. 8; *Hanmantapa* v. *Jibu Bai*, 24 B. 547, *Ajodhya Pershad* v *Sheo Pershad*, 5 C. W. N. 58 *Peare Lal* v. *Ashraf Khan*, 71 I C. 456 · A I R. 1923 A. 213.

Inherent Power of Court to Set Aside an Ex Parte Decree.—A Court has no power, apart from the provisions of Or. IX, r. 13 to set aside an *ex parte* decree, or an application made for that purpose. *The scope of the inherent power of a Court in this respect considered; Gadi Neelaveni* v. *Narayana Reddi*, 37 M L J 590 43 M 94: 53 I. C. 847 (26 M. 599 *overruled*) *Ajodhya* v *Mt. Phul Koer*, 1 Pat 277; *Jagannath* v. *Abdul Hakim*, 73 I. C. 660.

Effect of Setting Aside an Ex Parte Decree.—The suit stands revived and any previous order refusing to allow the defendant to appear made under r. 7 necessarily stands reversed, *Sankarling* v *Rathnasabhapti*, 21 M. 324.

An attachment of property in execution of the *ex parte* decree falls to the ground when the decree is set aside; *Lala Jagat* v. *Tulsiram*, 1 B. L. R. A. C. 71: 11 W. R. 99.

Where the decre-holder is himself the auction-purchaser the sale cannot stand if the decree is subsequently set aside; *Sett Umeddmal* v.

Srinath 27 C. 810: 4 C. W. N. 602; *Hazari* v. *Janki*, 6 C. L. J. 92; *Chandan* v. *Ramdini*, 30 C. 499; *Krishna* v. *Jogendra*, 24 C. L. J. 469.

A sale cannot be set aside against a *bona fide* auction purchaser not a party to the decree, on the ground of the decree having been subsequently reversed; *Zainulabdin* v. *Muhammad Asghar*, 10 A. 166 P. C.

An *ex parte* decree which is subsequently set aside is not a nullity and a stranger at a sale in execution is protected; *Paresh* v. *Hari*, 38 C. 622; 15, C. W. N. 875: 14 C. L. J. 400.

As soon as the *ex parte* decree is set aside the execution-sale held thereunder falls through if the purchaser is the decree-holder and a fresh decree subsequently made cannot validate the sale; *Abdul Rahman* v. *Sarfat Ali*, 22 C. L. J. 412. Purchasers from such decree-holder auction purchasers are not entitled to protection as strangers; *Satis* v. *Rameswari*, 22 C. L. J. 409.

An attachment in execution is null and void if at the time of attachment the decree had been set aside and was non-existent and a renewed decree passed subsequently will not validate it.—*Chettiattil Muhamod* v. *Kunhi Koree*, 29 M. 175.

After an *ex parte* decree is set aside, the Court has power to cause restitution.—*Sarado Prasad* v. *Soudamini*, 3 C. L J. 181.

A sale set aside on the cancellation of an *ex parte* decree does not revive when a fresh decree is passed against the defendant; *Raghunandan* v. *Jagdis*, 14 C. W. N. 182.

The Court cannot after sitting aside an *ex parte* decree proceed to uphold it as if it was still subsisting; *Raman* v. *Mohideen*, 14 M. L. J. 81.

"Upon such terms as to costs, payment into Court or otherwise."—Where the defendant is not in fault, no terms should be imposed Terms may be imposed in other cases; *Venkatasami* v. *Shanmugam*, 32 I. C. 984.

The Court may order the deposit of the decretal amount to be paid in Court. The words "payment into Court" do not relate only to costs.—*In the matter of an Application by Sharoda Charan*, 7 C. W. N. 59-n; *Shyam Lal* v *Ram Narain*, 5 Pat. L J 420· 1 Pat. L. J. 443.

But a Court should not as a condition precedent to setting aside an *ex parte* decree require the deposit of a large sum of money, as it will work hardship on the defendant; *Indar Singh* v. *Gurdayal Singh*, 74 I. C. 86.

An *ex parte* decree may be set aside on condition that the defendant should find a surety, who would be responsible for any amount that might be found due from the defendant by any decree to be subsequently made in the suit; *Sonatun* v. *Dino Nath*, 26 C. 222. 3 C. W. N. 228.

In setting aside an *ex parte* decree, the Court may direct the applicant to pay all costs incurred by the plaintiff within a fixed time and in default the application is liable to be dismissed.—*MaCaron* v. *F. Wells*, 27 A. 192.

Where an *ex parte* decree was ordered to be set aside upon terms of a certain payment by a given date *Held*, on appeal, that the Court had jurisdiction to extend the time for payment or pass a fresh conditional order, the original order having become inoperative; *Jagarnath* v *Kamta Prasad*, 36 A. 77

Proviso. "Cannot be set aside as against such defendant only."—Under the old Code there were conflicting opinions as to the power of the Court to set aside the whole decree where the decree was *ex parte* against some of the defendants only The Calcutta High Court held that the Court might do so, whereas the Bombay High Court in *Menakee* v. *Sitaram*, 18 B 142, took a contrary view All these cases are discussed in *Jadubansa* v *Mohunt Hari Charan*, 6 C L J 226; *Valia* v. *Marutha*, 31 M. 454, and *Bhuramal* v *Harkishan*, 24 A 383 F. B. *See also*, *Haji Ashfaq* v *Lala Gouri*, 33 A 264 P C., which is in accordance with the Calcutta view

It cannot be laid down as an inflexible rule of how that whenever an order is made under s 108, C P Code, 1882, the effect is to set aside the whole decree, although it may have been made against some of the defendants after contest, or although an unsuccessful effort may have been made by some other defendants to set aside the *ex parte* decree, it is not obligatory upon the Court to set aside the whole decree and to re-open the entire suit under all circumstances Principles which should be applied in determining whether the entire decree to be set aside, or whether it should be set aside only in so far as it effects the applicant, discussed and explained.—*Jadubansa Narain* v *Mohunt Hari Charan*, 6 C. L. J. 226

The proviso now makes it clear that relief is *ordinarily* to be given only to the party who is entitled to and applies for it. If, however, in order to give such relief it is necessary to set aside the whole decree as against others also, who are themselves not entitled to have the decree as against them set aside, the decree may be set aside against all; and the fact that the decree is a compromise decree, will make no difference; *Meenakshisundaram* v *Chandrakasa*, 38 M. L. T 315. (1927) M. W. N. 294 · A. I R. 1927 M. 550.

The proviso does not apply to the case of a defendant against whom the suit has been dismissed on the merits in the first instance; *Ghannumal* v *Sant Das*, 1913 P L. R 91. *See* also *Baburam* v. *Emperor*, 8 A. L. J. 674

The proviso does not authorise the Court in setting aside a decree at the instance of defendants against whom it had been obtained *ex parte* to set it aside in so far as it is in favour of the contesting defendants behind their back; *Ali Ahmad* v *Brown*, 17 C. W. N. 142.

An *ex parte* decree against a debtor and his surety can be set aside against both on the application of the surety alone · *Md. Raza* v. *Mt. Farka* 24 I. C. 115. *See*, however, *Singer Co.* v. *Mohammad*, 1914 P. L. R 246: P W. R. 166

Application to Set Aside Ex Parte Decree by Party Not Properly Represented in the Suit, If Maintainable.—To attract the provisions of Or. IX, r. 13, the persons seeking the aid of the Court must be a party to the suit; *Eda Ponnayya* v. *Jangala Kamakotayya*, 37 M. L. J. 390: 26

M. L. T. 327: 53 I. C. 184; *Abhoy Ram Jha* v. *Kandarp Narayan*, 60 I. C. 783; *Permanand* v. *Lakhmi Chand*, 66 I. C. 460.

Heirs of a defendant against whom an *ex parte* decree is passed before his death, have a right to apply to set aside the *ex parte* decree; *Mt. Banoo* v. *Lala Hardwari Lal*: A. I. R. 1923 All. 30.

Ex Parte Decree Against Minor Defendant.—Mere irregularities in the appointment of the guardian *ad litem*, who allowed the suit to proceed *ex parte*, do not entitle the minor to re-open the decree unless he can satisfy the Court that he has been prejudiced and deprived of some good defence which was open to him; *Ram Rekha Singh* v. *Ganga Prasad*, 24 A. L. J. 970: 97 I. C. 514: A. I R. 1926 A. 545 F. B. Failure of the guardian *ad litem* to appear and defend is no ground for setting aside an *ex parte* decree passed against a minor, unless fraud, collusion, or gross *negligence* on the part of the guardian *ad litem* is proved; *Vishnu* v *Datta*, 9 Bom. L. R. 1099.

Onus of Proof.—Where a judgment-debtor applies to set aside an *ex parte* decree on the ground of non-service of summons, he should be called upon to give his evidence, or to make out a *prima facie* case.—*Khudeerun* v. *Chutterdharee*, 21 W. R. 242; *Jhuttoo* v *Lulita*, 22 W. R. 423; *Torab Ali* v. *Chooramun*, 24 W. R. 262. *See* also *In the matter of Dintarini Debi*, 8 C. 880 (882), and *Rakhal* v. *Secy. of State*, 12 C. 603 (605).

In appeal against an *ex parte* decree, it is sufficient in the first instance to establish that in the trial Court the necessary proof of service of summons was not given by the plaintiff It is not incumbent on the appellant to show that summons was in fact not duly served.—*Fakhruddin* v. *Ghafuruddin*, 23 A 99.

Where the summons was not served personally on the defendant but on a *gomasta*, *held* that the burden of proving that such service was proper under Or. VI, r. 12 or r. 13, was on the plaintiff; *Nagari* v. *Namburi*, 14 M. L T. 535.

Ex Parte Decree Obtained by Fraud.—A suit is maintainable to set aside an *ex parte* decree on the ground of fraud, even after the rejection of plaintiff's application under this rule; *Prannath* v *Mohesh*, 24 C. 546. Affirmed in 28 C 475 P C ; *Dwarka* v. *Lachhman*, 21 A 289; *Ram Narain* v. *Shew Bhunjan*, 27 C. 197; *Sadho Misser* v. *Golab Singh*, 3 C. W. N. 357; *Khagendra* v. *Pran Nath*, 29 C 395, P C. 6 C. W. N. 473; *Debendra* v *Prasanna*, 5 C L J 328; *Golap* v. *Indra*, 13 C. W. N. 493; *Balkissen* v *Tapessur*, 17 C. W N 219; *Maharani Janki Koer* v. *Babu Thakur Rai*, 1923 Pat. 336 · 75 I C 343 In order to set aside a decree on the ground of fraud, it must be shown that the fraud was practised in relation to the proceedings in Court, and the decree must be shown to have been procured by practising some sort of fraud upon the Court, *Muktamala* v. *Ramchandra*, 97 I. C. 879.

Where in a suit to set aside an *ex parte* decree on the ground of fraud, the only fraud alleged was the non-service of summons, and the plaintiff had, on this very ground, previously unsuccessfully applied to set aside the *ex parte* decree, under this rule. *Held* that the suit was barred by *res judicata*.—*Puran Chand* v. *Sheo Dat*, 29 A. 212: 4 A. L. J. 51;

Niadar Mal v *Raunak Husain*, 29 A. 608; *Narsingh* v. *Rafikan*, 37 C. 197· 14 C. W. N 507; *Khirode* v. *Sm. Ashtullabu*, 20 C. W. N. 845: *Yogamba* v. *Arumuga*, 20 M L T 126. *See* also, *Ibrahim Harun Jaffer* v. *Yusuff Hussain Jaffer*, 22 Bom L. R. 798; *Janglal* v. *Laljit*, 6 Pat. L. J. 1· 60 I. C 124 But where a suit to set aside an *ex parte* decree was bassed on two grounds, *viz*, (1) that the summons was not duly served, and (2) that the decree was obtained by perjured evidence, it was held that the question of non-service of summons was not *res judicata*, because the suit included matters which could not have been raised on the application to set aside the decree; *Nalini Kanta* v. *Hari*, 29 C. W. N. 325; A. I R 1925 C 663 86 I. C 779.

In a suit to set aside *ex parte* decree on the ground of fraud, the Court has jurisdiction to investigate into the merits of the case; *Lakshmi* v *Nur Ali*, 38 C 936 15 C. W. N 1010; followed in *Kedar* v. *Hemanta*, 18 C W. N. 447

Other Remedies.—Besides the remedy given by this rule of applying to set aside the *ex parte* decree, a defendant against whom an *ex parte* decree is passed has two other remedies open to him:—(1) He may appeal from the *ex parte* decree under s. 96 and the appellate Court has jurisdiction to reverse the decree of the lower Court, on the ground that such Court was wrong in proceeding to decide the suit *ex parte* and remand the suit for re-hearing—*Sadhu Krishna* v. *Kuppan Ayyangar*, 30 M. 54, F B 16 M L J 479 (23 C 738; 17 B. 733; 23 M. 260, *dissented from*, 23 M 445 *followed*), *Farzand Ali* v. *Ekadashi*, 26 O. C. 10. 10 O L J 36, *Jethalal* v *Varajlal*, 46 B. 184: A. I. R. 1922 Bom 267

(2) The defendant may also apply for review of an *ex parte* decree; *Hari Hur Pershad* v *Buddu Pershad*, 13 C L. R 254; *Mutto* v. *Ilahi Begam*, 6 A 65, *Poreshnath* v *Khettromonee*, 20 W. R. 284; and *Ali Azim* v *Ram Manik*, 12 W. R. 195 *Hakimgir* v. *Basdeo*, 17 C. W. N. 631; *Lala Chet Narain* v. *Rampal*, 16 C W. N. 643; *Shavaksha* v. *Hugh*, 12 Bom L R 886 *Contra* *Motee Chand* v. *Radhamadhub*, 2 W. R. Mis 24. The fact that an application under Or. IX, r. 13 could have been preferred and that it was barred on the date of the review application is no bar to the review, *Chokkalingam* v. *Lakshumanan*, 38 M L. J. 224 (1920) M W N 228.

The remedy given by this rule is not open to a defendant if the decree is passed on grounds other than his non-appearance.

Whether Remedies Are Concurrent.—The remedies are concurrent The defendant against whom an *ex parte* decree has been passed is entitled to apply for setting aside the dismissal under this rule and *at the same time* to appeal from the decree Further, he is entitled to appeal from the decree or to apply for review of judgment, without previously applying to set aside the dismissal under this rule, *Karuppan* v. *Ayyathorai*, 9 M. 446; *Ashruffenessa* v. *Lahureaux*, 8 C. 272; *Raj Narain* v. *Ananga*, 26 C. 598

When a defendant against whom an *ex parte* decree is passed, does not apply to set aside the dismissal under this rule but appeals from the decree, the only question, according to the Calcutta High Court, with

which the appellate Court was concerned, was whether the decree was wrong in law or based on insufficient evidence, and that it could not deal with the question whether the lower Court was right in proceeding *ex parte; Jonardan* v. *Ramdhone*, 23 C. 738. The Rangoon High Court has followed this decision of the Calcutta High Court in *Raj Chandra* v. *K. D. O. C. Ray*, 2 Rang. 108: 79 I. C. 506: A. I. R. 1924 Rang. 137. It was held by the Madras High Court in *Sadhu* v. *Kuppan*, 30 M 54, that the appellate Court was competent to deal with the question of the defendant's non-appearance, and further, that if it came to the conclusion that the lower Court ought not to have proceeded *ex parte*, it had the power to remand the case to that Court for re-hearing. The Bombay High Court, in *Jethalal* v. *Varajlal*, 46 B. 181· A I R. 1922 B 267, took the same view as the Madras High Court

Appeal, etc.—An appeal lies from an order rejecting an application to set aside an *ex parte* decree under Or. XLIII,r. 1 (*d*) This is so even if the application for setting aside the decree has been dismissed for default; *Kumud* v. *Hari*, 21 C L. J. 628; *Pikari Pramanik* v. *Sarat Sundari*, 37 I. C 835 But where in such a case the Court refused to set aside the order of dismissal and restore the application, *held* that no appeal lies; *Sharief Hussain* v. *Haidar Hussain*, 20 A. L. J. 67 I. C. 320. The order passed on appeal is final under s 104 and in not open to second appeal; *Abinash* v. *Martin*, 8 C 832.

An appeal lies from an order rejecting the application for an order to set aside a decree passed *ex parte*, when the order is made, because the conditions which were lawfully imposed on the defendant, were not complied with; *Narayan* v. *Vaikunt*, 28 B. L R. 1249: A I R. 1927 B. I F. B (*Fakirgowda* v. *Vishnudas*, 50 B. 326 28 Bom. L R. 578 *overruled*)

Where an application to set aside an *ex parte* decree is dismissed for failure to pay process fee, this is in substance a dismissal for default and an appeal lies from the order; *Bahadur Singh* v. *Wasawa Singh*, 69 I C. 713.

There is no appeal from an order setting aside an *ex parte* decree.—*Shama* v *Hurbuns*, 16 C 426 *Benaik Rao* v *Putani Singh*, 17 A. L J. 1052. It has been held by the High Courts of Allahabad, Calcutta and Lahore that an order under Or IX, r 13, setting aside an *ex parte* decree, is not an order that affects the merits of the case, and hence the alleged wrongfulness of the order cannot be urged as a ground of objection under s 105 in an appeal from the decree in the suit: *Tassaduq* v *Hayatunnissa*, 25 A 280, *Nidhalal* v *Collector of Bullandshahar*, 14 A L J 610, *Chintamoney* v *Raghoonath*, 22 C 981, *Mohamed* v *Manohar*, 40 C L J 588· A I R 1925 C 473; *Nishi* v *Umarlal*, 41 C L J 186 A I. R 1925 C 711, *Sayma Bibi* v *Madhusudan*, 52 C 472 A I R 1925 C. 766 But a contrary view was taken in *Gopala Chetti* v *Subbier*, 26 M. 601, *M S Mahomed* v *Collector Toungoo*, where it was held that such an order may be questioned in appeal from final decree.

An order setting aside an *ex parte* decree may be open to revision under s 115 if the conditions of that section are satisfied; see, *Monmohini* v. *Naranarayan*, 4 C. W N. 456; *Narayan* v *Jotindra*, 19 C L J.

258; *Karuppayee* v. *Chinnammal*, 13 M. L. T. 101: *Shidhant* v. *Anandram*, 8 Bom. L R 567.

A party against whom an *ex parte* decree has been passed can, without applying to have the decree set aside under Or IX, r. 13, appeal from the decree on the ground that the refusal to adjourn the case was not proper; *Jethalal Girdhar* v. *Varajlal*, 23 Bom L. R. 789.

Hearing of Application Under this Rule Pending Appeal.—Where a defendant against whom an *ex parte* decree has been passed, applies under this rule to set it aside, and at the same time appeals from the decree, it has been held that the proper Court to hear the application is the Court which passed the *ex parte* decree, and not the appellate Court; *Kalimuddin* v. *Esahakuddin*, 51 C 715 83 I C 220 A. I. R. 1924 C. 830; *Kumud* v *Jatindra*, 38 C 394. 9 I. C 189, *Damodar* v. *Sarat*, 13 C. W N 846, *Palaniappa* v. *Subramania*, 44 M 731· 62 I. C. 755; *Mirza Abdullah* v *Ramzan*, 21 A L J. 901 79 I C. 381: A. I. R 1924 A. 173; *Hummi* v *Azizuddin*, 39 A 143: 36 I C. 277

Hearing of Application After Disposal of Appeal.—Where the defendant appeals against the *ex parte* decree and the decree is confirmed or otherwise disposed of in appeal, the Court which passed the decree loses its jurisdiction to entertain an application under this rule, even though the application was made before the filing of the appeal; *Dhonai* v. *Tarak*, 12 C. L J. 53, *Kalimuddin* v *Esahakuddin*, 51 C 715 A. I. R. 1924 C. 830; *Sankara* v. *Subraya*, 30 M. 535; *Mathura* v *Ram Charan*, 37 A 208: 28 I. C 261.

Limitation.—The limitation for an application by the defendant to set aside an *ex parte decree* is 30 days as provided by Art 164 of the present Limitation Act IX, of 1908 The period of 30 days will commence from *the date of the decree or, where the summons was not duly served, when the applicant has knowledge of the decree* Under art 164 of the old Limitation Act XV of 1877, the period of limitation began to run from " the date of executing any process for enforcing the judgment." Thus, an important change has been introduced by the present Limitation Act.

An applicant who seeks to have an *ex parte* decree set aside has to prove that the application is within the time allowed by law. If he alleged that he did not know of the decree, he will have to explain satisfactorily the circumstances which led to the default, *The Firm Maghimal Khairati Ram* v. *The Firm Gopi Ram Ramchand*, 75 I C. 1020

Where the right to apply was lost under the old Limitation Act, the new Act cannot revive the right; *Nepal* v. *Niroda*, 39 C 506

The term 'knowledge' means knowledge of the fact that a decree of the kind is in existence; it does not embrace knowledge of the contents and general effect of the decree; *Abdool* v *Esmailji*, 12 Bom. L. R. 462

The term 'knowledge' means a certain and clear perception of the particular decree which is sought to be set aside; *Bapurao Sakharam* v. *Sadbu*, 47 B. 485; *Muhammad Sahib* v. *Alagappa Chettiar*, A. I. R. 1920 M.; *Kumud* v. *Jotindra*, 38 C. 394: 13 C. L. J. 221; 15 C. W. N. 399, (403).

Proceedings on Application Under this Rule are Proceedings Independent of the Suit.—Proceedings consequent on an application for setting aside an *ex parte* decree are not merely a branch of the suit which is terminated when the *ex parte* decree is passed, and the suit does not revive, if at all, until after the proceedings in the application are terminated successfully; *Hari Singh* v. *Muhammad Said*, A. I. R. 1927 Lah. 200 (A. I. R. 1926 Lah. 379 *followed*).

Fresh Vakalatnama Not Necessary in Application to Set Aside Ex Parte Decree.—A pleader duly appearing in a suit is not obliged to file a fresh *vakalatnama* for the purpose of an application to set aside an *ex parte* decree in the suit; *Bachubai* v. *Ibrahim Isak*, 24 Bom. L. R. 744 A. I. R. 1922 B. 207: 69 I C. 169.

No decree to be set aside without notice to opposite party.

14. No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party. [S. 109.]

COMMENTARY.

An auction-purchaser of property sold in execution of an *ex parte* decree does not come under the description of " opposite party ", *Jatindra* v. *Sri Nath*, 26 C. 267: 3 C W N. 261; nor a person who has attached the *ex parte* decree; *Sevugan* v. *Obla*, 23 M. L. J. 524: 8 M L. T. 237.

Notice to opposite party is imperative. Oral notice given to pleader who appeared in execution proceedings, but not in the suit, was considered insufficient; *Yerrakantala* v. *Delavar*, 24 M. L. J. 482 13 M. L. T. 344. See *also*, *Mahomed Jamil* v. *Bibi Tufailan*, 63 I. C 47.

The provision for notice shows that the opposite party should be heard before the decree be set aside, *Ali Ahmad* v. *Brown*, 17 C. W. N. 142.

ORDER X.

EXAMINATION OF PARTIES BY THE COURT.

1. At the first hearing of the suit, the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials. [S. 117.]

Ascertainment whether allegations in pleadings are admitted or denied.

COMMENTARY.

"Shall ascertain from each party or his pleader."—The proper way of clearing up the pleadings after the plaint and written statement have been filed is that prescribed by Or X, r 1, C P. Code, the provisions of which are peremptory. It is of the utmost importance for the purpose of doing justice between the parties that this oral examination contemplated by this rule should be duly and carefully carried out by the Court, *Anjuman-un-nissa* v *Ashiq Ali*, A I R 1922 Oudh 178: 66 I. C 222

Admissions made by a party under this rule are conclusive against him; *Abdul Aziz* v *Maryam Bibi*, 97 I C 176 A I R. 1926 A. 710

Admitted.—*See* cases noted under the heading "Effect of admissions and Statements in the Pleadings" in Or VIII r 5

It is a very dangerous thing for a Court to decree in favour of a plaintiff, merely upon alleged verbal admissions by the defendant of a sum due, without the most clear and cogent proof of such admissions, especially when the plaintiff shrinks from bringing his accounts into Court —*Lalla Sheo Prasad* v *Jaggernath*, L R. 10 I A 74

Effect of Admission by Pleader.—Admission made in a statement in a case by a pleader on behalf of his client after full consideration and consultation is admissible as evidence against the client in another case, in which he is a party.—*Comabutter* v *Paresh Nath*, 15 W. R 135.

The Court will accept the statements from counsel, from his place at the bar, without burdening him with an oath —*Sreemuty Nistariney* v. *Rai Nundo Lall Bose*, 3 C W N 694. A pleader cannot bind his client by an erroneous admission of law, *Rama* v *Mannar*, 23 M. L J. 327; *Krishna* v *Udit*, 9 I C 621

As to the effect of a pleader's admission, see notes, section 2, under heading "Authority of Pleaders to Bind Client."

Oral examination of party, or companion of party.

2. At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied, may be examined orally by the Court; and the Court may if it thinks fit, put in the course of such examination questions suggested by either party. [S. 118.]

COMMENTARY.

Verbal admissions made by a pleader of a party to a suit must be received with caution, must be taken as a whole, and must not be unduly pressed.—*Natha Singh* v *Jodha Singh*, 6 A 406

This rule merely enables the Court to ascertain what the questions in controversy are, and is not intended to be in substitution for regular examination on oath. Any statement made by a party while being examined under this rule is binding only upon him, *Janki* v. *Arku*, 2 A L J 777; *Surajmal* v. *Musst. Chhote*, 94 I. C. 1003 A I. R. 1926 A 411

Substance of examination to be written.

3. The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record. [S. 119.]

COMMENTARY.

A judgment recording the admission of a pleader must be taken as correct, unless it is contradicted by an affidavit or the Judge's own admission that the record he made was wrong, *Hur Dyal* v *Heera Lal*, 16 W. R 107

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original Civil jurisdiction.—Or XLIX, r 3, cl. (2).

Consequence of refusal or inability of pleader to answer.

4. (1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2, refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit. [S. 120.]

COMMENTARY.

A Court is not justified in imposing penal consequences upon a party who fails to appear, by passing a verdict against him, unless it is clearly made manifest that he had been ordered to attend and wilfully refused to obey the order, and the evidence which he was required to give was really material.—*Rajchookun* v. *Busject Tewaree*, 20 W. R. 165, *Obhoy Churn* v. *Pearc Dassia*, 22 W. R. 270.

The stringent provisions of this section ought to be applied only in the case of contumacious litigants.—*Data Hurkman* v. *Oodoychand*, 6 W. R. 247, and *Thakoor Lall* v. *Brohmomoyce*, 15 W. R. 253.

The discretion which the Court has of passing judgment against a party for non-compliance with its order to attend and give evidence is not confined to cases where the party summoning him cannot prove his case otherwise than by the evidence of such other party, or where the fact to be proved is solely and exclusively within the knowledge of such other party.—*Kashinath Shaha* v. *Dwarkanath*, 9 B. L. R. 215: 17 W. R. 550; *Ishan Chandra* v. *Harish Chunder*, 9 B. L. R. 218-*note*: 12 W. R. 369.

The provisions of this section ought to be exercised with the most temperate discretion, and where the Court, waiving the default of a defendant, adjourned the further hearing of the suit, it cannot afterwards pass judgment against the party in default.—*Pudiyar Vasudavan* v. *Kovi-Langatha*, 4 M. H. C. 231.

Scope of Section.—Or. X, r. 4 is self-contained and provides for all cases where a party is ordered to attend Court for the purpose of giving evidence. Or. IX, has no application to the special set of circumstances contemplated by Or. X, r. 4, *Kandath Puthiyadath* v. *Puthiyadath Chengara Raman Nayar*, (1921), M. W. N. 890. 63 I. C. 961.

"Answer any material question."—Where a plaintiff appears by a pleader, the Court has no power to issue an order under Or. X, r. 4, unless the pleader refuses, or is unable, to answer a material question.—*Satu* v. *Hanmantrao*, 23 B. 318, *See* also, *Bhimrao* v. *Gopal*, 5 Bom. L. R. 687.

Plaintiff's mooktear being unable to answer certain material questions, the plaintiff was ordered either to appear in person or send some one who could reply; and he having done neither, the suit was dismissed.—*Nilmoney Singh* v. *Ram Huree*, 2 W. R. 161.

Before the Court makes an order compelling the attendance of a party to the suit, it must be satisfied that his evidence will be material.—*Gopal Chunder* v. *Mohesh Chunder*, 21 W. R. 44; and *Makooand Adit* v. *Suttoorghun*, 17 W. R. 507.

"Without lawful excuse."—A defendant's saying that he was willing to attend when he did not attend, and showed no reason why he could not, is no lawful excuse for his non-attendance when summoned to attend. What is or is not a lawful excuse must depend on the circumstances of each case.—*Doorga Dutt* v. *Jheengoor Jha*, 18 W. R. 63.

"Pronounce Judgment."—These words have been substituted for "pass a decree." The two expressions mean the same thing. If the plaintiff is in default the Court may dismiss his suit. If the defendant is in default the Court undoubtedly has the power to decree the suit against him without any evidence; *Rajchookun* v. *Busject*, 20 W. R. 165. But the power is discretionary and the Court may in such a case require the plaintiff to give evidence.

The non-attendance of a defendant, when cited as a witness to give evidence, is not alone sufficient to justify the decision of the suit against him. *Roop Narain* v. *Kashee Ram*, 2 N. W. P. 67; and *Bhally Mahomed* v. *Nabin Chunder*, 15 W. R. 269.

A Court ought not to take everything for granted against the party in fault, but to require the other party to prove his case, so far as he can, without the desired evidence, and to hear what evidence the defaulting party adduces, before imposing upon him the penalty of default.—*Mahomed Amidoolla* v. *Durbesh*, 24 W. R. 314.

Effect.—An order dismissing a suit under this rule is a decree and bars a second suit on the same cause of action; *Punamchand* v. *Mollison*, 13 Bom. L. R. 658

Appeal.—An appeal lies from an order pronouncing judgment against a party under sub-rule (2) [Or. XLIII, r. 1, cl. (*e*)].

COMMENTARY.

A Court is not justified in imposing penal consequences upon a party who fails to appear, by passing a verdict against him, unless it is clearly made manifest that he had been ordered to attend and wilfully refused to obey the order, and the evidence which he was required to give was really material.—*Rajchookun* v *Busjeet Tewaree*, 20 W. R. 165; *Obhoy Churn* v. *Peare Dassia*, 22 W R 270

The stringent provisions of this section ought to be applied only in the case of contumacious litigants.—*Data Hurkman* v. *Oodoychand*, 6 W. R. 247, and *Thakoor Lall* v *Brohmomoyee*, 15 W. R. 253.

The discretion which the Court has of passing judgment against a party for non-compliance with its order to attend and give evidence is not confined to cases where the party summoning him cannot prove his case otherwise than by the evidence of such other party, or where the fact to be proved is solely and exclusively within the knowledge of such other party.—*Kashinath Shaha* v *Dwarkanath*, 9 B L R 215· 17 W. R. 550, *Ishan Chandra* v *Harish Chunder*, 9 B L R. 218-*note*: 12 W. R. 369.

The provisions of this section ought to be exercised with the most temperate discretion, and where the Court, waiving the default of a defendant, adjourned the further hearing of the suit, it cannot afterwards pass judgment against the party in default.—*Pudiyar Vasudavan* v. *Kovi-Langatha*, 4 M H C 231

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"Answer any material question."—Where a plaintiff appears by a pleader, the Court has no power to issue an order under Or. X, r. 4, unless the pleader refuses, or is unable, to answer a material question.—*Satu* v *Hanmantrao*, 23 B 318; *See* also, *Bhimrao* v. *Gopal*, 5 Bom. L. R. 687.

Plaintiff's mooktear being unable to answer certain material questions, the plaintiff was ordered either to appear in person or send some one who could reply; and he having done neither, the suit was dismissed.—*Nilmoney Singh* v *Ram Huree*, 2 W. R 161

Before the Court makes an order compelling the attendance of a party to the suit, it must be satisfied that his evidence will be material.—*Gopal Chunder* v. *Mohesh Chunder*, 21 W. R. 44; and *Makooand Adit* v. *Suttoorghun*, 17 W. R. 507

"Without lawful excuse."—A defendant's saying that he was willing to attend when he did not attend, and showed no reason why he could not, is no lawful excuse for his non-attendance when summoned to attend What is or is not a lawful excuse must depend on the circumstances of each case.—*Doorga Dutt* v. *Jheengoor Jha*, 18 W. R. 63.

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The non-attendance of a defendant, when cited as a witness to give evidence, is not alone sufficient to justify the decision of the suit against him. *Roop Narain* v. *Kashee Ram*, 2 N. W. P. 67; and *Bhally Mahomed* v. *Nabin Chunder*, 15 W. R. 209.

A Court ought not to take everything for granted against the party in fault, but to require the other party to prove his case, so far as he can, without the desired evidence, and to hear what evidence the defaulting party adduces, before imposing upon him the penalty of default.—*Mahomed Amidoolla* v *Durbesh*, 24 W. R. 314.

Effect.—An order dismissing a suit under this rule is a decree and bars a second suit on the same cause of action; *Punamchand* v. *Mollison*, 18 Bom. L R. 658.

Appeal.—An appeal lies from an order pronouncing judgment against a party under sub-rule (2) [Or. XLIII, r. 1, cl. (*c*)].

ORDER XI.

DISCOVERY AND INSPECTION.

Discovery by interrogatories

1. In any suit the plaintiff or defendant, by leave of the Court, may deliver interrogatories in writing for the examination of the opposite parties or any or more of such parties, and such interrogatories, when delivered, shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer. Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness. [S. 121.]

COMMENTARY.

This rule corresponds to s 121 of the C P Code, 1882, with several additions and alterations It follows English Or XXXI, r 1.

" The provisions in the Code as to discovery are based on the rules of English procedure in force at the time when it was passed Since then the English procedure has been amended and is now contained in Or. XXXI. This order has in effect been adopted in rules regulating the procedure on the original side of the High Courts of Calcutta and Bombay and has, it is believed, been found to work satisfactorily in practice

" On the other hand, in mofussil Courts little use has yet been made of the machinery of discovery, and the Committee therefore think, the rules of the Calcutta and Bombay High Courts, on their original sides, may be safely adopted without risk of disturbing a procedure with which the mofussil Courts have become familiarized

" This will secure uniformity of practice and the advantage of commentary on the rules prescribed by the English decisions."—*Report of the Special Committee*

See Form No 1, *Appendix C*

Scope.—Rules 1 to 11 deal with the first branch of discovery, *viz.*, by way of answers to *interrogatories* Rules 12 to 19 deal with the second branch of discovery as affecting *documents*. Rule 12 deals with the simple discovery of documents, *i.e.*, the power of compelling the opponent to *disclose* the documents he has in his possession; and the subsequent rules deal with their *production and inspection*.

Discovery by Interrogatories.—This order now closely follows the English Or. XXXI, and English decisions on the subject are of great advantage. The main object of interrogatories is to save expense by obtaining admissions from the opposite party; *Waghji* v. *Khatro*, 10 B 167 (171). A plaintiff may interrogate with a view to obtain information or admission in support of his own case, but he cannot be allowed to put fishing questions in order to try whether he can discover any flaw in the defendant's case or suggest any answer to it; the interrogatories must be directed to a case to which the plaintiff has already committed himself; *Ali Kader* v *Gobind*, 17 C. 810. The interrogatories must be as to *facts* and not as to conclusions of law, inference of facts or constructions of a document; *Nittomoyee* v *Soobul*, 23 C 117 (123). A party is not entitled to administer interrogatories with the object of ascertaining the *evidence* in support of his adversary's case. It would thus appear that a party seeking discovery by interrogatories is entitled to put questions for the purpose of extracting from his opponent information as to the facts material to the questions between them, or for the purpose of securing admissions as to such facts, in order that expense and delay may be saved, or to destroy his opponent's case, or to support his own case; *Bhagwandas* v. *Burjorji*, 37 B 347 For a full discussion of this order, see *Nittomoyee* v *Soobul*, 23 C 117.

What Interrogatories may be Allowed.—Under the English law, interrogatories are allowed in order that a party may know what case he has to meet, *i e*, to ascertain the nature of the opponent's case. But in *Ali Kader* v. *Gobind*, 17 C 840, decided under the Code of 1882, it was held that interrogatories in India are not to be framed to anticipate or supply defects of pleadings or to ascertain the case of the other side It was said that if the pleading was too vague, the Court might require a better statement under s. 112 (Or VIII, r. 9). This view that interrogatories in India have a limited operation was approved in *Nittomoyee* v. *Soobul*, 23 C. 117, also a case decided under the Code of 1882 But as pointed out in *Baijnath* v *Raghunath*, 41 C 6, no distinction can *now* be drawn between the English and Indian practice as the Indian Or. XI is the same as the English Order XXXI.

"In any suit."—This order applies primarily to suits, and by virtue of s 141 to miscellaneous proceedings It has been held to apply to probate proceedings and a probate Court can direct an executor on delivery of interrogatories to make a full discovery of the assets of the deceased; *Anil* v. *Rajendra*, 43 C 300 · 23 C L J. 680 An order for discovery can be made under r 13 by a Land Acquisition Judge, *Br Ind St Navigation Co* v *Secy of State*, 38 C 230 · 15 C W. N 87 12 C L J 505. This order does not apply to rent suit in Bengal; *see* s 148 (*a*), Bengal Tenancy Act (VIII of 1885)

"By leave of the Court."—It is the duty of Court, under Or XI, r. 1 to determine whether the applicant should be allowed to interrogate the other side, but not to determine at that stage what questions the party interrogated should be compelled to answer This rule contemplates (1) leave to interrogate, and (2) service of interrogatories through the Court. Where interrogatories are scandalous, or an abuse of the process of the Court, the Court may interfere at any stage.—*Sham Kishore* v. *Shoshibhoosun*, 5 C. 707; *See* also *Premsukh* v. *Indro*, 18 C. 420.

"Opposite party."—These words do not relate solely to a party on the other side of the record One defendant may administer interrogatories to another defendant if there is some right to be adjusted in the action between them, *Shaw* v *Smith*, 18 Q. B. D. 193; *Brichal* v. *Birch*, (1913) 2 Ch. 375, but not where there is no issue between them; *Marshall* v. *Langley*, (1889) W N 222.

A defendant who does not appear in answer to a suit, and against whom proceedings are *ex parte*, is not within the connotation of the term "opposite party" in Or II, r 1 of the C. P Code, and the plaintiff is not entitled to administer interrogatories to him and to use his answers to interrogatories as evidence in the case, *Krishna Ayyar* v. *Madhava Panikkar*, 63 I C 258

Time or Stage for Interrogatories.—In England discovery is not generally granted to the plaintiff until after defence, for until then it is not possible to say what really is material In England a plaintiff is sometimes (though very rarely) allowed discovery before statement of claim But under our Code this can never be done, for the words of this rule are "in any suit," and there can be no suit without a plaint filed A defendant is also generally not allowed discovery before putting in his defence.

"Probate proceedings."—Or. XI applies to proceedings in probate by virtue of s. 266 of the Indian Succession Act; *Anilabala* v. *Rajendra*, 43 C 300. 34 I C 227

Particular interrogatories to be submitted.

2. On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court. In deciding upon such application, the Court shall take into account any offer, which may be made by the party sought to be interrogated, to deliver particulars or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs. [New.]

COMMENTARY.

This rule is new. It follows English Or XXXI, r. 2.

"In deciding upon such application."—Under this rule, the Court has power to state only what interrogatories shall be administered It cannot settle interrogatories; *Anilabala* v. *Rajendra*, 43 C. 300: 34 I. C. 227.

"Leave shall be given as to such only of the interrogatories."—Interrogatories should be disallowed if the object of the plaintiff is to know what the evidence is on which the defendants rest their case; *Upendra* v. *Sarada Sundari*, 36 I. C. 883.

3. In adjusting the costs of the suit, inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court, either with or without an application for inquiry that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault. [S. 123.]

Costs of interrogatories.

COMMENTARY.

This rule corresponds to section 123 of the C. P. Code, 1882, with some additions and alterations, and it follows the English Or. XXXI, r. 3.

4. Interrogatories shall be in Form No. 2 in Appendix C, with such variations as circumstances may require. [New.]

Form of interrogatories.

COMMENTARY.

This rule is new, it follows English Or. XXXI, r. 4.

5. Where any party to a suit is a corporation or a body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly. [S. 124.]

Corporations.

COMMENTARY.

This rule corresponds to s. 124 of the C. P. Code, 1882, with some change in the language. It follows English Or XXXI, r. 5.

The member or officer is under no obligation either to disclose his own knowledge or to obtain and disclose the knowledge of other agents or servants of the corporation, acquired otherwise than in the course of his or their employment. It seems that all the interrogatories might be delivered to different officers, each officer to answer those on which he had special knowledge. The Secretary is as a rule the proper person to answer. *See* "Annual Practice," 1917, p. 519.

6. Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited *bona fide* for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer. [S. 125.]

Objections to interrogatories by answer.

COMMENTARY.

This rule corresponds to section 125 of the C. P. Code, 1882, with some additions and alterations It follows English Or. XXXI, r. 6

" May be taken."—The grant of leave to one party to deliver interrogatories to another, does not amount to an order requiring the other party to answer them, that party may perhaps have good ground for refusing to answer them or some of them —*Prem Singh* v. *Indro Nath*, 18 C. 420, F B

When an order for administration of interrogatories is made *ex parte*, under r 2, a party objecting to the interrogatories administered, may, at his peril, omit to answer the interrogatories to which he objects; but the more prudent course is to file his affidavit in answer, stating in it his objections to answer such questions as he objects to —*Shamkishore* v *Soshibhusun*, 5 C 707

" Scandalous."—Nothing can be scandalous which is relevant, *Fisher* v *Owen*, 8 C D 653 Interrogatories, though tending to criminate or discredit the party interrogated are not scandalous if they are pertinent and material to the case of the interrogatoring party

" Irrelevant."—Discovery must be *directly* relevant to the matters in issue, as shown by the second proviso to r 1, distinguishing between discovery and cross-examination The functions of discovery and cross-examination are different, and the mere fact that the questions would be admissible in cross-examination of a witness does not make them good as interrogatories, *e g*, questions which are put only to test the credibility of a witness

An objection by the plaintiff under Or XI, r 6 that some of the interrogatories are irrelevant requires adjudication by the Court that the rule gives the plaintiff an alternative remedy and not that he was to ask the interrogatories to which he objected to be struck out; *Bhagwan Das* v *Ramkumar*, 16 A L J. 762: 46 I. C 660 A party should not be compelled to give discovery of documents by interrogatories, the relevancy of which is denied; *Nittomoye* v *Soobul*, 23 C. 117.

" Not sufficiently material at that stage."—A fact may be relevant but not material at a particular stage of the suit What is material at one stage may not be material at another stage Thus, a question relating to the amount of damages is relevant although it is premature until the question of liability has been determined A party can refuse to answer interrogatories on the ground that the matter enquired after is premature and not sufficiently material at that stage of the suit; *Neekram Dobay* v. *Bank of Bengal*, 14 C 703

" Any other ground."—This would include the grounds set forth in the next rule (r 7), for setting aside or striking out interrogatories Besides these grounds there are, under the English law, *four* other grounds on which discovery can be resisted as of right: (*a*) as being criminatory or penal, (*b*) as being within the doctrine of legal professional privilege, (*c*) as disclosing the party's evidence, (*d*) as being injurious to public interests

(*Bray's Digest, Art.* 42). In general, questions excluded by the Indian Evidence Act, ss. 121-129, which could not be asked if the party were in the witness-box cannot also be put as interrogatories. As regards questions tending to criminate, under s. 132 of the Indian Evidence Act, (unlike under English law) the party if he were in the witness-box, could not refuse to answer them. It would thus appear that in India, he can be compelled to answer an incriminating interrogatory. He should, however, to protect himself, claim the privilege; *Queen* v. *Gopal*, 3 M. 271. On the point of privilege *see* notes to ss. 121-129 and 132, in the Author's *Indian Evidence Act*.

Setting aside and striking out interrogatories.

7. Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories. [New.]

COMMENTARY.

This rule is new, and it follows English Or. XXXI, r. 7 Under r. 2 no interrogatories can now be administered except such as have been allowed, and it is difficult to see how the occasion can arise for applying to set aside or strike out interrogatories Any ground for setting them aside or striking them out is of course a ground for disallowing them, or for objecting to answer them *See* "Annual Practice," 1917, pp 520-521.

Where an *ex parte* order is made giving leave to interrogate, the party ordered to answer has a right to come into Court to have the order set aside if the case is one in which interrogatories should not have been allowed; *Sham Kishore* v. *Shosibhoosun*, 5 C. 707

Affidavit in answer filing.

8. Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as the Court may allow. [S. 126.]

COMMENTARY.

This rule corresponds to section 126 of the C. P Code, 1882; the words "*from the service thereof*" which occurred after the words "ten days" have been omitted If follows English Or XXXI, r. 8

Form of affidavit in answer.

9. An affidavit in answer to interrogatories shall be in Form No. 3 in Appendix C, with such variations as circumstances may require [New.]

COMMENTARY.

This rule is new and it follows English Or. XXXI, r 9.

No exception to be taken.

10. No exception shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court. [New.]

COMMENTARY.

This rule is new and it follows English Or. XXXI, r. 10.

Order to answer or answer further.

11. Where any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination, as the Court may direct. [S. 127.]

COMMENTARY.

This rule corresponds to s. 127 of the C. P. Code, 1882, the proviso has been omitted It follows English Or XXXI, r 11

Insufficient Answer.—The Court has not to go into the question of the truthfulness of the answer, but to see whether it is sufficient or not A substantial answer is sufficient, but it must be clear and specific and must not be evasive *See* Or VIII, r 4, which, though dealing with pleading, is equally applicable to answer to interrogatories. A party must answer to the best of his knowledge, information and belief.

Viva Voce Examination.—A roving cross-examination is not legitimate; the party should only be required to make such an answer as would have been sufficient if originally given in writing, *Litchfield* v. *Jones*, 51 L. T 572.

Application for discovery of documents.

12. Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit: Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs. [S. 129.]

COMMENTARY.

This rule corresponds to s. 129 of the C P. Code of 1882, with much elaboration, and it follows English Or. XXXI, r. 12.

13. The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No. 5 in Appendix C. with such variations as circumstances may require. [S. 129, para 2.]

Affidavit of documents.

COMMENTARY.

This rule corresponds to para. 2 of s. 129 of the old Code, with additions and alterations; and it follows English Or. XXXI, r. 13.

Discovery of Documents.—The proper mode of ascertaining what documents the adversary has, is by an application under r. 12 and not by interrogating him. No affidavit is necessary on the application; and it is generally granted as a matter of course; but in case of contest it must be shown that the document are relevant; *Nittomoyce* v. *Soobul*, 23 C. 117 (125); *Amarendra* v. *Kallykissen*, 2 C. W. N. 17 (18). The Court has discretion to refuse an order for discovery. A Land Acquisition Judge can order discovery; *B. I. S. N. Co.* v. *Secy. of State*, 38 C. 230.

In a suit against a public body and generally in cases where the establishment of the plaintiff's claim depends on documents in the defendant's possession, the defendant must allow inspection of the relevant documents to which the plaintiff has no access; *The Municipal Board of Agra* v. *Ashrafi Lal*, 44 A. 202: 20 A L. J. 1.

"On oath."—The Advocate-General cannot be called upon to make discovery on oath; *Advocate-General* v *Adamji*, 30 B. 474.

"Possession or power."—A party who is ordered under r. 12 to make discovery on oath should set forth in his affidavit all documents which *are* or *have been* in his possession or power; see *Kalian* v. *Safdar*, 8 A 265 (267). All documents must be included in the affidavit in which the party has any possession or property jointly with others or even in which he has no property at all, if they are in his corporeal possession As regards document which are not but have been in the party's possession he must state what has become of them. The words " possession or power " in r 12 do not bear the limited meaning which they bear under r. 14 for the purpose of an order for production.

Affidavit.—The affidavit should set out the grounds on which privilege is claimed with respect to the production of any document. A party is entitled to put in a further affidavit in support of his claim of privilege; *Ambika* v. *Bengal Spinning Co* , 22 C. 105 As to privilege, *see* notes to r. 14 under the heading " PRIVILEGE," and notes to r 6, *ante*, under the heading " ANY OTHER GROUND "

When the affidavit is insufficient, a summons may be taken out to consider its sufficiency; *Oriental Bank* v *Brown*, 12 C 265; *Kennelly* v. *Wyman*, 1 C. 178; *Jadub* v. *Kanai*, 20 C 587.

If the affidavit is insufficient the party will be ordered to amend his affidavit; *Amarendra* v. *Kallykissen*, 2 C. W N 17.

10. No exception shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court. [New.]

No exception to be taken.

COMMENTARY.

This rule is new and it follows English Or. XXXI, r. 10.

11. Where any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be And an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination, as the Court may direct [S. 127.]

Order to answer or answer further.

COMMENTARY.

This rule corresponds to s 127 of the C. P Code, 1882; the proviso has been omitted. It follows English Or XXXI, r 11.

Insufficient Answer.—The Court has not to go into the question of the truthfulness of the answer, but to see whether it is sufficient or not A substantial answer is sufficient, but it must be clear and specific and must not be evasive *See* Or VIII, r 4, which, though dealing with pleading, is equally applicable to answer to interrogatories. A party must answer to the best of his knowledge, information and belief.

Viva Voce Examination.—A roving cross-examination is not legitimate, the party should only be required to make such an answer as would have been sufficient if originally given in writing; *Litchfield* v. *Jones*, 51 L. T 572.

12. Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit: Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs. [S. 129.]

Application for discovery of documents.

COMMENTARY.

This rule corresponds to s. 129 of the C. P. Code of 1882, with much elaboration, and it follows English Or. XXXI, r. 12.

13. The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No. 5 in Appendix C, with such variations as circumstances may require. [S. 129, para 2.]

Affidavit of documents.

COMMENTARY.

This rule corresponds to para. 2 of s. 129 of the old Code, with additions and alterations; and it follows English Or. XXXI, r. 13.

Discovery of Documents.—The proper mode of ascertaining what documents the adversary has, is by an application under r. 12 and not by interrogating him. No affidavit is necessary on the application; and it is generally granted as a matter of course; but in case of contest it must be shown that the document are relevant; *Nittomoyee* v. *Soobul*, 23 C. 117 (125); *Amarendra* v *Kallykissen*, 2 C. W N. 17 (18). The Court has discretion to refuse an order for discovery. A Land Acquisition Judge can order discovery; *B. I. S. N Co.* v. *Secy. of State*, 38 C. 230.

In a suit against a public body and generally in cases where the establishment of the plaintiff's claim depends on documents in the defendant's possession, the defendant must allow inspection of the relevant documents to which the plaintiff has no access; *The Municipal Board of Agra* v. *Ashrafi Lal*, 44 A. 202: 20 A. L. J. 1.

"On oath."—The Advocate-General cannot be called upon to make discovery on oath; *Advocate-General* v. *Adamji*, 30 B. 474.

"Possession or power."—A party who is ordered under r. 12 to make discovery on oath should set forth in his affidavit all documents which *are* or *have been* in his possession or power, see *Kalian* v. *Safdar*, 8 A 265 (267). All documents must be included in the affidavit in which the party has any possession or property jointly with others or even in which he has no property at all, if they are in his corporeal possession. As regards document which are not but have been in the party's possession he must state what has become of them The words " possession or power " in r. 12 do not bear the limited meaning which they bear under r. 14 for the purpose of an order for production

Affidavit.—The affidavit should set out the grounds on which privilege is claimed with respect to the production of any document. A party is entitled to put in a further affidavit in support of his claim of privilege; *Ambika* v *Bengal Spinning Co.*, 22 C 105 As to privilege, *see* notes to r. 14 under the heading "PRIVILEGE," and notes to r 6, *ante*, under the heading "ANY OTHER GROUND."

When the affidavit is insufficient, a summons may be taken out to consider its sufficiency; *Oriental Bank* v *Brown*, 12 C 265, *Kennelly* v. *Wyman*, 1 C. 178; *Jadub* v. *Kanai*, 20 C. 587.

If the affidavit is insufficient the party will be ordered to amend his affidavit; *Amarendra* v. *Kallykissen*, 2 C. W N. 17.

The oath of the party swearing the affidavit is conclusive upon the question of possession and privilege, *Nittomoye v. Soobul*, 23 C. 117; *Vinayak v Narotam*, 17 B 581 Under the English law the oath is also conclusive as to relevancy, but on this point; see *Nittomoye v. Soobul*, 23 C. 117

The conclusiveness of an affidavit under r 13 does not preclude the opposite party from claiming inspection of specific documents not disclosed in the affidavit, under r 18 (2), *Basanta v Kumudini*, 38 C. 428; 16 C. W. N. 81

Where there are several plaintiffs, all of them must join in making an affidavit, unless specific reasons are shown to the contrary. The fact that some of them reside in England is no sufficient reason; *Byrie v Shivasankar*, 15 B. 7

A defendant may obtain discovery or inspection as against a co-defendant, if the latter can be regarded as an opposite party —*Anandrao Vithal v Budra Malla*, 17 384

Non-disclosure of Documents.—It is open to a litigant to refrain from producing any document that he considers irrelevant; if the other litigant is dissatisfied, it is for him to apply for an affidavit of documents, and he can obtain inspection and production of all that appears to him, in such affidavit, to be relevant and proper If he fails so to do, neither he nor the Court at his suggestion, is entitled to draw any inference as to the contents of any such documents, *Bilas Kunwar v Desraj*, 37 A. 557 42 I A 202

14. It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just [S. 130.]

Production of documents.

COMMENTARY.

This rule corresponds to s 130 of the old Code It follows the English Or. XXXI, r 14

Production of Documents.—After obtaining knowledge of the documents that are in the possession of the other party (by means of an affidavit under r 13) a party may compel their production under this rule (r 14) No order for production can be made unless a party has admitted the documents in his power or possession (*Kumar Rameshwar v. Rani Bikhnath*, 5 Pat L J 550), for which purpose, unlike under r. 12, it means sole legal possession and the right and power to deal with them. For this purpose possession of the agent is possession of the principal and one partner represents his other partners; *Haji Jakaria v. Haji Casim*, 1 B. 496.

An order for production can be made even before the issues have been framed; *Gobind* v. *Kunja*, 14 C. W. N. 147; 10 C. L. J. 407.

Only an order for production can be made under this rule. An order for inspection must be made under r. 18; *Abdul Karim* v. *Abdus Subhan*, 14 I .C. 51.

A Judge has no discretion to refuse to order production of documents relating to matters in question in a suit, provided they are not privileged; *Wallace* v. *Jefferson*, 2 B. 453; *Balamoney* v. *Ramasami*, 30 M. 230.

Under the Evidence Act, in regard to certain documents, when they are absolutely privileged, the Court has no power whatever to order production. But, under this section, the Court does possess the discretion, and the discretion is to be exercised according to the practice of the Court. —*Vishna Yeshamant* v. *New York Life Insurance Co.*, 7 Bom. L. R. 700.

A written summons distinctly describing the nature of the document required must be issued on a party to a suit required to produce a document. A verbal order to his pleader is not sufficient —*Doorga Monee* v. *Benode Monee*, W. R. (1864), 164.

Practice to be followed where a party producing documents wishes to have certain portion of them to be sealed up.—*Heera Lall* v. *Ramsurun*, 4 C. 835; *Jadub Lall* v. *Kanai Lall*, 20 C. 587; and *Harendra Nath* v. *Grindra Kumar*, 3 C. W. N. 495.

Where inspection of documents is objected to on the ground of immateriality, the Court will, if necessary, order them to be produced for its own inspection in order to judge of their materiality.—*Gurmuk Roy* v. *Tularam*, 28 C. 424.

A Court ought not to delegate to a commissioner the exercise of the power which the Court possesses under r. 14; *Gobind* v. *Kunja*, 10 C. L. J. 407: 14 C. W. N. 147.

Privilege.—Confidential communications between principal and agent relating to matters in a suit are not necessarily privileged; *Wallace* v. *Jefferson*, 2 B 453. To be privileged under s 126, Evidence Act, a communication by a party to his attorney must be of a confidential or private nature; *Memon Hajee* v. *Abdul Karim*, 3 B. 91. Statements laid by clients before counsel for the purpose of obtaining legal advice are privileged; *Munchershaw* v. *New Dhurumsey Spinning and Weaving Co.*, 4 B. 576.

Letters written by one of the defendant's servants to another for the purpose of obtaining information with a view to possible future litigation are not privileged. In order that privilege may be claimed, it must be shown on the face of the affidavit that the documents were prepared merely for the use of the solicitor.—*Bipro Das* v. *Secretary of State*, 11 C. 655.

Documents which contain the purport of interviews with, and of advice received from, the plaintiff's solicitors and counsel as to the plaintiff's position in regard to their said claim, and as to the steps to be taken thereto, are privileged. Documents which record the steps taken by the

plaintiffs from time to time in prosecuting their claims against the defendant are not privileged.—*Ryre* v *Shivashankar*, 15 B. 7.

Letters written by the solicitor of two plaintiffs to the solicitor of the third plaintiff are privileged, the fact that portions of them had been read to the defendant's solicitor was no waiver of the privilege as regards the parts which were not read —*Kay* v *Poorunchand*, 4 B. 631.

Where, in an affidavit of documents, privilege is claimed for a correspondence, on the ground that it contains instructions and confidential communications from the client to his solicitor, it must appear that each letter contains confidential communications with reference to the conduct of the suit —*Oriental Bank Corporation* v *Brown & Co.*, 12 C. 265.

In a suit for specific performance of a contract to purchase, where the defendant alleged that the plaintiff had induced him to sign the agreement by fraud and misrepresentations regarding the nature, the extent, and the value of the property, the defendant was not allowed inspection of the plaintiff's title-deeds, accounts, and other papers and documents relating to the property agreed to be purchased —*Sutherland* v. *Singhee Churn*, 10 C. 808

Admissibility in Evidence of Documents Produced in Court.—Where the Court directs a document to be produced under Or. XI, rr. 12 and 14, it does not *ipso facto* become evidence in the case It must be proved by witnesses and when marked as an exhibit on the side of the party relying on it; *Jugal Kishore* v *Altra*, 4 Lah L J. 385.

Revision.—Under s 115, interlocutory orders passed under Or. XI, r. 14, directing the production of documents, are not subject to revision.—*In re Nizam of Hyderabad*, 9 M 256 Followed in *Balamoni* v. *Ramaswamy*, 30 M 230, 17 M L J 79

Inspection of documents referred to in pleadings or affidavits.

15. Every party to a suit shall be entitled at any time to give notice to any other party in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit. [S. 131.]

COMMENTARY.

This rule corresponds to s. 131 of the C. P. Code, 1882 It follows the English Or XXXI, r. 15 It should be read with ss 163 and 164 of the Indian Evidence Act.

Inspection.—This rule does not apply to documents other than those referred to in the pleadings and those relied upon by the plaintiff; *Khetsidas* v. *Narotamdas*, 32 B. 152. But the Calcutta High Court has held that r. 15 does not apply to documents relied upon by the plaintiff; *Chandmall* v. *Dhanraj*, 24 C. W. N. 302: 56 I. C. 457.

Right to inspection includes right to take notes and obtain copies; *Gobind* v. *Kunja*, 10 C. L. J. 407: 14 C. W. N. 147, the party inspecting and obtaining copies will bear its costs, though under exceptional circumstances such costs may be made costs in the cause; *Fatmabai* v. *Haji Cassam*, 11 Bom. L. R. 402.

Notice to produce.

16. Notice to any party to produce any documents referred to in his pleading or affidavits shall be in Form No. 7 in Appendix C, with such variations as circumstances may require. [New.]

COMMENTARY.

This rule is new and it follows the English Or. XXX, r. 16.

Time for inspection when notice given.

17. The party to whom such notice is given shall, within ten days from the receipt of such notice, deliver to the party giving the same, a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in Form No. 8 in Appendix C, with such variations as circumstances may require. [S. 132.]

COMMENTARY.

This rule corresponds to s. 132 of the old Code and follows the English Or. XXXI, r. 17. The place where business is conducted and account books are kept is the proper place to give inspection; *Kevaldas* v. *Pestonji*, 5 B. 407.

Order for inspection.

18. (1) Where the party served with notice under rule 15 omits to give such notice of a time for inspection, or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit: Provided that the order shall not be made

when and so far as the Court shall be opinion that it is not necessary either for disposing fairly of the suit or for saving costs. [S 133.]

(2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs. [S. 134.]

COMMENTARY.

Sub-rule (1) corresponds to s. 133 and sub-rule (2) to s. 134 of the C. P. Code, 1882, with several additions and alterations; and it follows English Or. XXXI, r 18.

"**Served with notice.**—Before the Court will make an order under this rule, the preliminary notice mentioned in r. 14 must be given by the party applying for inspection, *Mohendro* v. *Ishan*, 10 C. 56.

Plaintiff should not be ordered to give inspection of documents not mentioned in the plaint till after the defendant has filed his written statement; but the rule is not inflexible; *Khetsidas* v *Narotum*, 32 B. 152.

If a notice under r 15 be not answered as provided by r. 17, the party may apply for an order under this rule and his application must be supported by an affidavit; *Dhapi* v. *Rampershad*, 14 C. 768.

The filing of an affidavit of documents under r 13, does not preclude the other party from subsequently applying for an order under this rule for the inspection of specific documents not disclosed in the affidavit; *Basanta* v. *Kumudini*, 38 C. 428

Where defendants objected to produce certain documents for inspection, because such documents, were obtained after dispute arose, and for purposes of litigation that might arise between them and the plaintiffs: *Held*, in an application for their production and inspection, that the affidavit was not sufficient to support the defendant's claim to privilege. —*Umbica Churn* v. *Bengal Spinning and Weaving Co*, 22 C. 105 and 4 C. W. N. clxviii (168).

The Court ought not to permit a person, formerly in the service of the defendant, to inspect, as the plaintiff's agent, the defendant's books which had been in his charge.—*Enamul Huq* v. *Ekramul Huq*, 25 C. 294.

The proper time for making an application under this section is at the hearing of the suit and not before; *Amarendra* v. *Kallykissen*, 2 C. W. N. 17.

Where parties require the inspection or production of telegraphic messages it is for them and not the Court to obtain the necessary sanction of Government; *Leckraj* v. *Palee Ram*, 2 N. W. P. 210.

Appeal.—No appeal lies from an order allowing inspection; *Ahmed* v. *Ayesha*, 11 Bom. L. R. 248.

COMMENTARY.

19. (1) Where inspection of any business books is applied for, the Court may, if it thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations: Provided that, notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made.

Verified copies.

(2) Where, on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

(3) The Court may, on the application of any party to a suit at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specified documents, to be specified in the application, is or are or has or have at any time been in his possession or power; and, if not then in his possession when he parted with the same and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application, and that they relate to the metters in question in the suit, or to some of them. [New.]

COMMENTARY.

This rule is new, and it follows the English Or. XXXI, r. 19-A. Sub-rule 3, " is not a process of discovery, but only a process in aid of discovery; and the documents must be so *specified* that they can be at once identified "; *per* FLETCHER MOULTON, L. J., in *Huntly* v. *Backworth Collieries* (1911) W. N. 84.

Premature discovery.

20. Where the party from whom discovery of any kind or inspection is sought objects to the same or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection. [S. 135.]

COMMENTARY.

This rule corresponds to s 135 of the C P Code, 1882, with some verbal changes only It follows English Or XXXI, r 20.

The intention of r 20 is to give the Court the power of raising and determining an issue for the exclusive purpose of deciding the right to discovery before the hearing of the cause, *Ahmedbhoy* v. *Vulleebhoy*, 6 B. 572

Non-compliance with order for discovery.

21. Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly. [S. 136.]

COMMENTARY.

This rule corresponds to paras 1 and 2, of s 136 of the C. P. Code of 1882, with some alterations and omissions The word *defended*, has been substituted for the word " answered " Para 3 of the old section, relating to criminal prosecution for non-compliance with the order, has been omitted. It is based upon English Or XXXI, r. 21.

Non-compliance with Order for Discovery.—This rule renders the defendant liable to have his defence struck out upon failure to answer an interrogatory It does not make it obligatory upon the Court to do so. If there is obstinacy or contumacy on the part of the defendants, or a wilful attempt to disregard the order of the Court, an order under this rule is appropriate.—*Bansi Singh* v *Palit Singh*, 7 C. L J. 295 (5 C. 707, 9 C. 923, and several English cases *referred to*).

This rule cannot be applied unless there has been an order for discovery under r. 12 or for inspection under r. 18; *Dev Karan* v. *Sangidas*, 27 Bom. L. R. 604: 89 I. C. 215: A. I. R. 1925 B. 386: *Kishan Lal* v.

Sultan Singh, 38 A. 5: 30 I. C. 525; *Lalchand Gobindram* v. *Tejbhandas*, 96 I. C. 1003. This rule does not apply to cases where there has been non-compliance with an order for production of documents made under r. 14; *Lyallpur Sugar Mills Co., Ld.* v. *Ram Chandra Gur Sahai Cotton Mills Ld.*, 44 A. 565: 67 I. C. 73: A. I. R. 1922 A. 235; *Sithamalli* v. *Ramanathan*, 46 M. L. J. 350: 77 I. C. 766: A. I. R. 1924 M. 582.

Where a party fails to comply with an order for discovery, the proper remedy is for the party seeking the discovery to apply to have the proceedings stayed or the suit dismissed; *Kunj Lal* v. *Babu Banwari Lal*, 4 Pat. L. J. 394: 48 I. C. 711.

The powers given to the Court by r. 21 should not be exercised except in extreme cases; *Shamkishore Soshibhoosan*, 5 C. 707: 5 C. L. R. 509; *Ram Nath* v *Prabhu Dayal*, 65 I. C. 661; *Rameswar Narayan* v. *Rikshash Koeri*, 5 Pat. L. J. 550: 58 I. C. 281.

Where a defendant neglects to comply with an order for production and inspection, the Court will, although in the last resort, order his defence to be struck out.—*Khajh Assenoollajoo* v. *Khajah Abdool Aziz*, 9 C. 923.

In a suit brought by two *purdanashin* ladies, they were ordered to declare by affidavit all the documents which were and had been in their possession. After some ineffectual proceedings, the Court dismissed the suit in consequence of the orders not having been complied with. *Held* that the party from whom discovery was sought being *purdanashin* ladies, it was not *expedient* to enforce the penalty; *Kalian Bibi* v. *Sufdar Husain*, 8 A. 265.

The Court has no jurisdiction to pass an order under this rule unless the provisions of r. 15 are strictly complied with; *Dhapi* v. *Ram Pershad*, 14 C. 768. *See* also, *Kishun* v. *Sultan*, 13 A. L. J. 831 38 A. 5.

Infliction of the penalty imposed by Or. XI, r. 31, C P. Code, for non-discovery, after the whole trial is closed, is improper—*Dinbai* v. *Fromroz* 43 I C. 71.

The High Courts in India possess the power of enforcing obedience to their orders by committal for contempt The remedies provided by this section in cases of disobedience to an order of Court may be regarded as cumulative They subject the offender to particular liabilities for his contumacy, but do not extinguish the Court's power of constraining him to obedience.—*Hassonbhoy* v. *Cawasji*, 7 B. 1; *Navivahoo* v *Naratamdas*, 7 B. 5; *Godu* v. *Surajmal*, 27 A 380.

A Court has inherent power to strike the defence of a defendant of its own motion under this rule, *Lal Das* v. *Spratt*, 84 P. L R. 1910: 8 I. C. 245.

The Court has no power to strike out a defence under this rule for failure of the defendant to appear for examination as a witness for the opposite side; *Vasudeva* v. *Sankaran*, 22 M. L. J. 60.

Order XI, r. 21 of the C P. Code does not justify the dismissal of a suit for non-compliance with an order under Or XI, r. 14, C. P. Code, for production of documents; *Sithamalli Subbayyar* v. *Ramanathan*· 46 M. L. J. 350: 19 L. W. 355 (65 I. C. 661 *disstd. from*).

Under Or. XI, r. 18, when a party applies to inspect documents in the pleadings or in a previous affidavit of documents, and makes an affidavit for that purpose, the Court ought not to make an order for inspection without giving the other side an opportunity of replying to the affidavit. In such a case, dismissal of suit for non-compliance with the terms of the order is not proper, *Firm of Durga Prasad* v. *Firm of Bishwanath Lakshmi Chand*, 22 A L J. 299 L. R 5 A 255.

Appeal.—An order under this rule is appealable under Or. XLIII, r. 1 (*f*).

Review.—Where plaintiff's suit has been dismissed under Or. XI, r. 21, the Court has no power to review its order under s. 151, the order being appealable, *Asutosh* v. *Indu Bhusan*, A I R. 1927 C. 158: 98 I C. 70.

An order dismissing a suit under this section is a decree within the definition of s 2, Civil Procedure Code, and is, therefore, appealable.—*Maharajadhiraj Maharana Shri Mansingji* v *Mehta Hariharram*, 19 B 309. Followed in *Kamalabhy Dassi* v *Jotindra Mohun*, 6 C. L. J. 374.

Where a defence is struck out under this rule and a decree is made, as in an undefended cause, the decree is not *ex parte* within the meaning of Or. IX, r 13, so as to allow of an application to set it aside under that rule; *Keshana* v *Pottoah*, 2 C. W N 676, *See* also, *Chunnilal* v. *Chamanlal*,, 7 A. 159.

Using answers to interrogatories at trial.

22. Any party may, at the trial of a suit, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always that in such case the Court may look at the whole of the answers, and if it shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, it may direct them to be put in. [New.]

COMMENTARY.

This rule is new, and it follows English Or. XXXI, r. 24.

A party, at whose instance interrogatories have been administered, must put in the answers as part of his evidence, if he wishes to use them at the hearing.—*Gosto Behary* v *Johur Lall*, 4 C 830: 4 C. L. R. 164.

Under Or. XI, r. 22, the answers or portions of the answers obtained to interrogatories served in a case are admissible as against the party answering them, though great caution should be exercised in using them as evidence; *Narayana Bharatigal* v *Ittuli Amma*, 39 I. C. 893

Order to apply to minors.

23. This order shall apply to minor plaintiffs and defendants, and to the next friends and guardians for the suit of persons under disability. [New.]

COMMENTARY.

This rule is new, and it follows the case of *Nathmull Narsingdas* v. *Malharao Holkar*, 10 B. 350 and of *Waghji Thackersey* v. *Khatao Rowji*, 10 B. 167, where it has been held that an affidavit of documents may be required from a minor defendant; and it overrides the case of *Duncan* v. *Bhoyro Prosad*, 22 C. 891, where it was held that an infant party cannot be compelled to give discovery by affidavit and inspection of documents in his possession, and that the penalties prescribed by s. 136 of the old Code (r. 21) were obviously inapplicable to infants and persons under disabilities.

ORDER XII.

ADMISSIONS.

Notice of admission of case.

1. Any party to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party. [New.]

COMMENTARY.

This rule is new, and it has been borrowed from English Or. XXXII, r. 1.

"The committee think the practice of admissions may with advantage be extended to facts as well as to documents. The procedure is not compulsory, but its adoption would result in cheapening and expediting litigation, and it is hoped that its use will be encouraged by Courts."—*Report of Special Committee*

Admissions Generally.—Admissions may be considered as being—

I. On the Record (*a*) *Actual, i e*, either on the pleadings or in answers to interrogatories under Or. XI, (*b*) *Implied*, from the pleadings under Or. VIII, rr 3, 4, 5

II. Between the Parties by (*c*) *Agreement*, (*d*) *Notice*. This order deals with admissions by notice.

Notice to admit documents.

2. Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense. [S 128.]

COMMENTARY.

This rule corresponds to s. 128 of the old Code, with several alterations and additions. It has been borrowed from English Or. XXXII, r. 2.

If an admission be made "with a saving of all just exceptions" as to the admissibility of the document, it so far recognizes the general character and accuracy of the documents, that no objection can subsequently be taken to the *authenticity* of any part of them, or to their reception in evidence on the ground of any interlineation, however mate-

rial, appearing upon them. Unless this were so, great inconveniences would follow; for as one main object of inducing a party to admit under notice is to dispense with the necessity of formal proof of the instrument, it would obviously open a door to fraud, if the party admitting were at liberty afterwards to object to an interlineation, which the attesting witness might alone be enabled to explain. An admission will not be vitiated because the date of a promissory note, otherwise correctly described in the notice to admit, is mis-stated. A party will not, however, be entitled to the costs of proving any document specified in the notice unless the witness called to establish this proof has, at least in his examination-in-chief, been questioned to no other fact. Though a notice to admit does not contain any saving of all just exceptions, the party admitting, may still rely on any valid objection to the admissibility of a document specified in it. This rule extends to every document which a party proposes to adduce in evidence, whether or not it be in his custody or control, and whether or not it be put in issue by the pleadings. See *Taylor on Evidence*, 10th Ed., Vol. I, pp. 518-519.

Form of notice.

3. A notice to admit documents shall be in Form No. 9 in Appendix C, with such variations as circumstances may require. [New.]

COMMENTARY.

This rule is new and it has been borrowed from English Or. XXXII, r. 3

Notice to admit Facts.

4. Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs: Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just. [New.]

COMMENTARY.

This rule is new, and has been borrowed from English Or. XXXII, r. 4.

Nine Days.—Would probably mean nine *clear* days exclusive of the day of service of notice and of the day fixed for hearing. A notice to admit facts should, where practicable supersede interrogatories. *See* Or. XI, r. 2

Form of admissions.

5. A notice to admit facts shall be in Form No. 10 in Appendix C, and admissions of fact shall be in Form No 11 in Appendix C, with such variations as circumstances may require. [New.]

COMMENTARY.

This rule is new and it has been borrowed from English Or. XXXII, r. 5.

Judgment on admissions.

6. Any party may at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the Court may upon such application make such order, or give such judgment, as the Court may think just. [New.]

COMMENTARY.

Scope and Object of Rule.—This rule is new and it has been borrowed from English Or. XXXII, r 6 It enables either party at any stage of the suit to apply for judgment on the admissions made by the other side. Either the plaintiff or the defendant may apply, but some of several plaintiffs cannot make the application, all the plaintiffs must join therein, *Kirke* v. *North*, (1895) 2 Ch. 747. It enables the party applying, to get rid of so much of the suit as to which there is no controversy; *Throp* v. *Holdsworth*, 3 C. D. 640. The rule is merely *permissive*, and a party by not availing himself of it and proceeding to trial in the ordinary way, does not thereby waive his right to rely, at the trial, on the *admissions* contained in the pleading, *Tildesley* v *Harper*, 7 C D. 403.

The object of this rule is to enable a party to obtain speedy judgment, at least to the extent of the relief which, according to the admissions of the defendant, the plaintiff is entitled to The latter need not relinquish the rest of the claim in moving for judgment It is not necessary to have a decree drawn up, but it can be enforced in execution proceedings by virtue of s 36 of the Code; *Tabilram Tarachand* v. *Vassumal*, 92 I. C. 602: A. I R. 1926 Sind 119.

Under this rule, in a partition action, where the defendants have, by their statement of defence, admitted the facts stated in the claim showing the plaintiff's title, the plaintiff has *a right*—instead of having the action set down for hearing—to an order for preliminary decree on motion; in an action between partners, and in one between principal and agent, an order for an account and for the delivery of securities has been

made on motion before the hearing, the judge acting solely on the admissions contained in the pleadings. A plaintiff may move for judgment upon admissions, although he has joined issue on the defence, and given notice of trial. See *Taylor on Evidence*, 10th Ed., Vol. I, pp. 581-582.

"Or otherwise."—These words show that the rule is not confined to admissions made under r. 1 or r. 4, but is of general application and justify the making or giving of an immediate order or judgment when an admission is made by letter, of facts which show that the defendant has no defence to the action; *Ellis* v. *Allen*, (1914) 1 Ch. 904. A verbal admission is sufficient when it is clearly proved that it has been made; *Re Beeny*, (1899) 1 C. 499.

Judgment on Admissions.—A party applying for judgment upon admissions in a pleading must accept as true the statements contained in it. The admissions must be clear and unequivocal. The plaintiff must have a clear case, and the mere admission or non-denial by the defendant of a right asserted by plaintiff, but which in fact has no existence in law, is not sufficient to entitle the plaintiff to a judgment; *Chilton* v. *Corporation of London*, 7 C. D. 735. Where one defendant does not appear and another makes an admission as to the plaintiff's right to relief, the plaintiff may proceed against the latter under this rule and against the former by default; *Parsons* v. *Harris*, 6 C. D. 694.

In order to entitle the plaintiff to have judgment on admission, there must be clear admission that the money is due and recoverable in the action in which the admission is made, and the admission also must be clear and unequivocal. An ambiguous admission in a written statement that a certain sum of money was due to the plaintiff, is not such an admission as would justify an order under this rule; *Devsi Narain* v. *Hassanand*, 97 I C. 623: A I. R 1927 Sind. 25.

In a case where the written statement taken as a whole could not be regarded as an unambiguous and unconditional admission that Rs. 9,535 was due to the plaintiff, the sum could not be recovered by the plaintiff by an application under Or XII, r. 6, C. P. Code, *Koramull Ramballav* v. *Mongilal Dahni Chand*, 23 C. W. N 1017: 54 I. C 836.

Final judgment ought not to be passed upon admissions in a pleading or an affidavit unless the admissions are clear and unequivocal. It must further be remembered that the power of the Court to pass judgment on admissions is discretionary and its exercise cannot be claimed as a matter of right, *Galstaun* v *E D. Sassoon & Co. Ltd*, 27 C. W. N. 783 (23 C. W. N. 1017 *folld.*)

If the plaintiff's case is clear and the written statement of the defendant raises no defence, the practice in English Courts allows the plaintiff in a suit for specific performance to move for a decree on the written statement being put in, and to get such a decree at once as a matter of course.—*Moulvie Mahomed Ikramull Huq* v. *Wilkie*, 11 C. W N. 946, P. C.: 6 C L. J. 682: 17 M. L. J. 454: 4 A. L. J. 740

If a plaintiff abandoning his own case, relies upon the admissions of the defendant, he would be bound to take them as a whole; *Sheopershad* v. *Juggernath*, 10 I. A. 74: 13 C. L. R. 206 (171), P. C.

Where a defendant admits the claim, the Court, being satisfied as to his identity, should at once give judgment for the plaintiff. 12 W. R. 432, 434, 435.

A party is not bound by an admission on a point of law, nor precluded from asserting the contrary.—*Tagore* v *Tagore*, 9 Bom. L. R. 377, P. C : 18 W. R. 357 (367), P. C *See* also, 27 C 156 P. C pp. 162, 163, and 21 A. 285.

Title to land cannot pass by admission when the statute requires a deed—*Jadu Nath* v *Rup Lal*, 4 C. L. J 22: 33 C 967: 10 C. W. N. 650. *See* also, *Mathura* v *Ramkumar*, 20 C W N. 370: 23 C. L. J. 26

As to the effect of admissions and statements made in the pleadings, see the cases collected under Or VIII, r 5

"The Court may make such order or give such judgment as the Court may think just."—The power of the Court is discretionary and will not be exercised where the case cannot be conveniently tried on motion; *Mellor* v. *Sidebottom*, (1877) 5 C. D 342, *Galstaun* v. *E D. Sassoon & Co.*, 27 C W N 783 82 I. C 348· A. I R. 1924 C 190. "The rule was not meant to apply when there is any serious question of law to be argued"; *per* Mellish, L J, in *Gilbert* v *Smith*, 2 C. D p. 689 An admission made in error may be allowed to be withdrawn; *Hollis* v. *Burton*, (1892) Ch 228.

Under Or XII, r 6 of the C .P. Code, though the party has no absolute right, *the Court has got discretion to pass judgment for the* amount admitted and to allow the plaintiff to prove the balance of his claim in the ordinary way; *Premsukhdas Assaram* v *Udairam Gunga Bux*, 45 C. 138. 22 C W N 204.

Infant.—Judgment cannot be obtained under this rule upon admissions contained in the defence of an infant defendant; *Byrne* v. *Byrne*, 5 L. R. Ir. Ch. D 134.

Appeal.—An order rejecting an application for judgment on admission is a "judgment" within the meaning of cl. 15 of the Letters Patent and is appealable; *Koramall* v. *Mongilall*, 23 C. W N. 1017: 54 I. C. 836

Affidavit of signature.

7. An affidavit of the pleader or his clerk, of the signature of any admissions made in pursuance of any notice to admit documents on facts, shall be sufficient evidence, of such admissions, if evidence thereof is required. [New.]

COMMENTARY.

This rule is new and it has been borrowed from English Or. XXXII, r. 7.

Notice to produce documents.

8. Notice to produce documents shall be in Form No. 12 in Appendix C, with such variations as circumstances may require. Affidavit of the pleader or his clerk, of the service of any notice to

produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice and of the time when it was served. [New.]

COMMENTARY.

This is new; it has been borrowed from English Or. XXXI, r. 8. The object of this rule is to enable secondary evidence of the documents to be given at the trial if they are not then produced pursuant to the notice. *See* s. 65, cl. (*a*), and s. 66, Indian Evidence Act.

Costs.

9. If notice to admit or produce specifies documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice. [New.]

COMMENTARY.

This rule is new, and it has been borrowed from English Or. XXXII, r. 9.

ORDER XIII.

PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS.

Documentary evidence to be produced at first hearing

1. (1) The parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced. [S. 138.]

(2) The Court shall receive the documents so produced: provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs. [S. 140, Para. 1.]

COMMENTARY.

In sub-rule (1) the words "*shall produce*" have been substituted for the words, '*shall bring with them, and have in readiness at the first hearing of the suit to be produced when called for by the Court,*" which occurred in the old section. Under the present rule, the parties shall have to produce all documentary evidence in their possession and power at the first hearing of the suit, but under the old section, the parties were simply required to bring with them and to have in readiness all their documents, which they had to produce only when *called for by the Court*. The word "produce" means to bring into view or notice; it does not mean file.

"First hearing of the suit."—The words "first hearing of the suit" in Or. XIII, r 1 mean the date when for the first time the case is called on for hearing and is really gone into and not the date when the case is fixed for hearing but not gone into at all. Consequently documents produced before the commencement of the actual hearing of a suit cannot be rejected though produced after the date originally fixed for the trial of the suit; *Taran Mandal* v. *Raj Chandra Mandal*, 50 I. C. 298. But see *Biswa Nath* v *Kali Charan*, 27 C L. J 119, in which it was held that the trial Court had under Or. XVII, r. 2 of the Code, a discretion to refuse to accept the documentary evidence on which the plaintiffs intended to rely and which were not produced before the date fixed for the hearing of the suit on which date the parties had been directed to produce their documentary evidence though the hearing resulted only in an adjournment

The provisions of Or. XIII, r 1 do not exclude the discretion of the Court to receive any documentary evidence at any subsequent stage. The trial Court has a discretion in the matter. The Appellate Court shall not interfere with the discretion of the trial Court unless it has been capriciously exercised; *Rani Prayag Kumari* v. *Siva Prosad*, A. I. R. 1926 C. 1: 42 C. L. J. 290: 93 I. C. 385.

A party is bound to be prepared at all points with his documentary evidence, and as soon as the Court has framed the issues, at once to tender (if called upon) the documentary evidence bearing thereon. The words "first hearing," do not mean the first hearing on the issue.—*Gour Hurree* v. *Pran Hurree*, 21 W. R. 42.

For the meaning of the words "first hearing," the case of *Imamuddin* v. *Liladhar*, 14 A. 524 (526), may be referred to.

Parties are required to have with them in Court, at the first hearing of the suit, all their documentary evidence, but need not file it then unless it is called for.—*Mahbub Hossein* v. *Patasu Kumari*, 1 Bom. L R. 120; 10 W. R. 179. Approved in 12 C. W. N. 312: 8 C L. J. 147 (21 W. R. 42 *referred to*).

Or. XIII, r. is enacted to prevent fraud by the late production of suspicious documents, and not to shut out formal evidence beyond suspicion, such as certified copies of public documents like records of Government.—*Ranchhod* v. *Secretary of State*, 22 B. 173; *Syed Ikram Hossain* v. *Ramlochan*, 23 W. R. 29; *Lilabati* v. *Bishnu*, 6 C. L. J 621, p. 634 and *Talewar* v. *Bhagwan*, 12 C. W. N 312: 8 C. L. J. 147.

"**In such form as the High Court directs.**"—*See* Appendix H, Form No. 5.

Effect of non-production of documents.

2. No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings, unless good cause is shown to the satisfaction of the Court for the non-production thereof and the Court receiving any such evidence shall record the reasons for so doing [S. 139.]

COMMENTARY.

This rule should be read with Or. VII, rr 14, 18. *See* also cases noted under **r. 1.**

If, when evidence is taken before commissioners, a document is tendered and objected to on any ground, the opposite party is not precluded from objecting to the document, at the trial, on any other ground.—*Balli* v. *Gaukim Swee*, 9 C 939.

The plaintiff tendered in evidence a judgment which was filed with the plaint, after he had closed his case, but before the defendant commenced his. *Held* that the Court was wrong in refusing to receive his document.— *Baroda Prasad* v *Madhab Chandra*, 33 C. 1345.

An Appellate Court is bound to consider the documents admitted by the lower Court. it cannot strike them off, on the ground that they were not filed with the plaint.—*Minakshi* v. *Valu*, 8 M. 373

Discretion of Court to Admit in Evidence Documentary Evidence Not Produced at First Hearing.—Documentary evidence which has not

been produced at the first hearing of a suit in accordance with Or. XIII, r. 1 may be admitted at a later stage at the discretion of the Court; *Imambandi* v. *Mutsaddi*, 45 C. 878 P. C.: 22 C. W. N. 50: 23 C. L. J. 409: 16 A. L. J. 800: 35 M. L. J. 422: 45 I. A. 73; *Muhammad Tabarak* v. *Dalip Narain* A. I. R. 1927 Pat. 117: 98 I. C. 968.

The Court may admit documents not produced at the first hearing when it is of opinion that the reception of the evidence will enable the person tendering it to win a case which he will otherwise lose; *Shankarlal* v. *Mahbub Shah* 70 I. C. 278: A. I. R. 1923 Oudh 59.

The fact that a document sought to be admitted in evidence at a late stage is a public document is a good cause for relaxing the stringency of the rule, *Mt. Tabunnessa* v. *Jugdip Pandey*, 2 Pat L. R. 1.

Appeal.—The fact that further documentary evidence is admitted after the first hearing is not a good ground of appeal; *Goshain* v. *Ruckmini*, 12 W. R. P. C. 32. An Appellate Court also cannot on that ground reject evidence admitted by the Court of first instance; *Minakshi* v. *Velu*, 8 M. 373.

3. The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible recording the grounds of such rejection. [S. 140 para. 2.]

Rejection of irrelevant or inadmissible document

COMMENTARY.

Reject.—It is the duty of the Court to receive and inspect every document tendered returning such as it considers irrelevant or otherwise inadmissible. A document may be inadmissible under the Evidence Act or for non-compliance with the provisions of the Stamp Act, or Registration Act, or any other Act.

Questions as to the admissibility of evidence should be decided as they arise, and should not be reserved until the judgment of the case is given.—*Rampbux* v. *Oghore Nath* 25 C. 401, *Jadu* v. *Bhabotaran*, 17 C. 173.

When a Court is doubtful as to whether a document is admissible or not, and its decision is open to appeal, it is better to admit than to exclude the document, *Kalikishore* v. *Bhusanchandra*, 18 C. 201 P. C.

Appeal.—No appeal lies from an order rejecting a document under this rule nor can it be interfered with under the Charter Act, *In re Erskine*, 18 W. R. 511, but the order may be impugned in appeal from any decree that may be passed.

4. (1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars namely:—

Endorsements on documents admitted in evidence.

(a) the number and title of the suit,

(b) the name of the person producing the document,

(*c*) the date on which it was produced, and

(*d*) a statement of its having been so admitted;

and the endorsement shall be signed or initialled by the Judge.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge. [S. 141.]

COMMENTARY.

The words "*or initialled*," which occur after the word "signed" in sub-rules 1 and2, are new.

As to admission of secondary evidence, *see* ss. 65 and 66; as to proof of private documents, ss. 67-73; of public documents, ss. 77 and 78; ancient documents, s. 90; as to presumptions regarding documents, ss. 79-89; as to exclusion of oral by documentary evidence, ss. 91-100, of the Indian Evidence Act.

Provisions of the Rule must be Strictly Complied with.—The provisions of Or. XIII, r. 4 must be strictly complied with. The endorsement should bear the name of the person tendering the document in evidence and the date on which it was so tendered. Merely by stamping the documents with the date on which they were filed in court, they do not *ipso facto* become evidence in the case without any formal proof; *Hari Singh* v. *Karam Chand Kanshi Ram*, A. I. R. 1927 Lah. 115 (A. I. R. 1924 Lah. 548 and 5 Lah. 227, *folld.*).

"Shall be signed."—The Appellate Court may refuse to read or permit to be used any document not indorsed in the manner required; *Sadik Hossain* v. *Hashim Ali*, 43 I. A. 42, 237: 38 A. 627: 36 I. C. 104. Documents admitted on the record without making the indorsement prescribed by this rule cannot be regarded as being legally before the Court; *Secretary of State* v. *Shrimati*, 5 Lah 227: A. I R. 1924 Lah. 548: 79 I. C. 74.

"And the endorsement shall be signed or initialled by the Judge."—Where documentary evidence is produced in a case, the Judge is required by Or. XIII, r. 4 of the C. P. Code to endorse with his own hand a statement in each document that it is proved against or admitted by the person against whom it is used, and until this is done, the document should not be filed as part of the record. The mere production of a document and the handing it over to an officer of the Court to put it on the file is not sufficient; *Shyamlal* v. *Ram Charan*, 43 I. C. 525.

Endorsements on copies of admitted entries in books, accounts and records.

5. (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where a document admitted in evidence in the suit is an entry in a letter-book or a shop-book or other account in [illegible]

been produced at the first hearing of a suit in accordance with Or XIII, r. 1 may be admitted at a later stage at the discretion of the Court; *Imambandi* v. *Mutsaddi*, 45 C 878 P. C. · 22 C. W. N. 50: 28 C. L. J 409: 16 A. L. J. 800: 35 M. L. J 422: 45 I. A. 73; *Muhammad Tabarak* v. *Dalip Narain*, A. I R. 1927 Pat. 117: 98 I. C. 968.

The Court may admit documents not produced at the first hearing when it is of opinion that the reception of the evidence will enable the person tendering it to win a case which he will otherwise lose; *Shankarlal* v. *Mahbub Shaw*, 70 I. C. 278 A I R 1923 Oudh 59.

The fact that a document sought to be admitted in evidence at a late stage is a public document is a good cause for relaxing the stringency of the rule; *Mt Taibunnessa* v. *Jagdip Pandey*, 2 Pat L. R. 1.

Appeal.—The fact that further documentary evidence is admitted after the first hearing is not a good ground of appeal; *Goskain* v. *Ruckmini*, 12 W. R. P. C. 32. An Appellate Court also cannot on that ground reject evidence admitted by the Court of first instance; *Minakshi* v. *Velu*, 8 M. 373.

Rejection of irrelevant or inadmissible document.

3. The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible recording the grounds of such rejection. [S. 140, para. 2.]

COMMENTARY.

Reject.—It is the duty of the Court to receive and inspect every document tendered, returning such as it considers irrelevant or otherwise inadmissible. A document may be inadmissible under the Evidence Act or for non-compliance with the provisions of the Stamp Act, or Registration Act, or any other Act.

Questions as to the admissibility of evidence should be decided as they arise, and should not be reserved until the judgment of the case is given.—*Ramjibun* v. *Oghore Nath*, 25 C. 401; *Jadu* v. *Bhabotaran*, 17 C. 173.

When a Court is doubtful as to whether a document is admissible or not, and its decision is open to appeal, it is better to admit than to exclude the document; *Kalikishore* v. *Bhusanchandra*, 18 C. 201 P. C.

Appeal.—No appeal lies from an order rejecting a document under this rule nor can it be interfered with under the Charter Act, *In re Erskine*, 18 W. R 511, but the order may be impugned in appeal from any decree that may be passed.

Endorsements on documents admitted in evidence.

4. (1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars namely:—

(*a*) the number and title of the suit,

(*b*) the name of the person producing the document,

(c) the date on which it was produced, and

(d) a statement of its having been so admitted;

and the endorsement shall be signed or initialled by the Judge.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge. [S. 141.]

COMMENTARY.

The words "*or initialled*," which occur after the word "signed" in sub-rules 1 and2, are new.

As to admission of secondary evidence, *see* ss. 65 and 66; as to proof of private documents, ss. 67-73; of public documents, ss. 77 and 78; ancient documents, s. 90; as to presumptions regarding documents, ss. 79-89; as to exclusion of oral by documentary evidence, ss. 91-100, of the Indian Evidence Act.

Provisions of the Rule must be Strictly Complied with.—The provisions of Or. XIII, r. 4 must be strictly complied with. The endorsement should bear the name of the person tendering the document in evidence and the date on which it was so tendered. Merely by stamping the documents with the date on which they were filed in court, they do not *ipso facto* become evidence in the case without any formal proof; *Hari Singh* v. *Karam Chand Kanshi Ram*, A I R. 1927 Lah. 115 (A. I. R. 1924 Lah. 548 and 5 Lah. 227, *folld.*)

"Shall be signed."—The Appellate Court may refuse to read or permit to be used any document not indorsed in the manner required; *Sadik Hossain* v. *Hashim Ali*, 43 I. A. 42, 237: 38 A. 627: 36 I. C. 104. Documents admitted on the record without making the indorsement prescribed by this rule cannot be regarded as being legally before the Court; *Secretary of State* v. *Shrimati*, 5 Lah. 227: A. I. R. 1924 Lah. 548: 79 I. C. 74.

"And the endorsement shall be signed or initialled by the Judge."—Where documentary evidence is produced in a case, the Judge is required by Or. XIII, r 4 of the C. P. Code to endorse with his own hand a statement in each document that it is proved against or admitted by the person against whom it is used, and until this is done, the document should not be filed as part of the record. The mere production of a document and the handing it over to an officer of the Court to put it on the file is not sufficient; *Shyamlal* v *Ram Charan*, 43 I. C. 525.

Endorsements on copies of admitted entries in books, accounts and records.

5. (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where a document admitted in evidence in the suit is an entry in a letter-book or a shop-book or other account in current use, the party on whose

behalf the book or account is produced may furnish a copy of the entry.

(2) Where such a document is an entry in a public record produced from a public office, or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished—

(a) Where the record, book or account is produced on behalf of a party, then by that party, or

(b) where the record, book or account is produced in obedience to an order of the Court acting of its own motion, then by either or any party.

(3) Where a copy of an entry is furnished under the foregoing provisions of this rule, the Court shall, after causing the copy to be examined, compared and certified in manner mentioned in rule 17 of Order VII, mark the entry and cause the book, account or record in which it occurs to be returned to the person producing it. [S. 141-A.]

COMMENTARY.

The words "*save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1921*" and "*letter-book*" are new.

When the original entries in an account-book are not in the handwriting fo the debtor, they are not liable to stamp-duty under Article I, Schedule I, Stamp Act (I of 1879); and therefore the copies of them are not chargeable with any Court-fees under article 8, Schedule I of the Court Fees Act of 1870, *Harichand* v. *Jivna Subhana*, 11 B. 520.

A copy or extract from an entry in an account-book, filed under this section requires no stamp; *Kastur* v. *Fakiria*, 26 B. 522.

Endorsements on documents rejected as inadmissible in evidence.

6. Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of rule 4 sub-rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge. [S. 142.]

COMMENTARY.

The words "*or initialled*" after the word "signed," are new.

When a Court has doubt as to the admissibility of a document, and its decision is open to appeal, it is better to admit than to exclude doubtful documents.—*Kalikishore* v. *Bhushan Chandra*, 18 C. 201, P. C. (203).

An objection as to the inadmissibility of a document and as to the mode of its proof, should be taken at the time when the document is attempted to be put in; *Madhabi* v. *Gayanendra*, 9 C. W. N. 111 (28 C. 835 *distinguished*).

If no objection is taken in the Court of first instance to the reception of a document in evidence, the Appellate Court cannot raise or recognize it in appeal; *Chimnaji* v. *Dinkar*, 11 B. 320; *Hriday* v. *Prasanna*, 28 C. 142; *Miller* v. *Madho*, 19 A. 76 P. C. distd.; *Kishori* v. *Rakhal*, 31 C. 152. *See* also, *Shahazadi* v. *Secy. of State*, 34 C. 1059 P. C. and *Ramprasad* v. *Shamnarain*, 6 C. L. J, 22.

Recording of admitted and return of rejected documents.

7. (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.

(2) Documents not admited in evidence shall not form part of the record and shall be returned to the persons respectively production them. [S. 142-A.]

COMMENTARY.

Documents which have not been proved, but simply filed in accordance with an usage in the mofussil should not be put up with the record. It is the duty of a Judge to pass over such documents as unproved; but it is also the duty of the pleader of the party against whom they are intended to be used to insist that they should not remain on the record at all.—*Kallida Pershad* v. *Ram Hari*, 5 C. 317.

Where a document tendered in evidence in the first Court was rejected as inadmissible, but was nevertheless allowed to remain on the record: *Held* that the mere fact of the document remaining on the record did not make it evidence in the Appellate Court.—*Hargobind* v. *Noni Babu*, 14 A. 356.

For the purpose of being endorsed and filed as part of the record as proved within the meaning of this section, see Cal H. C. Cir. Order No. 28 of 19th July 1879. Rules for the admission, filing, and return of documents; *see* Cal. H. C. Cir Order No. 7 of the 2nd June 1890.

Court may order any document to be impounded.

8. Nothwithstanding anything contained in rule 5 or rule 7 of this Order or in rule 17 of Order VII, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit. [S. 143.]

Return of admitted documents.

9. (1) Any person, whether a party to the suit or not desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under rule 8, be entitled to receive back the same.—

(a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and

(b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of:

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the orginal and undertakes to produce the original if required to do so:

Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless.

(2) On the return of a document admitted in evidence a receipt shall be given by the person receiving it. [S. 144.]

COMMENTARY.

Alteration.—The words "*receipt book kept for that purpose*" have been omitted. The words "*the Court is satisfied that*" and "*and that no appeal has been preferred*" have been added to clause (b). The words "*earlier than that prescribed by this rule*" have been substituted for "before either of such events," and the words, "*undertakes to produce the original if required to do so*" have been added in the first proviso. The word "wholly" has been added before the word "void" in the second proviso.

The copy substituted for the original under this rule must be a certified copy; *Kustur* v *Fakina*, 26 B 522 (525)

Return of Documents.—Proceedings for return of documents are purely *ministerial*. *No question can arise therein which would necessiate the taking of evidence on oath*—*Girijananda* v *Emperor*, 26 C. W. N. 660.

Court may send for papers from its own records or from other Courts.

10. (1) The Court may, of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other Court the record of any other suit or proceeding, and inspect the same.

(2) Every application made under this rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which, under the law of evidence, would be inadmissible in the suit. [S. 137.]

COMMENTARY.

Object.—The provisions contained in s. 165 of the Evidence Act, and Or. XIII, r. 10 are intended to arm the Court with a power of initiative in getting at the truth. The act of sending for documents under s. 165 or for a record under Or. XIII, r. 10, does not *ipso facto* make such document or record evidence in the case. Where a record has been inspected under this rule and the Judge finds therein relevant evidence or a guide to relevant evidence to be found somewhere else, proceedings must be adopted, if such evidence may be properly admitted at that stage, to have it brought into the trial according to the provisions of law. The discovery of a record containing admissions in favour of one party is a ground for review and not for additional evidence in appeal; *Punja* v. *Bhadu*, 9 N. L. R 11· 18 I. C. 857.

"May."—A Judge is not bound on an application to send for the record; *Heeramun* v. *Tahoour*, 7 W. R. 109

It is in the discretion of the Court to send for the record or not; the application must show that the papers are material, and where a proper case is made out the Court should exercise its power; *Raghunath* v. *Oomed Ali* W. R. F. B. 177.

A Court is not bound to send for the whole record, but only for such papers as might be specially mentioned in the application —*Janokee Beebe* v. *Habeebul*, W. R. (1864), 272

The party should first apply for return of the original from the other Court putting in a copy, and then, if refused, apply under this rule; *Coraah* v *Gooroo Churn*, 18 W. R 13.

In all cases in which the parties apply for a summons to produce documents, or apply to have a document sent for under this section, the Court ought not to refuse such application, merely because the documents cannot be produced before the termination of the trial —*Krishna* v. *Pratab*, 7 C. 560.

Omission by a Court to send for a document is not sufficient to set aside its decision unless such omission has prejudiced the party who wanted to prove the document; *Gopal* v. *Laloo*, 10 C. L. J. 27.

Revision.—Where a plaintiff failed to secure the production of an important document from the records of another Court though he took all reasonable steps for that purpose and the suit was disposed of by both the lower Courts without reference to that document, the High Court on revision set aside the judgment of both the Courts —*Gobinda* v. *Lakhun*, 11 C. W. N. 112 In *Ram Runjan* v. *Gopee Ballub*, 18 W. R 127 and in *Mahammad Abdul Aziz* v. *Mahommad Abdul Jalil*, 43 I. C. 57, the case was remanded

Provisions as to documents applied to material objects.

11. The provisions herein contained as to documents shall, so far as may, be apply to all other material objects producible as evidence [S. 145.]

ORDER XIV.

SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON.

1. (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

Framing of issues.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue, or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds: (*a*) issues of fact, (*b*) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence. [S. 146.]

COMMENTARY.

Objects of Framing Issues.—The object of any system of pleading is that each side may be made fully aware of the questions that are about to be argued, in order that each may bring forward evidence appropriate to the issues.—*Syed Muhammad* v *Fatteh Muhammad*, 22 C. 324, P. C.

The whole object of framing issues is to keep the various points arising for decision separate and distinct; to lump them all up together in the judgment defeats the object of the law; *Rajani* v *Ram*, 17 C. W. N. 55.

Framing and Settling Issues.—Issues are to be framed in respect of those facts only which have been alleged by one party and either denied or not admitted by the other party; *Fateh Muhammad* v *Imamuddin*, 2 Lah. L. J. 188 68 I C. 106.

The duty of raising issues rests on the Court, and it would be unsafe to presume, from the failure of the Court to raise the necessary issues, an

intention of the defendant to admit the facts which the plaintiff was bound to prove, *Ganoo* v *Shri Dev Sidheswar*, 26 B. 360.

It is the duty of the Court to frame proper issues arising from the pleadings in a case It is the duty of a litigant to produce evidence in respect of issues framed by the Court but he cannot be expected to produce evidence with regard to points not covered by the issues; *Kasturi Mal* v *Lajja Ram* 60 I C 751.

This rule contemplates that issues may be settled whether there was any *written statement* or not, though it is *not obligatory on the Court to* frame issues if the defendant makes no defence *Rustum Gazi* v. *Tara Prasanna* 11 C W N 871

It is essential to the right decision of a suit that appropriate issues should be framed and tried —*Ahmedabad Advance, S & W. Co.* v. *Lakshmishanker*, 30 B 173 7 Bom. L R. 246.

When framing an issue on the point of fraud, it is advisable, to set forth in the issue itself, a brief statement of the fraud alleged.—*Balaji* v *Gangadhar*, 32 B 255

Inconsistent Issues.—In a suit for cancellation of a sale-deed, it was alleged in the plaint that the deed was a forgery, and that, if it was not a forgery, its execution was obtained by fraud, and that it was, moreover, void for want of consideration *Held* that it was improper to raise the wholly inconsistent issue as to whether the document was executed without any consideration, or that it was executed under coercion.—*Iyyappa* v. *Ramalakshmamma*, 13 M 549 *See* the cases noted under the heading "Alternative and Inconsistent Pleadings" *See* also cases noted under Or. VII, r 7, and Or VIII, r 2

Issues in Special Cases.—

(*a*) *Suits between landlord and tenant* —Where a person who has been sued for arrears of rent sets up the title of a third party, such third party ought not to be made a party to the suit so as to convert a simple suit for rent into one for determination of title Such a suit raises only two issues, *viz* , (1) Does the relation of landlord and tenant exist between the plaintiff and defendant? (2) Are the alleged arrears due and unpaid?—*Lodai Mollah* v *Kally Dass*, 8 C 238 *See* also, *Dayal Chand* v. *Nabin Chandra*, 8 B L R 180 16 W R 235

In a suit by *patnidars* for rent, where the defendants plead a *lakheraj* title, the issue to be tried, is, not whether the *lakheraj* title is valid or not, but whether plaintiffs have at any time received rent for the lands in dispute —*Purbooddeen Mullick* v *Molaem Bibee*, 14 W R 49.

(*b*) *In a suit for possession where defendant turns out to be a mortgagee* —In a suit for possession of a piece of land, where defendant pleads limitation, and his witness discloses that his possession is that of a mortgagee. *Held* that it was the duty of the Court to frame an issue, find expressly on the fact of the mortgage, and provide for the rights of the mortgagee —*Muzboot Singh* v *Chunder Mashee*, 16 W R 41.

In a suit for possession after foreclosure of mortgage, the landlord as purchaser of the tenure which had been sold in satisfaction of his own

rent decree resisted the plaintiff's claim. *Held*, that the whole question was which of the two parties claiming was entitled to possession; and the issue to be decided was, whether or not the tenure was sold subject to previous incumbrances.—*Chunder Monee* v. *Mohesh Chunder*, 12 W. R. 460.

(c) *In suit for possession of land.*—The plaintiff sued to recover possession of certain lands, alleging that it was *lakhiraj* land, but failed to prove the title he alleged. *Held* that the plaintiff was entitled to suceed on the strength of his title by adverse possession, although it was not alleged in the plaint, and no express issue was raised on that point — *Sundari Dassee* v. *Modhoo Chunder*, 14 C. 592.

In a suit to recover possession based on a deed of sale. *Held* that the Court should have raised issues as to ownership and possession, as, even if the sale-deed were not proved, the plaintiff might have been able to substantiate a title independently of it —*Gobind* v. *Vithal*, 20 B. 753.

(d) *In suits to establish easement.*—In a suit to establish an easement where limitation is pleaded, the proper issues to frame under section 26, Act XV of 1877, are pointed out; *Punja Kuvarji* v. *Bai Kuvar*, 6 B. 20 (6 C. 394, P. C. *referred to.*).

Where the plaintiffs's eaves had projected over the defendant's roof for more than 30 years, and the plaintiff had thus acquired a right to have the water carried from his roof in the defendant's roof, and the defendant removed the plaintiff's eave by raising a wall. *Held* that the plaintiff was entitled to the relief either by damages or injunction, to determine which, issues were framed according to the state of the authorities and sent for the findings of the lower Court.—*Nasarbhai* v. *Badrudin*, 16 B. 533.

Issues between Co-defendants.—Issues should not generally be raised and tried between co-defendants; *Degumber* v *Khetter*, 2 W R. 45: *Bhugwan* v. *Dukhina*, 8 W R. 356, *Chajju* v *Umrao*, 22 A. 386. But this is to be done where the raising and determination of such issue is necessary to giving the appropriate relief to the plaintiff; *Madhavi* v. *Kalu*, 15 M. 264. Where the plaintiff's suit is dismissed, no issue between the co-defendants can be decided; *Bevan* v. *Crawford*, 6 C. D 29. *See* also, notes to s. 11 under the heading, "Co-defendants and *Pro-forma* Defendants."

Omission to Raise or Decide Issues.—The duty of raising issues rests, under the Code, with the Court, and it would be unsafe to presume from the failure of the Court to raise the necessary issues, an intention of the defendant to admit the facts which the plaintiff was bound to prove.—*Ganoo* v. *Shri Dev*, 4 Bom. L. R 58 *See*, however, *Malbhubai* v. *Mulchand*, 3 Bom. L. R. 535, where it has been held that to have proper issues is as much the duty of the parties as of the court.

Where substantial justice had been done in a case, the mere omission to settle issues by the Court of first instance, which was not made a ground of appeal to the first Court of appeal, but was noticed and commented on by that Court, was held not to constitute a fatal mistrial of the cause, so as to render a new trial necessary —*Mitna* v *Syed Fazl*, 13 M. I. A. 573. *See* also, *Mahomed Basiroolah* v *Ahmed Ali* 22 W R 418; *Kachekalyana* v. *Kachivijaya*, 2 B L R 72, P C 11 W R 33; *Chundra*

Kumar v *Chaudhri Narpat*, 29 A 184, P C 11 C. W. N. 321: 5 C. L J 115 17 M L J 103 *See*, however, *Rewun Pershad* v. *Jankee Pershad*, 11 M I A 25 in which the Judicial Committee remanded the case for omission to frame proper issues

Where it appeared that an issue was raised as to ownership and that both parties gave evidence on such issue, and the lower Appellate Court, omitted to find such issue *Held* that it ought to have found on the issue as to ownership —*Ramkor Gopalji* v *Gangaram*, 16 B. 545.

Where a point, on which there is no distinct issue is present to the minds of the parties, the decision on such point cannot be impeached on the ground that there was no issue raised —*Muthuraman Chetty* v. *Krishna Pillai*, 29 M 72 15 M L J 478

Where no question of limitation necessarily arises on the pleadings, it is not obligatory on the Judge to direct an issue on that point.—*Venkata Narasimha* v *Bhashya Karlu*, 25 M 367 6 C W N 641, P. C. *See* also, *Fischer* v *Kamala*, 8 W R 33, P C

Where the pleading of either party is too vague, the Court may call for a further or fuller written statement, or may frame and record issues until the case raised by the pleadings is ascertained with sufficient clearness —*Ali Kadar* v *Gobind Dass*, 17 C 840, (848)

An appellant before the Judicial Committee may be allowed to succeed upon a new case if the issues are sufficiently made to cover that case, if foundation has been laid for it in the Courts below, and if the respondent is not unfairly taken by surprise —*Raja Indra* v *Rani Raghubans*, 9 C. W. N. 1000 P C 2 C L J 191 27 A 634 15 M L J 352.

An order by a Judge of a Hight Court at a settlement of issues fixing a distant date for the hearing of the suit is not an order under s. 156, C. P. Code, 1882 (Or XVII, r 1) and is appealable —*R* v *R*, 14 M. 88.

Wrong Issue.—When the Court of first instance frames and tries wrong issues, the appellate Court should frame the proper issues and remand the case for retrial, *Beer Chunder* v *Tarinee*, 11 W. R. 20.

Variance Between Pleading and Proof.—A plaintiff is only entitled to succeed upon the cause of action alleged in his plaint, *Sheo Prasad* v. *Lalit Kuar*, 18 A 403 "It will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded upon inferences at variance with the case that the plaintiff has pleaded, and, by joining issues in the cause, has undertaken to prove"; *Eshan Chunder* v *Shama Churn*, 11 M I A 7, 23 *Joytara* v. *Mahomed*, 8 C. 975.

Issues of law and of fact.

2. Where issues both of law and fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. [S. 146, para 6.]

COMMENTARY.

The words "*or any part thereof*" are new. This rule is analogous to English Or. XXV, r. 3.

"May be disposed of on the issues of law only."—The terms of this rule are perfectly clear. They prescribe that when issues of law going to the root of a case arise, the Court is bound to try those issues first and may, in its discretion, postpone the settlement of the issue of fact until after the issues of law have been determined.—*Rangamani Dasi* v. *Jogendra Nath*, 9 C. L J. 128, (131).

The power to order trial on preliminary issues is contained in Or. XIV, r 2 and Or. XV, r. 3 (1), C. P. Code. Or. XIV, r. 2 clearly applies when in a settlement of issues the Court thinks there are issues of law upon which the case or some part thereof may be disposed of In such a case these issues are to be tried first and settlement of issues of fact may be postponed. Or. XV, r. 3 (1) applies after issues have been framed, and allows the Court to determine issues of law if satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit. There is no reason to confine the power of the Court to try certain issues as issues of law on the date of first hearing.—*Ram Krishna Pillai* v. *Krishnaswami Pillai*, (1922) M. W. N. 521: 15 L. W. 667: 68 I. C. 167 (20 C. L. J. 426: 19 C. W. N. 1193 *relied on*).

This rule has reference only to the stage of settlement of issues and has no application to the case where the plaintiff applied for trial of certain issues without evidence, long after that stage. An issue as to the validity of a custom should not be tried till the custom itself has been established with precision.—*Rai Yatindra* v. *Haricharan*, 20 C. L. J. 426. Relied on in *Raja Satya Niranjan* v. *Dwarka Nath*, 2 Pat L. T. 154: 60 I. C. 528.

The trial of a case piecemeal may lead to protracted litigation not conducive to the administration of justice.—*Mohipal* v. *Lalji*, 17 C. W. N. 166, p. 168.

This rule is not confined only to cases in which the issues of fact had not been settled It also applies to cases where the Court has not postponed the settlement of the issues of fact.—*Kaurmoni* v. *Wasig Ali*, 19 C. W. N. 1193.

Materials from which issues may be framed.

3. The Court may frame issues from all or any of the following materials :—

(*a*) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties;

(*b*) allegations made in the pleadings or in answers to interrogatories delivered in the suit:

(*c*) the contents of documents produced by either party.

[S. 147.]

COMMENTARY.

Materials from which Issues may be Framed.—Order XIV, r. 3, mentions the various materials in addition to the plaint on which the issues may be framed The obvious intention is to provide against failure of justice upon technical rules of pleading, and with that intention the Legislature makes it incumbent on the Court to frame issues on which the right decision of the case depends, and adds to the plaint other materials on which those issues may be framed —*Giyana* v. *Kandasami*, 10 M. 375, p. 502.

A Court, in framing issues, is not bound down to the language of the pleadings, but may frame them not only from the pleadings but also from the statement of the parties made before the Court.—*Mohamed Mahmood* v. *Sofar Ali*, 11 C 407 *See* also, *Kousullya Dassee* v. *Ram Juggurnath*, 8 W. R. 162, *Man Gobind* v *Umbika Monee*, 16 W. R. 218; and *Shahebzadi Begum* v. *Himmat Bahadur*, 4 B. L R. 103; 12 W. R. 512.

This rule authorizes a Court to frame issues on allegations collected from the oral examination of parties or their pleaders, notwithstanding discrepancy between these allegations and the written pleadings.—*Kobeeroodden Ahmed* v. *Nyam Bibee*, 8 W R 354

The Courts should confine themselves to the dispute between the parties and not go out of their way to raise fanciful points which are not raised by the parties themselves —*Lala Lachman Prasad* v. *Majju*, A. I. R. 1923 A. 167.

The sole guides to a Court in framing issues for trial in a case are not the pleadings of the parties The Court has got to settle the issues on the pleadings and after hearing the pleaders; *Srimati Basini Dasi* v. *Krishna-Lal*, 51 I C 1007

The Court may frame issues from objections taken orally, though not taken in the written statement —*Secretary of State* v. *Dip Chand*, 24 C. 806.

To ascertain the truth, a Court is competent to raise issues not raised by the pleadings of the parties —*Nistarini Dasi* v. *Makham Lal Dutt*, 9 B. L R 17 W R 432 *See* also *Nundo Lall* v *Prosonno Moye*, 19 W. R. 333

A defendant is not precluded from setting up a defence which does not appear in the written statement where the plaint does not set forth the true facts, the Court will allow an issue to be raised on it; *Soonder* v. *Namdar*, 21 W R 407; *Doorg Narain* v. *Brojo Kishore*, 23 W. R. 172.

Appeal.—No appeal lies from an order refusing to frame an issue asked for by a party to a suit, *Tuljaram* v. *Alagappa*, 35 M. 1: 8 I. C. 340; *Ebrahim* v *Fukhrunnissa*, 4 C 531.

Court may examine witnesses or documents before framing issues.

4. Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the

issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is, by summons or other process. [S. 148.]

Power to amend, and strike out issues.

5. (1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree strike out any issues that appear to it to be wrongly framed or introduced. [S. 149.]

COMMENTARY.

Scope.—The first part of this rule leaves it in the *discretion* of the Court to frame such additional issues as it thinks fit, whilst the latter part makes it *imperative* on the judge to frame such additional issues as may be necessary to determine the controversy between the parties; *Shamu Patter* v. *Abdul Kadir*, 35 M. 607 P. C: 39 I. A. 218; 16 I. C. 250.

Power of Original Court to Amend Issues or Frame Additional Issues.—Although a Court is competent to raise issues not raised by the pleadings, yet it is highly inconvenient, and may lead to the most direct injustice, to enter into enquiry if the issue has not been presented by the pleadings.—*Fischer* v. *Kamala Naikar*, 3 W. R. 33, P. C.

The Courts should not, as a general rule, frame additional issues from materials other than those specified in rule 3; *Dodbasappa* v. *Pradhanappa*, 27 Bom. L. R. 318. But where no injustice is likely to be caused to either party, the Court may under special circumstances allow issues to be raised upon matters which do not come within the proper scope of the pleadings; *Neora* v. *Radha*, 5 C. 64.

After the close of the plaintiff's case, the defendant applied for leave to raise a new issue, which if raised, would re-open the whole case; and it was not suggested that the facts relied on had newly come to the knowledge of the defendant. *Held* that the application could not be entertained.—*Haji Sahoo* v. *Aycsahabai*, 7 C. W. N. 665, P. C. · 27 B. 485, P. C.

A Judge is not bound to make any amendment in the issues of a case except for the purpose of more effectively putting in issue and trying the real question in controversy as disclosed by the pleadings on either side But where no injustice would be done to either party, the Courts under special circumstances may allow issues to be raised upon matter which does not strictly come within the proper scope of the pleadings —*Neora* v. *Radha*, 5 C. 64: 4 C. L. R. 353. *See* also *Ramdyal* v. *Ajodhya Ram*, 2 C. 1: 25 W. R. 435; and *Bizji Bebee* v. *Monohur*, 2 Ind Jur. N. S 118.

The Courts are not to raise an important and serious issue in a case for the parties when they have not raised it themselves by their own pleadings in the cause.—*Waliullah Khan* v. *Muhammed Isarullah*, 10 A. 627.

A Court is not authorized by this rule to frame new issues which have the effect of altering the nature of the suit. A Court's power of raising additional issues is co-extensive with its power of amending plaints and is subject to the same restrictions, *Narayan* v. *Hari*, 13 B. 664; followed in *Jhari* v. *Pirthi*, 2 Pat. L. J. 69.

Although a Court has power under this rule to add any issue before judgment is pronounced, yet, in exercising that power, it ought not to allow a new plea to be put forward. *Sohan Bibi* v. *Hiran Bibi*, 10 I. C. 230.

When a Judge at the settlement of the issues has refused to raise a certain issue, the Judge at the trial ought not to re-open that question and modify the issues.—*Bolye Chand* v. *Maulard*, 4 C. 572.

It is competent to a Court, at any time before passing a decree, to frame an additional issue embracing a matter not included in the plaint or written statement, but which may appear upon the allegations made on oath by the parties or by any persons present on their behalf or made by their pleaders; *Mohde* v. *Dongre*, 5 B. 609.

The Original Court has power to frame an additional issue to decide whether a lawful compromise has been effected between the parties subsequent to the institution of the suit; *Appasami* v. *Varadachari*, 19 M. 419.

In a declaratory suit it appeared on the evidence for the defendant that he was in possession of a part of the property, but no issue had been framed as to the maintainability of the suit under section 42 of the Specific Relief Act. *Held* that the first Court should take evidence and try an issue on this point.—*Abdul Kader* v. *Mahomed*, 15 M. 16.

In a suit to enforce a mortgage after arguments had been heard and judgment reserved, it appeared from the evidence of the witnesses to the mortgage-deed that they were not present at the execution but had put their names on the document at the acknowledgment of the mortgagors. *Held*, that the Court had power under this rule to frame and try the additional issue as to whether the deed was valid and properly attested although no such defence had been set up in the written statement; *Shamu Patter* v. *Abdul Kadir*, 35 M. 607 P. C.: 16 C. W. N. 1009: 14 Bom. L. R. 1034: 10 A. L. J. 259.

Power of Appellate Court to Amend, Add or Strike Out Issues.—Duty of Appellate Court, when addition or amendment of issues is necessary, pointed out.—*Kelu Mulacheri* v. *Chendu*, 10 M. 157.

An Appellate Court cannot raise an issue which was not raised in the Court below, the functions of the Appellate Court being not to interfere upon mere points of form but to rectify a judgment, where there has been error on the merits.—*Brojo* v. *Futick*, 17 W. R. 407; *Ram Narain* v. *Nilmonee*, 23 W. R. 169; *Makintosh* v. *Lal Chand*, 23 W. R. 332.

An Appellate Court cannot declare a right in favour of the parties, where no issue has been fixed on the point, and the right has not been set up in the lower Court.—*Official Trustee* v. *Krishna*, 12 C. 239, P. C.

Where a quite new and different issue is raised in the Appellate Court, it ought to be done in such a way as to give the parties the fullest opportunity of producing evidence upon it.—*Latoo* v. *Bhuban*, 17 W. R. 361; *Eshan* v. *Dhonay*, 11 W. R. 61.

Where no objection was taken in the grounds of appeal to the issues as framed in the first Court, nor was there any such contention in those grounds as that the High Court ought to direct the Subordinate Court to raise the proper issues, the Court refused to remand the case with a view to other issues being raised and tried *Jowadunissa* v *Jhaman Lal*, 23 W. R. 158

Where the lower Appellate Court framed a wrong issue, but it appeared from its judgment that there was a finding on the point which would have been raised, if the correct issue had been framed, the High Court refused to remand the case for a new finding on that issue —*Ram* v *Ganesh*, 21 B. 325.

A party cannot be permitted to change in special appeal the allegations on which he went to trial in the Courts below, and to raise altogether a new issue.—*Shivdas* v *Bhagwan*, 2 B. L. R. Ap 15 · 11 W. R. 10; *Khodeeram* v. *Kishen*, 25 W R. 145. *See* also *Indur* v. *Radhakishore*, 19 C. 507, P. C.

"At any time before passing a decree."—An additional issue may be raised even after the close of the arguments on the case; *Shamu Patter* v. *Abdul Kadir*, 35 M. 607; 39 I A. 218: 16 I. C. 250.

Questions of fact or law may by agreement be stated in form of issues.

6. Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue:—

(*a*) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement;

(*b*) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or

(*c*) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute. (S. 150)

Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

7. Where the Court is satisfied, after making such inquiry as it deems proper:—

(*a*) that the agreement was duly executed by the parties,

(*b*) that they have a substantial interest in the decision of such question as aforesaid, and

(*c*) that the same is fit to be tried and decided,

it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court;

and shall, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement; and upon the judgment so pronounced, a decree shall follow. [S. 151.]

COMMENTARY.

These two rules should be compared with Or. XXIII, r. 3. They provide for the adjustment of a suit, *contingently* on the opinion of the Court on certain issues of fact or law, submitted to it, whereas, Or. XXIII, r. 3 deals with the adjustment of a suit *absolutely* Under these rules the adjustment becomes absolute when the Court gives its opinion on the issues submitted to it and it is the duty of the Court to pronounce judgment accordingly Even under the old Code where the word "*may*" was used it was held that the Court was bound to give judgment according to the agreement, *Goculdas* v *Scott*, 16 B 202 To give effect to this decision the word "*shall*" has now been substituted.

Where the parties agree to refer certain issues of fact to a Commissioner and to abide by his decision, they impliedly agree not to appeal against the decree passed in accordance with the Commissioner's report, and hence they are estopped from impugning that decree; and the order of remand passed on appeal therefrom, and the subsequent proceedings in pursuance thereof are all null and void The principles laid down in Or. XIV, rr. 6, 7, are applicable in this case.—*Bahir Das* v. *Nobin Chandra*, 6 C. W. N. 121 29 C 306 (8 C. 455 *referred to*).

ORDER XV.

DISPOSAL OF THE SUIT AT THE FIRST HEARING.

1. Where, at the first hearing of a suit it appears that the parties are not at issue on any question of law or fact, the Court may at once pronounce judgment. [S. 152.]

Parties not at issue.

COMMENTARY.

The Judge has discretion, when the parties have come to a mutual agreement, or when the defendant has confessed judgment, to decide the suit at once in accordance with such agreement or confession. He is not bound to do so till the date fixed for hearing; and he cannot exercise that discretion where there is any doubt as to the good faith or identity of the parties.—*Bank of Bengal* v. *Currie*, 3 B. L. R. A. C 396: 12 W. R. 432.

2. Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants. [S. 153.]

One of several defendants not at issue.

COMMENTARY.

In an action against several joint-debtors, judgment recovered against one of them, who *admits the claim, does not bar the further prosecution of* the suit against the others.—*Dick* v. *Dhunji*, 25 B 378.

3. (1) Where the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit :—

Parties at issue.

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects.

(2) Where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such, further argument as the case requires. [S 154.]

COMMENTARY.

" May pronounce judgment."—It is competent to a Judge to determine a case at settlement of issues, if he is satisfied that the evidence then before him is decisive of the matter in dispute, unless objected to by any of the parties —*Soorendro Pershad* v *Jugobundhoo*, 22 W. R. 426.

A Judge cannot dispose of a suit at the first hearing if the party appears and objects to the adoption of that procedure —*Krishnabhupati* v. *Rama Murti*, 16 M 198

Where summons was issued for settlement of issues only and the vakil objected to the disposal of the suit at the first hearing. *Held* that the Court could not dispose of the suit on that day —*Varadachariar* v. *Parthasarathy*, (1914) M W N 501 27 M L 58

Order XV, r 3 (1) provides for the disposal of the suit at the first hearing and has no application where the plaintiff made his application for trial of some issues, without evidence, long after the date fixed for the first hearing —*Rai Yatindra* v *Haricharan*, 20 C L. J 426.

Failure to produce evidence.

4. Where the summons has been issued for the final disposal of the suit, and either party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues. [S. 155.]

COMMENTARY.

Although a case may have been set down for final disposal, if it be a case in which further evidence is required, the Judge is bound to adjourn the case, unless he is satisfied that the plaintiff has, without sufficient cause, failed to produce his evidence —*Ameer Ali* v *Ram Bahadoor*, 7 W. R. 84

The great object of the Civil Procedure Code in requiring a day to be fixed for the hearing of a case, and all the evidence to be adduced on that day is that parties may thus be confronted with each other, and the whole evidence on either side be at one and the same time before the Court Where a party fails to produce his documents at the proper time, a Court is justified in refusing to send for them subsequently, if not satisfied that they are necessary for the ends of justice.—*Sobhee Jha* v. *Soshee Nath Jha*, 15 W R. 150

In a mortgage suit, the first summons issued was for final disposal On the day of hearing the Court raised issues and dismissed the suit as

not proved as the plaintiff was not ready with witnesses. *Held* that there was a miscarriage of justice, for the Code required that in cases of such a nature the parties should have an opportunity to produce evidence and that summons should have been issued only for settlement of issues and not for final disposal which should be done only in simple case —*Tuljaram* v. *Sitaram*, 38 B. 377: 16 Bom. L. R. 39.

Remedy.—Where a suit is dismissed under this rule, the proper course is to appeal against the dismissal and not to apply for restoration under Or. IX, r. 9. *Hinga* v. *Munna*, 31 C. 150: 8 C. W. N. 97.

ORDER XVI.

SUMMONING AND ATTENDANCE OF WITNESSES.

Summons to attend to give evidence or produce documents

1. At any time after the suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence, or to produce documents.

[S. 159.]

COMMENTARY.

This rule corresponds to section 159, C P Code, 1882, with some additions and alterations The words "*at any time after the suit is instituted*" have been substituted for the sentence "*after the summons has been delivered or sent for service on the defendant, whether it be for the settlement of issues only or for the final disposal of the suit*," which occurred in the old Code

"At any time."—These words are significant Application for summons may now be made *any time* after suit, and they should as a general rule be allowed If the application is made at a late stage and without any excuse for it, summons should be issued at the applicant's risk, and no adjournment should be allowed on failure of the witnesses to attend, unless very good cause exists *See* cases noted below.

Party's Right to Summon—Duty and Discretion of Court.—A litigant's privilege of summoning witnesses, is subject to the control of the Court though such control will be exercised sparingly and only in exceptional cases to prevent abuse of its process —*Veerabadran Chetty* v *Nataraja Desikar*, 28 M 28.

Every Court is bound to render all reasonable assistance to enforce the attendance of his witnesses —*Nilmonee Banerjee* v. *Shurbo Mangola*, 6 W. R 14 A party is entitled at any stage before hearing to apply for a summons to cite witnesses without reference to the number of such applications previously made, and it is the duty of the Court to comply with such application if any time be left before the hearing of the cause.—*Anurup Chandra* v *Heera Monee*, 3 Bom L. R Ap. 38: 11 W. R. 418, *Haridas* v *Moazam Hossein*, 8 Bom L R Ap 16: 15 W. R. 447. Followed in *Tara Chand* v *Chandra*, 11 C L. J 99 5 I. C. 181.

Where on the day before the case had been fixed for final hearing, a party applied to the Court to send a Court-peon with an order to the Collector either to send his servant with the Chaukidari Register to be admitted in evidence, or to deliver it over to the Court-peon, *held* that there was no reason why even at a late stage the application should not have been complied with, *Raghu Nandan* v *Mahabir*, 7 Pat. L. T. 775. 96 I. C 418: A. I R 1926 Pat. 545.

Under Or. XVI, r. 1, a party has an absolute right to summon witnesses, and, so long as he pays the necessary expenses, to insist that their attendance shall be enforced. The only case in which the Court has power to refuse to issue summons is where the application is not made *bona fide* or where in the exercise of its inherent powers to prevent the abuse of its own process it is necessary to refuse to issue summons. The fact that the party originally undertook to bring the witnesses or applied late for issues of summons does not affect the duty of the Court.—*Pritam Singh* v. *Sobha Singh*, 75 I. C. 866.

A party to a suit is entitled as of right to obtain summonses for his witnesses at any time before the final hearing, though the Court may properly refuse to adjourn the hearing.—*Bhagwat Das* v. *Debi Din*, 16 A. 218; *Saibai* v. *Balkrishna*, 27 Bom. L. R. 471: 87 I. C. 702: A. I. R. 1925 B. 368; *Baikali* v. *Alarakh*, 15 B. 86, *Kaji Ahmed* v. *Kaji Mahamad*, 9 B. 308; *Krishna* v. *Protab*, 7 C. 560; *Moni Lal* v. *Khiroda*, 20 C. 740; R. 569; *Firm of Bal Mukund Arjundas* v. *Firm of Dayaram*, 63 I. C. 736.

So long as the hearing of a case stands adjourned, and so long as the party who wishes to summon witnesses has not closed his case, the Court is bound to summon them, unless the application is made so late that the witnesses cannot be expected to attend in time before that party's case closes.—*Indro Chunder* v. *Dunlop*, 9 W. R. 530. See also, *Brojonath* v. *Protap Chunder*, 22 W. R. 296, *Upendra* v. *Chairman of Calcutta Corporation*, 16 C. W. N. 116, *Mahomed Hayat* v. *Gulam Mahommad*, 60 I. C. 656; *Bhag Chand* v. *Musaji*, 68 I. C. 272.

Where certain witnesses are not present on the day of hearing owing to non-service of summons upon them without fault of a party, the Court ought to issue fresh summons and is not justified in depriving the party, who wishes to produce them, of his right to have the evidence of those witnesses taken, *Gopi Chand* v. *Kripa Ram*, A. I. R. 1926 Lah. 26

Where a party delayed in giving the names of his witnesses, but would yet have been within reasonable time to secure their attendance on the day of hearing, if summonses had been sent through different peons by the railway. *Held* that the Court was bound to direct the issue of the summonses also, all additional expenses being paid by such party.—*Pearee Mohun* v. *Madhub Chunder*, 9 W. R. 489. Followed in 11 C. L. J. 29

Where a party hims[illegible] esses fails to bring them, the Court is not [illegible] mmonses to his witnesses, although it may [illegible] v. *Keshavji*, 6 B. 742

Where in the first Court the defendant applied for a witness to be examined, but no order was made on the subject. *Held* that the lower Appellate Court was justified in remanding the case to entertain the application.—*Bonomalee Churn* v. *Hafizuddeen*, 13 Bom. L. R. 274-*note*. 12 W. R. 317.

Responsibility for Non-service of Process.—After the payment of the process fees, the officer of the Court, and not the applicant, is responsible for service and return.—*Mussitee Kanum* v. *Hookoom Bibi*, 15 W. R. 88.

Issue of Fresh Summons—Parties to Move in the Matter.—An application for a fresh summons to appear, etc., should be issued on petition

showing that a fruitless endeavour had been made by plaintiff to serve the first summons, and that it was not by any default of his that he had failed.—*Urquhart* v. *Gilbert*, 1 Ind Jur N S. 224.

A Judge has discretion as to granting a second summons, and is bound to enquire into the circumstances under which it is applied for; and when there has been great and unexplained laches, he should refuse it.—*Gour Churn* v. *Peary Lal*, 15 Bom L R. Ap 12

Where witnesses do not appear after service of summons, it is the duty of the party requiring their evidence, and not of the Court, to move for further measures to be taken to secure their attendance.—*Nund Mohun* v *Goluck Nath*, 11 W. R 99 *See* also *Bachman* v. *Lal Beharee*, 13 W. R. 324.

The Court has also discretion to take stronger measures than issue of summons again *See rules* 10-12, 17, 18 of this Order.

Application to be Made Within Reasonable Time.—An application for summons must as a rule be granted, and the question whether it is made within reasonable time is only to be decided when, afterwards owing to the failure of the witness to attend, an adjournment is prayed for; *Amir Ali* v. *Kulsum* 8 I C 418 *See also Moti* v *Kanhya*, 4 I. C. 797.

Refusal of Summons.—When Court is convinced that a vexatious desire to obstruct justice is the guiding motive, *Moti* v *Kanhya*, 4 I. C. 797. *See also Ram Phul* v *Wahed*, 14 W R 66, *Ramdhan* v. *Rajballav*, 6 Bom. L. R Ap 10 Where witnesses are described vaguely; *Amir* v. *Kulsum*, 8 I C 418 When application is not made *bona fide*; *Veerabadran* v. *Nataraja*, 28 M 28

Remedy When Summons Refused.—No appeal lies simply for refusal to issue summons The ground can be urged when appealing from the decree The Appellate Court may order a re-hearing and direct the lower Court to issue summons if it is of opinion that the refusal has caused substantial injustice affecting the merits of the case, otherwise there will be no interference; *Upendra* v *Chairman of Calcutta Corporation*, 16 C. W. N. 116; *Bhagwat* v *Debi*, 16 A 218, *Gopi Chand* v *Kripa Ram*, A. I. R. 1926 Lah 26.

An exercise of the discretion of the Court in refusing to grant a fresh summons on account of delay in applying for it cannot be interfered with, in special appeal —*Brojo Lall* v *Aughore Lall*, 25 W. R 71.

If the Court wrongly refuses summons, the High Court may interfere in revision; *Kazi Ahmad* v. *Kazi Ahmad*, 9 B 308

Persons Competent to be Witnesses.—A wife can be examined as to non-access of her husband during the married life, without independent evidence being first offered to prove the illegitimacy of her children.—*Bazario* v. *Inglis*, 18 B 468.

Where a Judge is the sole judge of law and fact in a case tried before himself, he cannot give evidence before himself, or import matters into his judgment not stated on oath before the Court in the presence of the accused —*Queen-Empress* v. *Manikam*, 19 M. 263.

A Munsif ought not to be called on to depose as to what took place before him in the course of a trial which he was conducting as munsif, and he is entitled to exemption.—*Anonymous*, 6 Mad. H. C. Ap. 42.

A boy, who is not prevented from understanding the questions put to him, or from giving rational answers to those questions by reason of tender years, is a competent witness.—*Queen-Empress* v. *Ramsewak*, 23 A. 90.

Mode of examining a child witness—Competency to be tested before examination.—*Sheik Fakir* v. *The Emperor*, 11 C. W. N. 51. See *Nafar* v. *King-Emp.*, 18 C. W. N. 147. As to the value of the statement of a boy, see *Chandrasang* v. *Mohansang*, 4 C. L. J. 181, P. C., 30 B. 523.

See section 118 of the Author's Indian Evidence Act (1 of 1872) and the notes thereunder.

Expenses of witness to be paid into Court on applying for summons.

2. (1) The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend and for one day's attendance.

Experts.

(2) In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence

CALCUTTA HIGH COURT

VIII *Cancel* Clauses (1) and (2) of Rule 2, Order XVI, and *substitute* therefor the following —

"(1) The Court shall fix in respect of each summons such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance

(2) In fixing such an amount the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case." (P 1177)

This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction. (*See* Or. XLIX, r. 3, cl. 3.)

A party need not pay into Court the costs of summoning and defraying the expenses of the witnesses until the Court fixes what is reasonable — *Mohun Mundur* v *Brij Bhookun*, 9 W R 128

Persons of rank and wealth are entitled to travelling and other expenses suitable to their circumstances —*Chunder Sekhur* v. *Jadub*, 19 W. R. 78

Non-payment of necessary expenses under this rule may be a good ground for refusal to issue a warrant for arrest of a witness who has failed to attend in obedience to a summons —*Todar Mal* v *Said Muhammad*, 17 A. 277.

A witness is entitled to be paid his expenses by the party at whose instance he has been summoned, although he has not applied for them before giving his evidence —*London, Bombay and Mediterranean Bank* v. *Mahomed Ibrahim*, 4 B 619 See also *In re Bullock*, 28 B. 647.

No action for expenses of witnesses will lie—Explanation of the manner of providing for the payment of such expenses —*De Saran* v *Hurrish Chunder*, 5 W R S C C Ref 6 *See*, however, *Nemai Chandra* v. *Ajahar*, 8 C W. N 178

A suit is maintainable to recover the expenses paid to a witness, who failed to appear in pursuance of a summons served in time.—*Nataraja Desikar* v. *Veerabadran Chetty*, 17 M L J 143

Non-payment of witnesses' expense at the time of issuing summons—The Court has power to order payment before passing the decree and may levy the amount summarily —*Chenchuramayya* v. *Narsimhayya*, 17 M. L J. 435. *See* rule 4.

Expenses of Witnesses in Government, Municipal or Private Service. —Government servants and persons in Municipal or Private Service cited as witnesses in Civil suits are not entitled as part of their expenses to the payment of the salary which they would earn in their ordinary employment for the time which they spend in attending Court. As to the servants of Municipal bodies and private employees, *Held* that Court below was right in supposing that the question depends on the provisions of Rules 2, 3 and 4 of Or XVI, and on the rules made by the High Court under cl. (3) of r. 2, *In the matter of Reference under r 1, Or. XLVI, C P. Code*, 38 C. L J. 149

Non-service of Summons owing to Process-server's Default.—Where plaintiff pays process fee and witnesses' expenses in time, but the summons is not served owing to default on the part of the process-server, it is illegal to dismiss the suit; *Mati Ram* v. *Kishori Lal*, 6 Lah. L. J. 418: 85 I. C. 321: A. I. R. 1925 Lah. 296

Tender of expenses to witness.

3. The sum so paid into Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

[S. 161.]

X. *Cancel* Clause (1) of Rule 4, Order XVI, and *substitute* therefor the following:—

" (1) Where it appears to the Court or to such officer as it appoints in this behalf that the sum so fixed is not sufficient to cover such expenses or reasonable remuneration, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and in case of default in payment, may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons; or the Court may discharge the person summoned, without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid " (P. 1178)

and discharge such person as aforesaid.

Expenses of witnesses detained more than one day.

(2) Where it is necessary to detain the person summoned for a longer period than one day, the Court may, from time to time, order the party at whose instance he was summoned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and, in default of such deposit being made, may order such sum to be levied by attachment, and sale of the moveable property of such party; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

[S. 162.]

COMMENTARY.

This rule corresponds to 162, C. P Code, 1882 The words " *reasonable remuneration* " have been added after the word ' expenses ' in sub-rule (1) It has been made in consequence of the insertion of sub-rule (2) in rule 2

Where there was no proof that a defaulting witness s expenses were tendered by the party, the Court on appeal declined that witness's evidence to be taken —*Ishan Chunder* v. *Onath Nath*, 18 W R 16

When a witness has been summoned to give evidence in a case which is adjourned, it is not necessary to issue a fresh summons to the witness He need only be warned that his attendance will be required on the day to which the hearing may be postponed —*Subbarayadu* v. *Chenchuramayya*, 21 M. 200.

An order in a suit that plaintiff should pay a certain sum as expenses for one of his witnesses, cannot be executed by sale of plaintiff's immovable property but the amount must be levied only in the manner prescribed in r. 4; *Md Warish Sadagar* v. *Rahman Ali Miah*, 26 C W. N. 877.

" Sale of moveable property."—Where witnesses' expenses are not deposited by any party, only his moveable property may be attached under sub-rules (1) and (2) of this rule; *Muhammad Warish* v. *Rahaman*, 26 C. W. N. 877; 70 I. C. 123.

Appeal.—An order of attachment and sale under this rule was formerly appealable (*Bijoy* v *Joykishen*, 12 W. R 430), but not now; *see* Or. XLIII, r. 1.

Time, place and purpose of attendance to be specified in summons.

5. Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document, which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy. [S. 163.]

COMMENTARY.

A written summons distinctly describing the nature of the document required must be issued on a party to a suit required to produce a document. A verbal order to his pleader is not sufficient.—*Doorga Monee* v. *Binode Monee*, W. R (1864), 164.

Punishment for Non-attendance.—Where summons did not mention the place at which, or the time of the day when, the attendance was required: *Held* that such person could not lawfully be punished for non-attendance in obedience to such summons.—*Empress of India* v. *Rami Saran*, 5 A. 7. *See* also, *Anonymous*, 7 M H C Ap. 14 and 43. Before convicting a person under s. 174, I P Code, it must be proved that he had notice to appear at a certain time and place, and that he did not do so.—*In the matter of Shib Pershad*, 17 W R Cr 38

Where a public servant was absent on the date fixed in a summons: *Held* that the person summoned could not be convicted though he failed to attend, having the intention to disobey the summons.—*Queen-Empress* v. *Krishtappa*, 20 M. 81

A conviction for non-attendance cannot be had, unless the person summoned was legally bound to attend, and refused or intentionally omitted to attend.—*In the matter of Sree Nath Ghose*, 10 W. R. Cr. 83.

A witness cannot be convicted for non-attendance on a Sunday or other recognised holiday, *Q* v *Hargobind*, 8 B L. R. Ap 12.

Summons to produce document.

6. Any person may be summoned to produce a document, without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same. [S. 164.]

COMMENTARY.

A person summoned to produce a document cannot be cross-examined unless and until called as a witness; *see* s. 139 of the Evidence Act.

Omission to produce a document when ordered by a Court is an offence under s. 175, C. P. Code.—*Queen* v. *Seshayya*, 13 M. 24.

CALCUTTA HIGH COURT.

XI. *Insert* the following after Rule 7, Order XVI:—

"Rule 7 (*a*) (*i*) Except where it appears to the Court that a summons under this Order should be served by the Court in the same manner as a summons to a defendant, the Court shall make over for service all summonses under this Order to the party applying therefor. The service shall be effected by or on behalf of such party by delivering or tendering to the witness in person a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the Court

(*ii*) Rules 16 and 18 of Order V shall apply to summons personally served under this rule, as though the person effecting service were a serving officer

(*iii*) If such summons, when tendered, is refused or if the person served refuses to sign an acknowledgment of service or if for any reason such summons cannot be served personally, the Court shall, on the application of the party, re-issue such summons to be served by the Court in like manner as a summons to a defendant" (P. 1181.)

CALCUTTA HIGH COURT

XII *Cancel* Rule 8, Order XVI, and *substitute* therefor the following —

"8 (*1*) Every summons under this Order not being a summons made over to a party for service under Rule 7 (*a*) (*i*) of this Order, shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in Order V as to proof of service shall apply thereto.

(*2*) The party applying for a summons to be served under this rule shall, before the summons is granted and within a period to be fixed, pay into Court the sum fixed by the Court under Rule 2 of this Order." (P. 1181.)

mons. .... compliance with such summons, the Court shall, if the certificate of the serving-officer has not been verified by affidavit, and may, if it has been so verified, examine the serving-officer on oath, or cause him to be so examined by another Court, touching the service or non-service of the summons.

(2) Where the Court sees reason to believe that such evidence or production is material, and that such person has without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation or at any time afterwards, the Court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit not exceeding the amount of the costs of attachment and of any fine which may be imposed under rule 12.

Provided that no Court of Small Causes shall make an order for the attachment of immoveable property. [S. 168.]

COMMENTARY.

This rule corresponds to 168 of the C P Code, 1882. Some additions and alterations have been made but there has been no substantial change in the meaning The power to issue warrant under sub-rule (3) with bail is new The Court may not in all cases put the defaulting person to the humiliation of appearance in person before release

Before action is taken under this rule and proclamation issued, the Court must be satisfied that the evidence or production is material and that the offender is wilfully keeping himself away and has really absconded for avoiding attendance, *Bhubun Moyee* v *Kishore Dasee*, 6 W. R. 235; *Kalee Das* v *Eshan*, 13 W R 116, *Rajoo* v *Balgobind*, 1 W. R. 26; *Ajoodhya* v *Biber Misrun*, 15 W R 176 Some time should be given to prove that the evidence is material and that the witness is keeping away, *Prem Chand* v *Becharam*, 6 W R 126

Or XVI, r 10, does not make it obligatory on the part of the Court to compel the attendance of witnesses served except where an application has been made by one of the parties to that effect, *Manalal* v. *Sukhlal*, 57 I. C. 311.

The Court has a discretion as to the issue of proclamation and subsequent orders for attachment; but it should be exercised in a reasonable manner.—*Porun Chunder* v *Gopee Nath*, 8 W. R. 505.

It is the duty of the party requiring the evidence, and not of the Court, to move for further measures to be taken to secure their attendance when witness do not appear after summons.—*Nund Mohun* v. *Goluk Nath*, 11 W. R. 99; *Bachman* v. *Lall Beharee*, 13 W. R. 321.

If the party does not apply under this rule, and the Court believes that the witness is material, it would exercise a sound discretion by itself putting in force the provisions of this rule; *Ramnarayan* v *Jagdeo*, 33 A. 690.

Duty of Civil Courts and Settlement Officers to Follow the Provisions of Law Strictly as regards Summoning Documents Before Them.—Or. XVI, r. 10 of the C. P. Code does not apply where there has been no summons upon any body to produce the documents, and no order under r. 12 can be made until the procedure laid down in r. 10 has been followed where that rule applies. The civil Court, and particularly the peripatetic settlement Courts which cause a large amount of disturbance to local interests, cannot be too careful to follow the provisions of law strictly as regards summoning persons and documents before them; *Nabodip Chandra* v. *Secy. of State*, 20 C. W. N. 511.

"The Court may in its discretion issue a warrant."—A Court has no power to order the issue of warrant against a witness and to direct the party at whose instance the witness has been summoned, to pay the expenses for issuing a warrant for the appearance of a witness simply on the report of the process-server that the witness was absent and the summons had been affixed to his door but without complying with the prosions of Or. XVI, r. 10, C. P. Code. Such an order is wholly unjustifiable and is not binding on the party directed to pay the necessary process fees for issue of the warrant; *Naghaia* v. *Udkam*, 18 P. W. R. 1919: 39 I. C 592.

Where a person was summoned to produce a document and on his failure to do so, a warrant was issued first, and a proclamation was directed immediately after, and then his house was attached. *Held*, that after issuing a warrant, the Subordinate Judge had no right to issue a proclamation at a later stage. Where a witness appeared and stated that he had not the document in his possession, it is an illegal exercise of his power for the Judge to order an attachment; *Rangaswami Reddi* v *Konda Reddi*, 29 M L T. 95 61 I. C. 967.

Appeal.—An order of attachment under this rule is appealable, *see* Or. XLIII, r 1 cl (*g*).

If witness appears, attachment may be withdrawn.

11. Where, at any time after the attachment of his property, such person appears and satisfies the Court :—

(*a*) that he did not, without lawful excuse, fail to comply with the summons or intentionally avoid service, and,

(*b*) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule, that he had no notice of such proclamation in time to attend,

the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit.

[S. 169.]

COMMENTARY.

This rule corresponds to 169 C P Code, 1882, with some minor alterations in the language

Or XVI, r 11 provides for a case where the person appears and satisfies the Court that he has not intentionally failed to carry out the order. R 12 applies to the case of a person who does not appear and also fails to satisfy the Court. *Sib Kumari* v *Secy of State*, 31 C. L. J 363: 55 I C 425

12. The Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition in life and all the circumstances of the case, and may order his property, or any part thereof, to be attached and sold or, if already attached under rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any

Procedure if witness fails to appear

Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.

[S. 170.]

COMMENTARY.

A suit was held not maintainable against Government for sale of property for an absconding witness —*Bukhooree Singh* v. *Government*, 8 W. R. 207.

"Impose upon him such fine."—There can be no order under this rule until the procedure laid down in r. 10 has been followed; *Nabadwip* v *Secy. of State*, 20 C W N 511 But see *In re Magayya*, 48 M. 941, in which it has been held that neither the issue of a proclamation nor an order for attachment under r 10 is a condition precedent to the imposition of a fine under this rule

Where summons was affixed to his door and a witness was fined for non-compliance, the omission to record under Or. V, r. 20, express declaration of service of process did not invalidate the order; *In re Srikrishna Das*, 19 M. L J 31

An order imposing a fine on a person under Or. XVI, r. 12, for failing to appear in obedience to a summons is without jurisdiction unless it is made after attachment of the property of that person under r. 10; *Ram Gopal* v. *Secy. of State*, 55 I. C 425.

Appeal.—By rule 13 which has been newly inserted, the provisions of attachment and sale in execution of a decree have been made applicable to attachments and sales under this Order. So in matters of appeal against orders relating to attachments and sales under this Order, the applicability or otherwise of the provisions of appeal against orders of attachment and sale in execution of decrees should be considered. *See* Or. XXI, rr. 89, 90, 92 In *Badri* v *Tej Singh*, 33 A. 68, it was held that no appeal lies from an order releasing property from attachment under the proviso to this rule. But this was a decision under the old Code.

The refusal of a Court to inflict upon recusant witnesses is no ground for special appeal.—*Prankisto* v. *Kalee Dass*, 7 W. R. 460.

Mode of attachment.

13. The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this Order as if the person whose property is so attached were a judgment-debtor. [New.]

Court may of its own accord summon as witnesses strangers to suit.

14. Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary to examine any person other than a party to the suit and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document. [S. 171.]

COMMENTARY.

This rule corresponds to 171, C. P. Code, 1882, with some alterations. Similar provisions is to be found in Or X, rr. 2, 4

Where a Court desires to have evidence of one whom the defendant does not want to call, the proper procedure is to take action under this rule and not to insist on him to pay the costs necessary to call the witness and on his refusal to do so to decline to grant summons to his witnesses, *Billa* v. *Chhuta*, 10 I C 35 159 P L R. 1911.

In boundary disputes when the evidence is unsatisfactory, the Court ought to exercise its powers under this rule.—*Po Gyi* v *Mg Paw*, 5 L. B. R. 1

Cross-examination of Witness Called by Court.—A witness called by the Court is liable to be cross-examined by any of the parties to a suit — *Tarini Charan* v. *Saroda Sundari*, 3 B L R A C 115 11 W R 468. There is nothing in s 165 of the Evidence Act (I of 1872) debarring or dis-

qualifying a party to a proceeding from cross-examining any witness summoned by the Court.—*Gopal Lall* v. *Manick Lall*, 24 C. 288. *See*, however, *Queen-Empress* v. *Stanton*, 14 A. 521.

15. Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place. [S. 172.]

Duty of persons summoned to give evidence or produce document.

COMMENTARY.

A witness summoned to produce a document shall, if it is in his possession and power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The Court is to decide the validity of the objection. *See* s. 162 of the Evidence Act.

The chief officer of Karachi Municipality was summoned to cause the production of certain entries from a record which were not specified, and for which a search was made by him and the search-fee was claimed. *Held*, there is no provision under which such fee could be claimed. If the document is not duly specified the witness might apply for specification.—*Rewa Chand* v. *Laloo*, 5 S. L. R. 44.

16. (1) A person so summoned and attending shall, unless the Court otherwise directs, attend at each hearing until the suit has been disposed of. [S. 173.]

When they may depart.

(2) On the application of either party and the payment through the Court of all necessary expenses (if any), the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained in the civil prison. [New.]

COMMENTARY.

Sub-rule (1) corresponds to s. 173, C. P. Code, 1882, with some material alterations. Sub-rule (2) is new and has been added for the interest of the parties, who are sometimes put to great difficulty for non-attendance of witnesses at subsequent hearings.

Where a suit is adjourned, but the Court omits to bind the witnesses to be present, and they do not attend afterwards, an opportunity ought to be allowed to enforce their attendance by summons.—*Drakshampa* v. *In Re*, 16 I. C. 996.

17. The provisions of rules 10 to 13 shall, so far as they are applicable, be deemed to apply to any person who, having attended in compliance with a summons, departs, without lawful excuse, in contravention of rule 16. [S. 174, para. 1 and S. 176.]

Application of rules 10 to 13.

COMMENTARY.

This rule lays down in a modified form the provisions of para. 1 of s. 174 and s. 175 of the C P. Code, 1882. The wordings of the old sections have been materially changed.

This rule is of a highly penal nature, and its provisions, in order to give validity to anything purporting to be done under them, must be strictly complied with. Under it, a witness, who has failed to appear on his summons, can only be fined after he has been arrested and brought before the Court. Where a witness being served with summons applied for time to appear *Held* that the fact of his applying for time would not preclude him from saying that there had been no such service of the summons as could warrant action under this rule.—*Kali Narain* v. *Shaik* v *Sheik Bajoo*, 3 C. W. N 307.

There is no obligation in a civil Court to issue a warrant for non-obedience to a summons, when the absence is due to the non-payment of the necessary expenses.—*Todar Mal* v. *Said Muhammad*, 17 A. 277.

The jurisdiction to punish under this rule exists only when a witness who, not having attended on summons, has been arrested and brought before the Court —*In re Prem Chand Dawlatram*, 12 B. 63; *Kali Narain* v. *Sheik Bajoo*, 3 C. W. N. 307.

There should be satisfactory ground for believing that the default is without lawful excuse, before issuing a warrant for his arrest.—*Periyanna Chetty* v. *Govind Gounden*, 5 M. H. C. 104. What is or what is not a lawful excuse must depend on the circumstances of each case.—*Doorga Dutt* v. *Jheengoor Jha*, 18 W. R. 63.

A verbal order of the Court requiring a witness to attend on a future day would not justify warrant for his arrest in case of non-obedience — *Venkatappah* v. *Papammah*, 5 M. H. C. 132; *Anonymous case*, 6 M. H. C. Ap. 10 *See*, however, *Anonymous case*, 5 M. H. C. Ap. 15.

The non-attendance must be in the nature of wilful disobedience to attend. Where a witness was summoned for a certain day, and, being absent from home, did not receive the summons till after the day had passed, he could not be fined for non-attendance.—*Queen* v. *Ungun Lall*, 1 N. W. P. (Ed. 1873), 303.

18. Where any person arrested under a warrant is brought before the Court in custody, and cannot, owing to the absence of parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the

Procedure where witness apprehended cannot give evidence or produce document.

qualifying a party to a proceeding from cross-examining any witness summoned by the Court —*Gopal Lall* v *Manick Lall*, 24 C. 288. *See*, however, *Queen-Empress* v *Stanton*, 14 A. 521.

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When they may depart.

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COMMENTARY.

Sub-rule (1) corresponds to s 173, C. P. Code, 1882, with some material alterations Sub-rule (2) is new and has been added for the interest of the parties, who are sometimes put to great difficulty for non attendance of witnesses at subsequent hearings

Where a suit is adjourned, but the Court omits to bind the witnesses to be present, and they do not attend afterwards, an opportunity ought to be allowed to enforce their attendance by summons —*Drakshatapu* v *La Rive*, 16 I C. 986.

where the fact to be proved is solely and exclusively within the knowledge of such other party.—*Kashi Nath* v. *Dwarkanath*, 9 B. L. R. 215: 17 W. R. 550; *Ishan Chandra* v. *Harish Chandra*, 9 B. L. R. 218-note: 12 W. R. 369.

Where a caveator refuses to answer a question, this rule will not justify the Judge in dispensing with the proof of the will set up, and passing a decree in favour of the petitioner.— *Ravji Ranchod* v. *Vishnu Ranchod*, 9 B. 241 (Refd. to in *Monmohini* v. *Banga*, 31 C. 357: 8 C. W. N. 197).

In a suit to recover the balance due on a partnership transaction, the defendant who was examined as a witness for the plaintiff, refused to produce certain accounts relating to the partnership and relevant to the suit. *Held* that the Court below was justified in passing judgment against the defendant for refusing to produce documents.—*Katakam* v. *Bhupalam*, 4 M. H. C. 142.

Consequence of refusal to exhibit document in party's possession or power as evidence.—Order XX, r. 16 authorizes the Court to pronounce judgment against a person who, without lawful excuse, declines to produce the document then and there in his possession or power: if the document is produced, the requirement of the law is fulfilled Where the plaintiff who was present in Court, on being asked by Court, produced a certified copy of a judgment in his possession, but declined to exhibit it as evidence in in the case. *Held* that the Court could not pass an order for dismissal of the suit under Or. XVI, r. 20, C. P. Code.—*Radha Nath* v. *Uttam Chandra*, 28 C. L. J. 24: 46 I. C. 879.

21. Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable. [S. 178.]

Rules as to witnesses to apply to parties summoned.

COMMENTARY.

By this rule a party to a suit required to give evidence is bound by the rules applicable to witnesses.—*Emp.* v *Mayadeb*, 6 C. 762. 8 C. L. R. 292.

A Court is justified in passing a decree against a party who being cited as a witness fails to attend. *Brahmamoyee* v. *Kristo*, 2 C. 222; or does not produce the document summoned to produce —*Tara Chand* v *Baistub*, 16 W. R. 196.

Judgment ought not in ordinary circumstances to be passed against a defendant who *bona fide* requires the evidence of the plaintiff to be taken unless such evidence is given.—*Roy Dhunput* v. *Prem Bibee*, 24 W. R 72

If a party wishes to call his adversary as a witness, every possible effort should be made to compel his attendance.—*Subbaji* v. *Shiddappa*, 26 B. 392.

If a plaintiff calls the defendant as a witness to establish a given fact, the evidence of the defendant, so far as his credit is concerned, must be judged in the same way and on the same principles, as the evidence of

any other witness, and the plaintiff must stand or fail, as regards the proof of that fact, according as the evidence of the defendant, on whom he relies, is worthy of credit or the reverse.—*Mathura Das* v. *Jetha Jai Chand*, 2 C. W. N. (S. N.) xcix (99).

It is one of the artifices of a weak and somewhat paltry kind of advocacy for each litigant to cause his opponent to be summoned as a witness, with the design that each party shall be forced to produce the opponent so summoned as a witness, and thus give the counsel for each litigant the opportunity of cross-examining his client. It is a practice which all judicial tribunals should set themselves to render as abortive, as it is objectionable. It should never be permitted in the result to embarrass judicial investigation.—*Keshori Lal* v. *Chuni Lal*, 9 C. L. J. 172, P. C. 13 C. W. N. 370, P. C. This practice was also condemned in *Lal Kunwar* v. *Chiranji*, 14 C. W. N. 285 P. C., as a "vicious practice, unworthy of a high-toned or respectable system of advocacy," where the Privy Council pointed out the usefulness and necessity of the examination of the parties to the suit by themselves in support of their cases. In *Ram Singh* v. *Tursa*, 17 C. W. N. 1085, some brothers had executed separate mortgages in respect of their shares, and did not come to the witness box to explain how these transactions were consistent with their plea of jointness. It was held that the inference from the act of the brothers was only consistent with the hypothesis of separation.

ORDER XVII.

ADJOURNMENTS.

Court may grant time and adjourn hearing.

1. (1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

Costs of adjournment.

(2) In every such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment:

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded. [S. 156.]

COMMENTARY.

This rule corresponds to section 156, C P Code, 1882, with some variations In sub-rule (2), the word "*every*" has been substituted for the words "*in all such cases,*" and the words "*beyond the following day*" have been added after the word "*hearing*" in the proviso.

"May adjourn."—Parties cannot obtain adjournment by consent as a matter of course To regulate its own procedure is entirely the business of Court.—*Madhow* v *Ajudya*, 10 I. C 748 13 Bom. L. R. 161 The question of granting or refusing adjournment on the ground that a party is not ready with evidence is one essentially for the discretion of the Court, a discretion to be used judicially It is impossible for a Court of second appeal to interfere with its exercise —*Parsottam* v. *Kesho*, 21 I. C 206

For granting adjournments, the Courts ought not to be too technical as if one is anxious to find excuse for cutting the work of Courts, but should give reasonable opportunity to parties to adduce evidence; *Raghava Ayyar* v. *Ramasami*, (1926) M. W N 434 96 I C 536. A. I. R. 1926 M 859

This rule gives a discretion to the Court to grant time to the parties and to adjourn the hearing of a case No adjournment should be granted if sufficient case is not shown; *Bindubashini* v. *Secy. of State*, 51 C. 70: 79 I C. 745· A I R 1924 C. 774; but no adjournment should be refused if sufficient cause is shown; *Maharaja* v *Harihar*, 5 Pat. L. J. 390. 57 I. C. 250.

Discretion in Adjourning must be Exercised by the Trying Court and the Superior Court must Not Interfere.—Where a suit is once begun, the trying Court is bound to go on from day to day unless for special reasons it is necessary to adjourn it. Where a suit was part heard by the Sub-judge he was the proper officer to decide when the case was to be adjourned, and the District Judge had no voice in the matter. Where a Sub-Judge adjourned a part-heard case in obedience to the order of the District Judge *Held* that the order of the Sub-Judge must be set aside. —*Sivagami* v *Louis Gnana*, 16 M L. T 501

Rule Applies to Adjournments at Instance of Parties.—Order XVII, rules 1 and 2, do not apply to an adjournment which is not made at the instance of the parties, but which is necessitated by the rules of Court, which regulate the disposition of its own business —*Sreemutty Toolsy Money* v *Sreemutty Prosad Money*, 2 C W N 490

" Sufficient cause "—What is.—In an appeal before a District Judge, the respondent engaged two pleaders On the day of hearing the senior being ill had transferred his brief to another pleader, whom the Judge declined to hear as his name did not appear in the *vakalatnama* The junior not being instructed to argue applied for a day's adjournment to get himself ready This was refused and the appeal was decreed *ex parte* *Held* that the Judge had erroneously exercised his discretion. He ought either to have allowed the pleader, who appeared, to argue the case or allowed an adjournment, making if necessary, an order for costs in favour of the appellant —*Hare Krishna* v *Bishnu Chandra*, 7 C. L. J. 426.

On the day fixed for hearing, the defendant asked for an adjournment to obtain attendance of his witness, the application was refused and the case was proceeded with and adjourned for judgment Before delivery of judgment, the defendant produced certain witnesses, and asked for their examination; but his prayer was refused, and the judgment was subsequently delivered in favour of the plaintiff *Held* that the omission to examine defendant's witnesses was a substantial error in procedure.—*Monilal* v. *Khiroda Dasi*, 20 C. 749, *Taylor* v *Sarat Chunder*, 20 C. 745-*note*.

The question of the proper exercise of discretion of lower Courts to grant time to parties to produce further evidence discussed.—*Surjyamoni Dasi* v. *Kali Kanta*, 28 C. 37, 5 C W N. 195 See *Kaveriamma* v. *Lingappa*, 33 B. 96, p. 99.

Although a case may have been set down for final disposal, if it be a case in which further evidence is required, the Judge is bound to adjourn the case, unless he is satisfied that the plaintiff has without sufficient cause failed to produce his witnesses —*Ameer Ali* v *Ram Bahadoor*, 7 W. R. 84.

The rule of practice when applying for adjournment on the ground of producing document indicated.—*Saminatha* v *Sundara*, 2 M. W. N. 166.

Sufficient Cause—What is Not.—Where a defendant had known for some time previously that his case was coming on, and what evidence was necessary, a medical certificate to the effect that he was confined to his

bed by lumbago was held to be no sufficient ground for adjournment.—*Ellas* v. *Jorawar Mull*, 24 W. R. 202.

After settlement of issues the case was fixed for final hearing, when the plaintiff applied for summons on a witness, and asked for adjournment, but the Judge dismissed the suit. *Held* that the Judge was justified in dismissing the suit.—*Comalammal* v. *Rangasawmy*, 4 M. H. C. 56.

Where a summons for production of documents did not specify them, an adjournment for their production was rightly refused—*Aludomal* v. *Alu*, 10 I C. 554

When a party files process fee only two days before the hearing date any order passed for issue of processes must be understood to have been issued at the risk of the party in fault, and adjournment should not be granted when the case comes for hearing.—*Jagabandhu* v. *Goorey*, 1 Pat L. J. 173.

Order, with Respect to Costs of Adjournment.—Court has ample discretion as to the direction to be given in the matter of costs occasioned by adjournment. It can make the hearing on the adjourned date conditional on the payment of costs before that date—*Dhani Ram* v. *Murlilal*, 13 C. W. N. 525. 36 C 566. 11 C L. J 150. If no conditional order is passed, it is wrong to dismiss a case for non-payment of costs.—*Feru* v. *Biseswar*, 14 C. W. N. 40-*n*.

Where payment of costs is made a condition precedent to adjournment granted to the defendants, it is open to the Court to strike off the defence and proceed *ex parte*, when the costs are not paid as aforesaid; *East Indian Railway* v *Jit Mal*, 47 A. 538: 86 I C. 862 A. I. R. 1925 A. 280. But it is not open to the Court to strike off the defence unless payment of costs is made a condition precedent to the granting of the adjournment; *Veerabhadrappa* v. *Chinnamma*, 21 M 403: 8 M. L. J. 189.

When an order for adjournment is obtained by a party to an appeal on the condition that the costs of the adjournment will be paid to the other party and that condition is not performed, the appeal may be dismissed; *Nagendranath* v *Umacharan*, 49 I C 272

When the date fixed for hearing happens to be a holiday, the Court is in no way justified in taking up the case on the following day and in passing any order to the prejudice of any of the absent parties without duly serving upon them a fresh notice of hearing.—*Umatul Begum* v. *Saligram*, 29 I. C 137: 126 P. L. R 1915

The order for directing payment of costs under this rule may be executed under section 36 as a decree.

Appeal.—Under Or. XVII, r 1 (1), a Court may at any time grant an adjournment if sufficient cause is shown, but no appeal is allowed from an order refusing adjournment, and even when the refusal is impeached in an appeal from the decree, an appellate Court is generally disinclined to interfere with the trial Judge's exercise of the discretion; *Laxman Rao* v. *Vithoba*, 45 I. C. 898.

2. Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

Procedure if parties fail to appear on the day fixed.

[S. 157.]

COMMENTARY.

This rule corresponds to section 157, C P. Code, 1882 with some verbal changes only.

Rules 2 and 3 differ materially from each other, and the remedies against orders under these rules are also different Care should be taken to find out whether an order was passed under rule 2 or rule 3 If a suit is dismissed under rule 2 coupled with Or IX, r. 8, the remedy is by an application to the same court under Or. IX, r. 9, for revival. If the order is under rule 3 the remedy is by way of appeal. It does not infrequently happen that the Court's order dismissing a suit does not mention the section or rule under which it was made (*see* 34 C. 97, p 100). It also happens that the Court while dismissing a suit sometimes purports to act under one rule although the order would have been really under the other rule (*Chandramathi* v *Narayansami*, 33 M 241). In order that the proper remedy may be chosen it must first be ascertained from the facts, under which rule an order was really passed.

Order IX, Rule 8 and This Rule.—Order IX, r. 8 describes the consequences of the appearance of the defendant and non-appearance of the plaintiff The effect of Or XVII, r 2 is to make Or. IX, r. 8 applicable to adjourned hearings of cases —*Janardan* v *Ramdhone*, 23 C 738

Distinction between Rules 2 and 3.—The scope of r. 2 is quite distinct from that of rule 3. Rule 3 appears to contemplate a case in which the Court has materials before it to enable it to proceed to a decision of the suit. The words " notwithstanding such default " in rule 3 clearly imply that the Court is to proceed with the disposal of the suit in spite of the default, upon such materials as are before it Rule 2, on the other hand, speaks of the disposal of the suits and undoubtedly includes cases in which there might not be materials to enable to pronounce a decision on the merits. It is clear, however, that the contingency contemplated in rule 2 may happen in a case which falls within the letter of rule 3 It may well happen, for instance, that a plaintiff to whom time has been granted to produce evidence not only fails to do so, but also fails to appear. In such a case if there are no materials on the record the appropriate procedure to follow would be that laid down in rule 2, but if there are materials, the Court ought to proceed under rule 3; *Marianissa* v. *Ramkalpa*, 34 C. 235, pp. 237, 238; *see* also *Ramaya* v. *Rangaya*, 7 M 41, *Enautlla* v. *Jiban*, 41 C. 956: 19 C L J 535. Rule 2 speaks of the procedure to be followed when parties fail to appear on the adjourned day of hearing If the plaintiff is in default the suit may be dismissed under this rule and Or. IX, r. 8, and it may be revived again under Or IX, r.

9 (*Ryall* v. *Sherman*, 1 M. 287; *Nagendra* v. *Nabin*, 36 C. 189). If the defendant is in default, the suit may be decreed *ex parte* under this rule and Or. IX, r. 6, and it may be set aside by an application under Or. IX, r. 13 (see *Jonardon* v. *Ramdhone*, 23 C. 738 and other cases noted below). Rule 3 lays down the procedure to be adopted when time has been allowed to a party to do some act in furtherance of the suit and he fails to perform it The remedy of an order under rule 3 is to review or appeal, but there can be no restoration or revival of the suit.—*Kader Khan* v. *Juggeswar*, 35 C. 1023.

There is no conflict at all between rr. 2 and 3 and each may be fully applied to the proper stage of the case. The decision in 33 M. 241, in so far as it laid down that the two rules must be read as mutually exclusive, went too far; *Pichamma* v *Sreeramulu*, 41 M. 286 F. B.: 34 M L. J. 24 (1918) M. W. N. 92.

The distinction between rules 2 and 3 is that the former applies to hearings adjourned at the instance of the Court, while the latter applies to hearings adjourned at the instance of a party to whom time has been allowed to do some act to further the progress of the suit but who has defaulted; *Enatulla* v *Jiban*, 41 C. 956, *Usto Sahebdino* v. *Gulam*, 27 I. C. 924; 8 S. L. R 241

In order to apply Or XVII, r 3 to a case it must be shown that there was something upon which the Court could bring its judicial mind to bear in the shape of either evidence or pleadings and that the Court did before making its decision duly apply its mind Unless the facts clearly indicate that there was an adjudication, an order of dismissal whether it be for want of evidence or not, should be treated as an order under Or. IX. Whether in consequence of the plaintiff not adducing any evidence in support of his case, his suit is dismissed for default, and there is no indication that he was either willing to have the suit decided on the merits or that the Court in any way applied its mind to the rights and liabilities of the parties, the order must be treated as one under Or. XVII, r 2 and is not open to second appeal, *S K. Mahomed Baker Ali* v. *Chulhai*, 1 Pat L J 712

"Any day."—This rule does not apply to a case where no day has been fixed for the hearing; *Seetaram* v *Golam*, 18 W R 325.

"Hearing of the suit."—Or. XVII, rr. 2 and 3 apply only to a case where the actual hearing of the suit has been adjourned By the hearing of the suit is meant the hearing at which the judge would be either taking evidence or hearing arguments or would have to consider question relating to the determination of the suit which would enable him finally to come to an adjudication upon it, *Balmukund* v *Lachmi Narain*, 57 I. C. 718.

"Adjourned."—In this rule means adjourned at the instance of the parties and not by Court of its own motion —*Toolseymoni* v *Prosadmony*, 2 C. W. N. 490; *Pannalal* v *Bull*, 82 P L R 1906 30 P R 1906

"Failure to appear."—For the meaning of these words, see *Soonder Lal* v. *Goor Prasad*, 23 B 411 and *Lalta* v *Nand*, 22 A 66 The mere

physical presence of a pleader not instructed to proceed with the suit is not appearance.—*Bejoy Chand* v *Satish*, 9 I. C. 842.

As to what is appearance, see notes to Or. IX, r. 9, under the heading "APPEAR."

Applicability of this Rule—Instance.—Non-appearance of plaintiff on adjourned date—Dismissal of suit for default under Or. IX, r. 8, read with this rule *Held*, that suit should not have been dismissed for default, but ought to have proceeded under Or. XVII, r. 3—*Badam* v. *Nathu Singh*, 25 A. 104.

Where a defendant required to attend Court in person, failed to be present on the date of hearing, the only course open to the Court is to proceed under this rule In the absence of anything to show that the defendant had expressly asked for time and then made a default, the Court cannot pass an order to decide the case forthwith under r. 3.—*Panna Lal* v. *Bull*, 30 P R 1906 82 P. L R. (1906)

Order XVII, r 2 applies to the case where the hearing of a suit has been adjourned and on the adjourned date the parties or any of them fail to appear. In such a case, Or XVII, r. 2 enables the Court, if it so chooses to deal with the case as being one under Or. IX, or to make such other order as it thinks fit, *Ram Charan Lal* v. *Raghubar*, 45 A. 618: 21 A. L. J 495.

Order IX, r 13 applies to every case in which a decree is passed *ex parte* against the defendant, either under Or. IX, r. 6 by reason of his non-appearance at the first hearing, or under this rule by reason of his non-appearance at an adjourned hearing—*Jonardon Dobey* v. *Ramdhone Singh*, 23 C 738, F B (21 C 269 *overruled* 2 A. 67 *distinguished*). *See* also, *Hildreth* v *Sayaji Piraji*, 20 B 380, *Shankar Dat* v. *Radha Krishna*, 20 A. 195, *Srimant Sagajirao* v *Smith*, 20 B 736; *Ardha Chandra* v. *Matangini*, 23 C. 325 (p. 327), *Lalta Prasad* v. *Nand Kishore*, 22 A. 66; *Ramthal Ram* v. *Rameshar Ram*, 8 A 140; *Hira Dai* v. *Hira Lal*. 7 A. 538; *Pichamma* v. *Sreeramulu*, 41 M 286 F B : 34 M. L. J. 24: 23 M. L. T. 1.

At an adjourned hearing, the plaintiff's witnesses not being present, he applied for issue of warrant against one of his witnesses, This was refused, and the plaintiff's pleader retired intimating that he had not further instructions to appear, and the suit was dismissed. *Held* that the dismissal was under Or IX, r 8 read with this rule and not under rule 3.—*Mariannissa* v. *Ram Kalpa*, 34 C 235. 5 C. L J 260. *See* also, *Gopala Row* v. *Maria Susaya*, 30 M 274. 17 M. L. J. 225; *Maung Pway* v. *Saya Pe*, A I. R. 1927 Rang. 46. *See*, however, *Kader Khan* v. *Juggeswar Prosad*, 35 C. 1023.

The plaintiffs not being present, and the pleader having said he had no instructions to do anything further in the case, left the Court, a point had been reached at which it was literally true that the plaintiffs were absent, neither appearing in person nor by counsel authorized to act on their behalf. The dismissal was under Or. XVII, r. 2 and an application for restoration lay; *Lal Jangpal Singh* v. *Raja Khusalpat Singh*, 20 A. L. J. 97; *Syed Shah Muhammad Maudood* v. *Maharajah Sir Rameshwar*, 1 Pat. L. R. 281: 74 I. C. 693.

Where a suit is dismissed by the following order: " The plaintiff had failed to prove his case and has failed to prosecute his case; it is ordered that his case be dismissed for default." *Held* that the Court had not taken action under this rule and an appeal lay; *Chuttan* v. *Kanhaya*, 10 *A. L. J.* 478.

" May make such other order."—It has been held that these words do not entitle the Court to proceed with the suit on the merits. If neither the plaintiff nor his pleader appears on the day to which the hearing has been adjourned, it must make an order under Or. IX r. 8 dismissing the suit for " default of appearance " and ought not to decide it on merits; *Phul Kuar* v. *Hashmatullah* 37 A. 460. Even where a party has taken time to produce evidence, and on the date fixed for the hearing of that evidence, he is absent, the proper course to follow is to pass an *ex parte* decree under this rule and not to proceed under rule 3. The words " make such other order as it thinks fit " in rule 2 do not include an order under rule 3; *Ram Adhin* v. *Ram Bharose*, 47 A. 181: 85 I. C. 27: A. I. R. 1925 A. 182; *Ram Charan* v. *Raghubir*, 45 A. 618: 21 A. L. J. 495. Where the Court refuses a further adjournment, and passes another, but omits to state whether the order was made under this rule or r. 3, it must be taken that the order was made under this rule; *Ganeshi Lal* v. *Devidas*, 47 A 140: 85 I. C. 470: A. I. R. 1925 A. 267.

Appeal.—Order of dismissal under this rule is not appealable.—*Alwar* v. *Seshammal*, 10 M. 270.

Duty of Pleaders to Make themselves Acquainted with the Orders Passed.—It is not the duty of the officers of the Court to call upon the pleaders to sign the orders issued, or to inform them of the nature of the orders passed. It is for the pleaders to be present at the proceedings and to make themselves acquainted with the orders passed.—*Robert Watson & Co.* v. *Srimati Ambika Dasi*, 4 C. W. N. 237 (p. 238)

If the pleader engaged in a case is unable to attend on account of illness, the Court ought to allow another pleader to whom he transfers the brief, to conduct the case, although his name does not appear in the *vakalatnama.*—*Hare Krishna* v. *Bishnu Chundra*, 7 C. L. J 426

Execution Proceedings.—This rule does not apply to execution proceedings.—*Dhonkal* v. *Phakkar*, 15 A 81, *Tirthasami* v *Annapayya*, 1[illegible] M. 131.

Court may proceed notwithstanding either party fails to produce evidence, etc.

3. Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

COMMENTARY.

As to the distinction between this rule and rule 2, [illegible]

The adjournment must be at the instance of the parties and not by the Court of its own motion. Otherwise this rule will have no application. Where after plaintiff closed his case, the defence began, and at the end of the day the suit stood adjourned to the next day when neither the defendant nor his pleader appeared and the Court passed judgment on the materials before it.—*Held*, that it could not act under this rule as the other element was wanting, *viz.*, the adjournment was not at the instance of the party; *Reajuddin* v. *Jiban*, 18 C. W. N. 775; *Karam Chand* v. *Jindaram* 71 I C 862

Scope.—In order that this rule may apply the following elements must be present, *viz* , (1) The adjournment must have been at the *instance of a party* (as distinguished from adjournment by Court of its own motion); (2) There must be materials on the record to proceed to decide the suit (*Enatulla* v *Jiban*, 41 C. 956: 19 C L. J. 535· 23 I. C. 760; (3) The adjournment is granted to enable the party to produce his evidence or to cause the attendance of his witnesses or to perform any other act necessary to the further progress of the suit; (4) The party fails to perform the act for which adjournment was granted. The presence of one without the other does not justify the application of this rule. Of course the Court may grant further adjournment if there is any justification for it, instead of proceeding under this rule. The word used is " may."

This rule is applicable to only two cases where any party to whom time has been granted on his own application fails to do certain specified acts for which time was allowed, *Panna Lall* v. *Bull*, 30 P. R. 1906; 82 P. L. R. 1906; *Murlidhar* v *Narain*, 19 I C, 472, *Najeti* v. *Pachigolla*, 27 I. C. 882; *Mahant Damodar Das* v. *Raj Kumar*, 1 Pat. L. T. 188 The stringent provision of this rule cannot be invoked unless time was granted specifically for an act, *Harjas* v *Narain*, 23 I. C. 938: 51 P. R. 1915.

Where the plaintiff fails to appear on an adjourned date before the hearing of a suit has commenced, the Courts should proceed not under this rule, but under r. 2, and dismiss the suit under Or. IX, r. 8, so as to give the plaintiff an opportunity of setting aside the dismissal under Or. IX, r. 9; *Ratanbai* v *Shankar*, 46 B. 1020 · 69 I C 514: A I. R 1923 B. 27; *Mahant Damodar* v *Raj Kumar*, 1 Pat. 188: 69 I C. 837· A I. R. 1922 P. 485, *Basayya* v *Alayya*, 27 Bom. L. R. 477. 87 I. C. 710: A I. R 1925 B 328

Rule 3 applies only to cases where the parties are present and have not satisfied the Court as to the existence of any adequate reason for their not having done what they were directed to do (33 M. 241 *folld.*) *Pichamma* v. *Sreeramulu*, 41 M 286 · 34 M. L. J. 24: 23 M L T. 1

Default under Both Rules 2 and 3—Which Rule to Apply.—A case may well arise where there is default under both rules, *e g.*, a plaintiff who took time to produce evidence not only fails to do so, but fails to appear on the adjourned day of hearing. The question arises under which of the rules is the Court to act. The Bombay High Court, in *Srimant Sagaji* v. *Smith*, 20 B 736 and in *Basayya* v. *Suayya*, 27 Bom. L. R 477: A. I R. 1925 B 328, *held* that in such a case r. 2 applies. In *Chandramathi* v. *Narayanaswami*, 33 M 241, the Madras High Court, *held* that if there be default in appearance on the adjourned date of hearing r. 2 alone should be applied no matter whether there has not been default

of the kind mentioned in r. 3. In *Badam* v. *Nathu*, 25 A. 194, the Allahabad High Court, *held* that the Court should act under r. 3. The Calcutta High Court, in *Marianissa* v. *Ramkalpa*, 34 C. 235, took the same view as the Madras High Court, and *held* that r. 2 applies.

In recent cases the Bombay and Calcutta High Courts have held that where an adjournment is granted at the instance of a party for any of the purposes mentioned in r 3, and either party fails to appear at the adjourned hearing, the Court should proceed under this rule, and not under r. 2, if there are materials for a decision on the record; *Enatulla* v. *Jiban*, 41 C. 956; *Naigappa* v. *Gowdappa*, 7 Bom. L. R. 261. *See* also, *Har Gopal* v. *Harish*, 48 P. R. 120: 47 I. C. 596.

"Notwithstanding such default."—These words clearly imply that the Court is to proceed with the disposal of the suit inspite of the default upon materials as are before it. If, in the case of the plaintiff, such materials fail to substantiate the claim, the suit shall be dismissed for this reason, and not for default; *Pazhaniandi* v. *Naku*, 51 M L. J. 684: A. I. R. 1927 M. 109. 99 I C. 32.

"Proceed to decide the suit forthwith."—A decision passed " forthwith " under Or XVII, r. 3, is a decision passed on the merits on the materials, then before the Court; *Chidipatu Somayya, In re* 2 L. W. 1067· 31 I C 307.

Instances where this Rule was Held Applicable.—The plaintiff put in all the evidence, oral and documentary, that he wished to adduce. The hearing of the case was then adjourned to some other day. On that day no appearance was made on behalf of the plaintiff, and the Court dismissed the suit " for default of prosecution " acting apparently under Or. IX, r. 8, read with Or XVII, r 2. *Held* that the Court should have proceeded under this rule and ought not to have dismissed it for default. *Badam* v. *Nathu*, 25 A. 194

A Court has no power to dismiss a plaintiff's suit merely because the plaintiff has omitted to comply with an order of the Court directing him within a certain time to pay the costs of preparation of a map considered by the Court to be necessary to the decision of the suit. If an order of this kind is not complied with, it is the duty of the Court to go on and decide the suit on such materials as it has before it.—*Sitara Begam* v. *Tulshi Singh*, 23 A 462 Followed in *Mariannissa* v. *Ram Kalpa*, 34 C. 235 5 C L. J 260, *see* also *Nagendra Kumar* v. *Nabin Mandal*, 36 C. 189 (34 C. 235· 8 C W N 621 *followed;* 23 A. 462 *distinguished*)

Where on the day fixed for hearing, the plaintiff appeared by a pleader who asked for an adjournment which was refused *Held* that the proper procedure for the Court was not to dismiss the suit for default but to proceed with the case and write a judgment Order XVII, r. 2 was not applicable to the case but Or XVII, r 3 did apply; *Viswanatha* v. *Sami*, 18 L. W 209. (1923) M W N 802 (41 M. 256 *refd to*)

A holiday was fixed for hearing of a case by arrangement with both parties and so as to suit the convenience of plaintiff's pleader, but plaintiffs' pleader declined to appear on that day *Held* that the Court was

justified in proceeding under this rule.—*Bhagwan Das* v. *Har Pershad* 11 P. R 1906.

Where time was allowed to the appellants to take further steps, bu no steps were taken within time. *Held* that the Court could proceed t decide the appeal under this rule —*Jaisari* v. *Jaisari*, 17 I. C. 294

After adducing of all evidence, suit was adjourned for production o succession certificate as to part of plaintiff's claim. *Held* that the sui ought not to be dismissed under r. 2, but decided on merits under thi rule.—*Draupati* v *S I. Ry. Co.*, 24 I C. 353.

"Any other act necessary for the further progress of the suit."—Where in a suit for recovery of possession of certain lands, the defendant raised the contention that the suit was not properly valued, and the Court thereupon, on the application of the plaintiff, appointed a Commissioner to value the land and directed the plaintiff to deposit in Court the Commissioner's fee within a specified date *Held* that, on failure of the plaintiff to deposit the fee within the prescribed time, the Court had power to proceed under this rule, because payment of the Commissioner's fee is an act necessary to the further progress of the suit within the meaning of this rule, *Shaik Shaheb* v. *Mahomed*, 13 M. 519; *Virabhadrappa* v. *Chinnamma*, 21 M 403, *see* also *Tulshi Ram* v. *Daya Ram*, 23 A. L. J. 573: 88 I. C 448: A. I R 1925 A 604

Instances where this Rule was Held Not Applicable.—After settlement of issues, the final hearing was adjourned to a fixed date. On that date the plaintiff did not appear, and the suit was dismissed. *Held* that this rule did not apply, as the case was not adjourned, in favour of either party to enable him to produce his evidence.—*Ryall* v. *Sherman*, 1 M. 287. *See* also *Venkata Ramaya* v *Anumukonda*, 7 M. 41; and *Srimant Sagajirao* v *Smith*, 20 B 736

Where adjournments are made by a Court to give effect to its processes for compelling the attendance of witnesses *Held* that the case cannot be said to come under this rule, which contemplates a case where a party has obtained time to produce his witnesses, and has failed to do so.—*Pearee Mohun* v. *Shama Churn*, 19 W R. 34.

The first Court refused to grant plantiff's application to examine a defendant as a witness on his behalf On the adjourned date of hearing the plaintiff failed to produce any other witness, and the suit was dismissed under this rule *Held* that as the plaintiff had been prevented from examining the defendant on sufficient grounds, he had not committed default under this rule; *Latchman Rau* v *Raghunatha Rau*, 6 M. H C. 299

Where at an adjourned hearing, the witnesses on behalf of a party were not in attendance, and he applied for warrants against them, but the Court refused the application, and the pleader thereupon intimated that he had no further instructions and the suit was dismissed. *Held* that the order was not under this rule, *Ganga* v. *Gudar*, 5 I. C. 490 (34 C 235: *5 C. L. J. 260 relied on*)

Where the plaintiff's case was opened, and his witnesses being absent, a day's adjournment was allowed, and on the adjourned date a fresh

adjournment was applied for and refused, and the Court recorded the depositions of defendant's witnesses and dismissed the suit on the merits. *Held* that the dismissal under Or. XVII, r. 3, was without jurisdiction, and Or. XVII, r. 2 was applicable to the case; *Sashi Bhusan* v. *Dwarka Prasad*, 3 Pat. L. T. 64.

At the first hearing of a suit certain defendants had not been served and the Court passed orders adjourning the case and directing issue of summons to absent defendants on receipt of process-fees. The plaintiff took no action whatever in respect of the order, and on the date of hearing gave no reason for his default but asked for indulgence. The Court dismissed the suit under Or. XVII, r 3 of the Code *Held* that under the circumstances r. 3, Or XVII, was inapplicable and should not have been applied; *Sher Ali* v *Mangu*, 150 P. R. 1919: 52 I. C. 292.

Adjournment for Non-service of Summons.—When process-fee has been paid, and an adjournment is caused by non-attendance of witness for want of service, it does not amount to an adjournment granted to a party within the meaning of this rule; *Harjas* v. *Narain*, 29 I. C. 938: 51 P. R. 1915; *Lila Ram* v. *Ramzan*, 69 I. C. 665.

Dismissal, for Non-payment of Court-fee, etc.—Dismissal of a suit for non-payment of Court-fees or commission-fees is not an order under this rule.—*Muhammad Sadik* v. *Muhammad Jan*, 11 A 91 · *Nagathal* v. *Ponnusami*, 13 M. 44 *Shaik Saheb* v. *Mahomed*, 13 M. 510; *Ragava Chariar* v. *Vedanta Chariar*, 3 M 259. Neither is a dismissal for failure to amend plaint and pay costs of adjournment; *Rahman* v. *Ahmaddin*. 96 I. C. 312: A. I. R 1926 L 571. Nor does the dismissal of a suit for want of heirship certificate come under this rule.—*Petha Perumal Chetti* v. *Murugandi*, 18 M 466.

An interval of two hours for the payment of process-fees directed by the Court in the absence of a party is not reasonable time within which to make such payment, *Rampati* v. *Sachinandan*, 55 I. C. 650.

Non-payment of Adjournment Cost.—In the absence of a specific order making the payment of costs of adjournment a condition precedent to the hearing of the evidence of the party in default, this rule is not applicable.—*Virabhadrappa Chetti* v *Chinnammal*, 21 M. 493.

Where defendant was not aware that he was ordered to pay adjournment cost, and the further hearing of the case was not made conditional upon defendant's paying the cost, *held* that reasonable time should be allowed to pay the costs and his defence should not be struck out; *Kalu Sarang* v. *Abedannessa*, 97 I. C 172 A. I R 1926 C. 1221.

Force of an Order under this Rule.—The plea of *res judicata* ordinarily presupposes an adjudication on the merits, and the decision pronounced under this rule shall have the force of a decree on the merits, and bars a fresh suit notwithstanding the default on the part of plaintiff.—*Venkata Chalam* v *Mahalakshma*, 10 M 272. *See* also *Muhammad* v. *Imam Khatun*, 25 P. L. R 1912 37 P W R 1912

Execution Proceedings.—The dismissal of an application for execution for default does not bar a fresh application This rule does not apply to execution proceedings.—*Tirthasami* v. *Annappayya*, 18 M. 131. *See*

also *Dhonkal Singh* v. *Phakkar Singh*, 15 A. 84; *Hajrat Akramnissa* v *Valiulnissa*, 18 B. 429; *Pheku* v. *Pirthi Pal*, 15 A. 49: 20 C. 755 (758).

Remedy.—Where a case is declined under this rule, the decision is a decree and is therefore appealable; *Lalta Prasad* v. *Nand Kishore*, 22 A. 66; *Gaura Bibi* v *Ghasita*, 34 A. 123; *Pichamma* v. *Sriramulu*, 41 M. 286: 43 I C 566, *Sukkhu* v *Ram Lotan*, 41 A. 663: 51 I. C. 850 The party aggrieved may also apply for review; *Pichamma* v. *Sriramulu*, 41 M. 286: 43 I C 566.

ORDER XVIII.

HEARING OF THE SUIT AND EXAMINATION OF WITNESSES.

Right to begin.

1. The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin. [S. 179 Expl.]

COMMENTARY.

This rule corresponds with the Explanation to s. 179, C P. Code, 1882. The remainder has been transferred to r. 2.

" Right to begin."—Means the privilege of opening the case. The principles which govern the question as to who has the privilege or duty of the " right to begin " are difficult of application The first general rule as to the right to begin is, that the party on whom the *onus probandi* lies, as developed on the record, must begin. But this rule is subject to some exceptions —See *Taylor on Evidence*, 10th Ed , Vol I, p. 293 Sections 101 to 114 of the Evidence Act deal with the burden of proof The burden lies on him who would fail if no evidence at all were given on either side (s 102)

" Facts."—Of course means *all material* facts or allegations. If only a portion is admitted, there is no right to begin In a suit for partition, the defendants admitted a nucleus of joint property and claimed the right to begin on the ground that the onus was on them to prove that the whole property was not joint *Held* the plaintiff had the right to begin; *Aghore* v *Prem Chand*, 7 C L R 274

Right to Begin—Instances.—Where a preliminary objection is raised by defendant that a suit is barred by *res judicata*, he has right to begin. *Fatmabai* v *Aishabai*, 12 B 454

Where an appeal had been filed, the respondent objected that no appeal lay and by agreement of the parties, the case was set down for argument of this preliminary point *Held* that the appellant had the right to begin —*Rustomji Burjorji* v *Kessowji* 8 B 287

Upon the hearing of an application for review of judgment, upon which the opposite party was directed to show cause why the application should not be granted, counsel for opposite party should begin —*Ghansam Singh* v *Lal Singh*, 9 A 61

Where a claim is preferred to or any objection is made to the attachment of any property made in execution claimant must begin The onus is on him *Nga Tha* v *Burn*, 2 B L R 91 F B 11 W R 8 F. B. (8 W. R. 358 and 362 *over-ruled*)

In a suit for restitution of conjugal rights by husband, the wife admitted marriage but pleaded coercion and non-consent; *held* the defendant had the right to begin, *Tuvunammal* v. *Santiago*, 23 I. C. 242: 7 Bur. L. T. 129

Statement and production of evidence.

2. (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

[Para 1, S. 179.]

(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.

(3) The party beginning may then reply generally on the whole case. [Paras 1, 2, S. 180.]

COMMENTARY.

Where there are several defendants, and some of them support the plaintiff's case, the plaintiff and such of the defendants as support his case wholly or in part, must address the Court and call their evidence in the first place and then the other party, namely, the persons opposed to the plaintiff's case and that of the other defendants supporting the plaintiff, must address the Court and call their evidence.—*Haji Bibee* v. *Sultan Mahomed*, 32 B 599.

Where the burden of proving some issues is laid on the plaintiff and of others on the defendant, the plaintiff is entitled to reserve his case and produce rebutting evidence after defendant's evidence has been recorded only upon issues the burden of proving which has been laid on the defendant —*Karm Baksh* v. *Churagh Din*, 66 P R. 1911: 190 P. W. R 1911.

Hearing of Arguments.—That the Court delivered judgment without hearing arguments is no ground for setting aside the judgment when the party having the opportunity to address the Court did not do so; *Harji* v. *Devi Ditta*, 4 Lah 364: A. I R. 1924 Lah. 107: 77 I. C. 398.

The Counsel for appellant having cited new cases in reply, the respondent's Counsel was allowed to address the Court on the new cases cited, and on the points on which he had not addressed the Court before —*Kernot* v. *Walton*, 9 C. 14 (22).

Evidence where several issues.

3. Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party;

and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

[Para 3, S. 180.]

COMMENTARY.

Sometimes the burden of proof of some one or more issues lies upon the plaintiff, while that of proving others lies upon the defendant. Under such circumstances the plaintiff may (at his own option) either go into the whole case in the first instance, or else elect to only give evidence with regard to those issues which he is himself bound to prove reserving the right of rebutting his adversary's proofs, in the event of the latter establishing a *prima facie* case in support of the issues which lie upon him. The last named course is, in practice most usually adopted; and if it is followed, the defendant may have special reply on the plaintiff's fresh evidence, while the plaintiff will be entitled to the general reply on the whole case. If, however, the plaintiff at the outset thinks fit to call any evidence to repel the defendant's case, he will not be permitted to give further evidence by way of reply, in other words, he "cannot split his case;" since if such a privilege were allowed to a plaintiff, the defendant, in common justice, might claim the same, and the proceedings would run the risk of being extended to a very inconvenient length.—See *Taylor on Evidence*, 10th Ed., Vol. I, p. 298.

Witnesses to be examined in open Court.

4. The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendance of the Judge. [S. 18.]

COMMENTARY.

As to the order of production and examination of witnesses, *see* s. 135, Evidence Act.

In the absence of any (*a*) agreement to take evidence by affidavit, (*b*) order to prove particular facts by affidavit; (*c*) order for examination by interrogatories, or before a Commissioner, the witnesses will be examined *viva voce* and in open Court, *Warner* v *Mosses*, 16 C D, p 101 As to affidavit evidence, *see* next Order

Examination of Witnesses—Duty of Court.—It is not the business of a Court to determine what witnesses shall be examined The parties must select their own witnesses, and call upon the Court to examine such of them as they may offer for examination Every party is entitled to have all witnesses ready at the trial to be examined.—*Morno Moyee* v. *Bheem Koomar*, 6 W R 231, *Deen Dyal* v *Danee Roy*, 13 W R 185; *Looloo Singh* v *Rajendur Laha*, 8 W R 361, *Paran Chunder* v *Gopeenath*, 8 W R. 505; *Chowdhry Khoorgo Roy* v *Shib Tohul*, 17 W. R. 172; 9 B. 146 (149).

In order to establish the plea that a party was not allowed opportunity to adduce evidence, he must show that he tendered witnesses or other evidence, and his tender was rejected.—*Buksh Ali* v. *Joynat Khan*, 11 W. R. 248, *Chunder Nath* v. *Anund Moyee*, 11 W. R. 289, *see* also *Queen* v. *Totaram*, 11 W. R. Cr. 15.

The fact of a witness not having been named in the plaintiff's list of witnesses is no ground for refusing to examine him when produced at the proper time.—*Rakhal Dass* v. *Protap Chunder*, 12 W. R. 455.

Where a lower Appellate Court's refusal to examine witnesses is made a ground of special appeal, it is not sufficient to put in an affidavit to the effect that a verbal request of the vakil to examine witnesses was refused by the Judge.—*Ramessur* v. *Shib Narain*, 14 W. R. 419.

Where the lower Court omitted to examine certain witnesses it ought to be shown that the evidence of those witnesses would have been material to the case.—*Nilkanth* v. *Soosila*, 6 W. R. 324.

Witness tendered but refused by the lower Court may be examined in the Appellate Court, *Parmeshari* v. *Mohamed Syud*, 6 C. 608 (611); 7 C. L. R. 504.

The Courts in India had refused to examine 28 out of 54 witnesses produced by the party on the ground that as they were going to prove the facts deposed to by those already examined, it was unnecessary to take their depositions. The Judicial Committee remanded the case, being of opinion that the refusal by Court to permit the examination of witnesses was irregular.—*Jeswunt Singjee* v. *Jet Singjee*, 6 W. R. 46, P. C.; 2 M. I. A. 424. *See* also, *Gopee Ojha* v. *Hurgobind*, 12 W. R. 229, *Brij Soondur* v. *Kaimonnissa*, 24 W. R. 63.

It is the bounden duty of the Judge to receive all the evidence tendered, unles the object of summoning a large number of witnesses clearly appears to be to impede the adjudication of the case or otherwise to obstruct the ends of justice.—*Ram Dhan* v. *Rajballab*, 6 B. L. R. Ap. 10.

Where the first Court, considering it unnecessary of examine certain witnesses for the defence, dismissed the suit, and the Appellate Court, upon the recorded evidence, reversed the decree, and allowed the plaintiff's claim. *Held* that the lower Appellate Court ought to have allowed the defendant an opportunity to give the evidence which the first Court declined to take before reversion of the decree.—*Arjun* v. *Shankar*, 22 B. 253; and *Khuda Buksh* v. *Imam Ali*, 9 A. 339. *Durga Dayal* v. *Anoraji*, 17 A. 29 (32). *See* also *Pabitra Kunwar* v. *Maharaja of Beneras*, 30 A. 367.

It is in the discretion of the Court of first instance, after the plaintiff's case is closed, to allow him to call further witness. There is no right of special appeal upon the point.—*Rakhal Doss* v. *Protap Chunder*, 12 W. R. 455.

An objection that the Court of first instance had refused to examine witnesses, if not raised before the lower Appellate Court, cannot be raised on special appeal.—*Gooroodass* v. *Poran Mundle*, 12 W. R. 363; *Osman Singh* v. *Chummun Mahtoo*, 15 W. R. 87; *Somashekhara* v. *Subhadramaji*, 6 B. 524; *Lalla Debeedin* v. *Sheogolam*, 2 N. W. P. 206.

Interference by Court. Courts should in all cases exercise the power with which they have been entrusted by law in the examination of witnesses, if they see that they are not properly examined through the incompetency of those who have the management of the suits.—*Ramgati v. Imitari Banee* 1 B. L. R. (S. N.) 20; 10 W. R. 280.

As to Courts power to put questions, *see* s. 165, Evidence Act.

Open Court. The parties have a right to insist upon having all the advantages which attach to a public hearing of the whole case and the examination of all the witnesses in open Court.—*Soorendro Pershad v. Nundun Misser*, 21 W. R. 196.

As to the privileges of *pardanashin* women, *see* s. 132. Special arrangements may be made by the Court for the examination of *pardanashin* ladies in private. *In the matter of Din Tarini Debi*, 15 C. 775; 12 A. 69 (72); 109 P. L. R. 1903; 19 P. R. 1903 (Cr. 52).

Examination on Oath or Affirmation.—Section 6 of the Oaths Act (X of 1873) imperatively requires that no person shall testify as a witn
except on oath or affirmation.—*Q.-E. v. Maru*, 10 A. 207; *Q.-E.*
Sahai, 11 A. 183. But see *Q. v. Sewa Bhogta*, 14 B. L. R.
R. Cr. 12; 14 B. L. R. 295-n; 22 W. R. Cr. 1; and 2
in which it has been held that omission to take any
larity in the form in which it is administered
proceedings

Refusal to make the oath or solemn
under s. 8 of the Oaths Act (X of 187
—*Issen Meah v. Kalaram*, 2 C. L.
nivas, 22 B. 680; and *Muham*
856 *approved*). *See* also *Mo*

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In order to establish the plea that a party was not allowed opportunity to adduce evidence, he must show that he tendered witnesses or other evidence, and his tender was rejected.—*Buksh Ali* v. *Joynat Khan*, 11 W. R. 248; *Chunder Nath* v. *Anund Moyee*, 11 W. R. 289; *see* also *Queen* v. *Totaram*, 11 W. R. Cr. 15.

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Where a lower Appellate Court's refusal to examine witnesses is made a ground of special appeal, it is not sufficient to put in an affidavit to the effect that a verbal request of the vakil to examine witnesses was refused by the Judge.—*Ramessur* v. *Shib Narain*, 14 W. R. 419.

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An objection that the Court of first instance had refused to examine witnesses, if not raised before the lower Appellate Court, cannot be raised on special appeal.—*Gooroodass* v. *Poran Mundle*, 12 W. R. 363; *Osman Singh* v. *Chummun Mahtoo*, 15 W. R. 87; *Somashekhara* v. *Subhadramaji*, 6 B. 524, *Lalla Debeedin* v. *Sheogolam*, 2 N. W. P. 206.

ture of witnesses after the evidence is read over. It is however generally the practice in mofussil Courts to get the depositions signed by them.

The description of a witness in the heading of the deposition is not a part of the evidence given on solemn affirmation.—*Maqbulan* v *Ahmad Hussain*, 26 A. 108, P C. 8 C W N 241

" Shall be read over."—Failure to comply with the provisions of this rule and r. 6, is an informality which renders the deposition of an accused inadmissible in evidence on the charge of giving false evidence and under s. 91 of Evidence Act no other evidence is admissible —*Empress* v *Mayadeb*, 6 C 762. 8 C L R. 292, *Kamatchi* v *Emperor*, 28 M. 308; *Mohendra Nath* v *Emperor*, 12 C W N 845, *Emperor* v *Jogendra*, 42 C. 210, *Emperor* v *Nabab Ali*, 51 C 236 81 I C 803 A I R. 1924 C. 704. But see *Elahi Baksh* v *Emperor*, 45 C 825 45 I C 258; *Meango* v *Baviah*, (1918) M W N 237, *Bogra* v *Emperor*, 34 M. 141, where it was held that the deposition is admissible

The objection that the depositions of the witnesses were not taken down in the manner prescribed by the Code, but only notes of the evidence, cannot be taken in special appeal.—*Lalla Mahomed* v *Peer Nazur*, 18 W. R. 112.

A case cannot be remanded, on the ground that the depositions of witnesses do not bear the usual certificate that they had been read over to the witnesses —*Ram Gopal* v *Raghu Nath*, 62 C. L J. 496.

This rule was held applicable to cases under the Land Acquisition Act, *Heysham* v *Bholanath*, 17 W R 221.

Chartered High Courts.—This rule does not apply to Chartered High Courts (*vide* Or. XLIX, r 3, cl 4) or Punjab Chief Court [*vide* s. 16 (2), Act XVIII of 1884] in their ordinary or extraordinary original Civil jurisdiction. As to Central Provinces, *see* ss. 2, 3 of Act II of 1870; as regards Lower Burma, *see* s. 16, Lower Burma Act XI of 1889; as to Oudh, *see* s. 19 of Act XVIII of 1876

Witnesses Whether Bound to Sign or Thumb-mark Their Deposition.—There is no obligation upon witnesses in Civil cases to sign or thumb-mark their depositions. Courts cannot order but can doubtless ask them to do so, and if they refuse, they cannot be compelled and are not liable to prosecution for an offence under s 180, I. P. C.—*Emperor* v. *Fatih Ali*, 37 P. W. R 1912 Cr.: 245 P. L. R 1912: 16 I. C. 521.

Signature of Judge.—A prosecution for perjury can be sustained if the deposition is not signed by the Judge.—*Emperor* v. *Mayadeb*, 6 C. 762.

" Shall be read over in the presence of the witness."—The provisions of Or. XVIII, r. 5 would be sufficiently complied with if the depositions were read over in a place within sight of the presiding Judge and from which the witness could draw the attention of the Judge to any mistakes or omissions discovered by him. *Held* further that even if a deposition was not read over in the manner and circumstances specified by Or. XVIII, r. 5, it would not be altogether inadmissible in evidence; *Meango* v. *Baviah* 24 M. L. T. 242: (1918) M. W. N. 239.

When deposition to be interpreted

6. Where the evidence is taken down in a language different from that in which it is given, and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it is given. [S. 183.]

COMMENTARY.

Shall be interpreted to him."—See *Empress* v. *Mayadeb Gossami*, 6 C 762, noted under r 5

This rule does not apply to Chartered High Courts, etc. *See* note to last rule.

Evidence under section 138

7. Evidence taken down under section 138 shall be in the form prescribed by rule 5 and shall be read over and signed and, as occasion may require, interpreted and corrected as if it were evidence taken down under that rule. [Cl. (3), S. 185-A.]

COMMENTARY.

Under s 138, the Local Government of Bengal have authorized all the Judicial Officers to record evidence in English.

Memorandum when evidence not taken down by Judge.

8. Where the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record. [S. 184.]

COMMENTARY.

The rule does not apply to Chartered High Courts, etc. *See* notes to r. 5.

The failure of the Civil Court in a case of perjury to make a memorandum of the evidence of the accused, when examined before it, does not vitiate the depositions if the evidence itself was duly recorded in the language in which it was delivered in such Court —*In the matter of Behary Lal Bose*, 9 W R Cr. 69.

In order to enable an insolvent to appeal from an order passed in the matter of his petition, notes of the evidence must be taken at the hearing by an officer of the Court —*In re Lakhmidas Hansraj*, 5 Bom. H. C. 63. *See* also *Kallian Das Kirparam* v. *Trikam Lal*, 9 Bom H. C. 307.

Where there is a conflict between a Judge's memoranda of evidence and the recorded depositions of witnesses, the Court must be guided by the latter.—*Heera Nath Kooeree* v. *Burm Narain*, 15 W. R. 375; 9 B. L. R. 274.

When evidence may be taken in English.

9. Where English is not the language of the Court, but all the parties to the suit who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as is given in English taken down in English, the Judge may so take it down. [S. 185.]

COMMENTARY.

This rule has been practically rendered useless by the notifications of the Local Governments under 138 to record depositions in English.

This rule does not apply to Chartered High Courts, etc *See* notes to r. 5.

Any particular question and answer may be taken down.

10. The Court may, of its own motion or on the application of any party or his pleader, take down any particular question and answer, or any objection to any question, if there appears to be any special reason for so doing. [S. 186.]

COMMENTARY.

This rule does not apply to Chartered High Courts, etc. *See* notes to r. 5.

Question objected to and allowed by Court.

11. Where any question put to a witness is objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the court thereon. [S. 187.]

Remarks on demeanour of witnesses.

12. The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination.

COMMENTARY.

A witness who was examined stated his age to be 24 but the Judge made a note on his deposition that his age appeared to be 18 or 19 years *Held* that the Appellate Court could not come to a finding as to the age of the witness on the note of the Munsif which was not evidence in the case; *Mahomed Hasan Mia* v. *Abdul Hamid*, 50 I. C. 431.

13. In cases in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record. [S. 189.]

Memorandum of evidence in unappealable cases

COMMENTARY.

Under this section, a Judge is bound to take down the substance of what each witness deposes; he cannot record in his own words merely a short abstract of the whole evidence.—*Amrit Shaha* v. *Panchkari Shaha*, 9 C W. N. 418 Followed in *Chethrugope* v *Sri Charun*, 9 C. W. N. 420. Followed in *Ratna* v *Para*, (1915) M W. N. 768, where in a S. C C. case the memorandum of evidence was held to be incomplete in as much as the evidence of defendant's witness was not at all found.

Under s. 148 (*f*), Bengal Tenancy Act (VII of 1885), the evidence of the witnesses in suits for recovery of rent is to be recorded under the provisions of this section, whether an appeal is allowed or not.

COMMENTARY.

Chartered High Courts.—This rule does not apply to Chartered High courts, etc. *See* notes to r 5.

14. (1) Where the Judge is unable to make a memorandum as required by this Order, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court.

Judge unable to make such memorandum to record reasons of his inability.

(2) Every memorandum so made shall form part of the record. [S. 190.]

COMMENTARY.

The words "is *unable*" are substituted for "rendered unable in the old section. It does not appear what sort of inability is contemplated. This rule applies to rent suits under the Bengal Tenancy Act [*see* s. 143 (2)].

Chartered High Courts.—It does not apply to Chartered High Courts, etc. *See* notes to r. 5.

15. Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been

Power to deal with evidence taken before another Judge.

taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.

(2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 24. [S. 191.]

COMMENTARY.

The proviso to s. 191 of the old Code has been omitted, probably in view of s. 150 of this Code, which has rendered it unnecessary. As to Chartered High Courts, *see* Or. XLIX, r. 4.

" May deal with any evidence."—This rule corresponds with s. 191, C. P. Code, 1882. That section was substituted for the original by s. 18, C. P. Code Amendment Act (VII of 1888), in view of the decisions in *Afzaunnissa* v. *Ali Ali*, 8 A. 35, and *Jogram* v. *Narain*, 7 A. 857, where it was held that where a Judge after having recorded the evidence was removed and a new Judge came, the trial before the first Judge was abortive. These cases were discussed in the Full Bench Case of *Jadu Rai* v. *Kanezak*, 8 A. 576, and it was ruled that the new Judge had jurisdiction to deliver judgment after hearing arguments on both sides on the evidence taken by his predecessor. *See* also *Kummoory* v *Kasa*, (1912) M. W. N. 999.

Sub-rule (2) clearly contemplates the transfer after the case has been heard in part.—*Palanisami* v. *Thondma*, 26 M. 595. Referred to in *Mahadeo* v. *Gajadhar*, 10 C. W. N. 12.

The parties may, either expressly or impliedly, consent to the suit being determined by a Judge who has not been present throughout the trial, and to his taking into consideration evidence which has not been given before him *Soorendro Pershad* v. *Nundun Misser*, 21 W. R. 196. *See* also *Syud Mahomed* v. *Oomdah*, 13 W. R 184.

De Novo Trial After Remand.—A suit was tried by the munsif though objection was taken to plaintiff's maintaining it On appeal it was remanded for disposal after substitution of new plaintiff. Defendant asked the successor of the original munsif for a *de novo* trial which was refused. *Held* this rule did not apply and the prayer should have been granted; *Krishnabai* v. *Collector of Tanjore*, 21 M L J. 808: 9 I. C. 254.

If after remand of a case for disposal on the merits, the lower Court allows one of the parties to adduce further evidence, it ought to allow the other party also to do so whether or not it acted properly in letting in further evidence at all; *Krishna Mills Ld* v. *Sundar Singh*, 14 P. R. 1917: 39 I C 651.

Judgment by One Judge After Hearing of Evidence and Arguments by Another.—Where evidence and arguments were heard by one Judge, his successor can deliver judgment under this rule wihout hearing the vakils But his omission to give notice of delivery of judgment is a serious irregularity; *Kamoory* v. *Kasa Subbiah*, 12 M. L T. 332: 1912 M. W. N. 999: 17 I. C. 278.

A Judge who has not himself taken any portion of the evidence in a case ought not to decide it without hearing full arguments; *Krishna Mills Ld. v. Sundar Singh*, 14 P R 1917 39 I. C. 651.

A case was adjourned to a certain date for arguments, but the parties were not ready and the Judge gave them liberty to put in return arguments. By that time a new Judge came in and after a local inspection, he delivered judgment *Held* that the parties had sufficient opportunity to argue the case and the judgment was not vitiated; *Harji Mal v. Devi Ditta Mal*, 4 Lah 364

16. (1) Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.

Power to examine witness immediately.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same and shall sign it, and it may then be read at any hearing of the suit. [S. 192.]

COMMENTARY.

This is known as examination *de bene esse* The words "*and the Judge shall, if necessary, correct the same, and shall sign it,*" are new and have been added to sub-rule (3)

As to Chartered High Courts, *see* Or XLIX, r 4

A *de bene esse* examination of a witness about to leave the jurisdiction of the Court must be taken by the Court, unless the parties consent to the evidence being taken under a commission, *Edwards v. Muller*, 5 B L R 252

The Court has jurisdiction on a proper occasion when it is "necessary for the purposes of justice" to make an order for an examination *de bene esse* of witness upon an *ex parte* application, the order being taken by the applicant at his peril and subject to the risk of being discharged on sufficient grounds, *Bidder v Bridges*, 26 C D 1

Where witnesses are going abroad, or where from age, illness, infirmity or some other cause they are likely to be unable to attend at the trial, when they will be examined *de bene esse* and only in an extreme case will an order be made for examination *ex parte; Warner v. Moses*, 16 C. D. 100.

17. The Court may at any any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit. [S. 193.]

Court may recall and examine witness.

COMMENTARY.

This rule corresponds to s 193, C P Code, 1882, with some material changes The omission of the words "*who has not departed*" which occurred in the old section has enlarged the Court's power to recall witnesses.

The substitution of the words "*law of evidence*" for the words "*Indian Evidence Act, 1872*" has also enlarged its scope

The last para of the old section has been omitted in view of s. 150 of the present Code.

When a witness has been examined on behalf of the plaintiff, he cannot be recalled as witness for the defendant without leave obtained at the end of the first examination.—*Mackintosh* v *Nobinmoney*, 2 Ind. Jur. N. S. 160.

In five analogous suits certain witnesses were examined in four of the cases in which the plaintiff in one of the suits was not a party, and at his request the evidence taken in those cases was allowed to be used as evidence in this case, and then the witnesses were discharged Two days after this, he applied to have the witnesses recalled and re-examined, and his application was refused *Held* that the refusal was justified —*Sreenath Roy* v *Goluck Chunder*, 15 W R 348

18. The Court may at any stage of a suit inspect any property or thing, concerning which any question may arise. [New.]

Power of Court to inspect.

COMMENTARY.

This rule is new and the addition is an improvement Proviso 2 to s 60 of Evidence Act contains provision for production and inspection of a material thing and this rule should be read along with that

This rule vests an absolute discretion in the Munsif to make an inspection and the sanction of the District Judge is not necessary if he wishes to make an inspection without charges, *Bodi Naidu* v *Chengama*. 26 M. L J 9 32 I C. 297

Where at the instance of the plaintiff, the Munsif held a local inspection and in the course thereof at the instance of both the parties he examined a man whose statements he used as confirming his impression formed independently of them *Held* that it was not open, to any of the parties afterwards to turn round and say that the Munsif ought not to have taken those statements; *Narain Singh* v *Gaburail Uraon*, (1918) P. 131: 4 Pat. L. W. 189.

Under Or XVIII, r. 18, a Judge has power to visit a locality and to use the result of his local inspection for certain purposes, *e g.*, for the purpose of enabling him to understand the questions that are being raised to follow the evidence, to apply it to test it. Although it is desirable that he should place the result of his local inspection on the record, yet the omission to do so is a purely formal defect and would not necessarily vitiate his judgment, *Ram Chandra Rao* v *Babu Narayan Lal*, 58 I C 909; *Hari Charan* v. *Jitendra Nath*, 65 I. C. 601.

A judgment should not be based solely on the result of a personal local inspection made by the Judge, *Tirath Ram* v. *Md. Abdul Rahim*, 73 I. C. 616 A I. R. 1923 Lah. 546

ORDER XIX.

AFFIDAVITS.

Power to order any point to be proved by affidavit.

1. Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable.

Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit. [S. 194.]

COMMENTARY.

Affidavit includes affirmation and declaration It is a declaration in writing before a person having authority to administer an oath. (As to this, *see* s. 189). The Court may order particular facts to be proved by affidavit unless the opposite party desires the production, of the deponent for cross-examination and he can be produced. The proviso is of general application, and the Court has no power to order an affidavit used on a previous application to be read at the hearing when the other party desires the witness to be produced; *Blackburn Union* v. *Brooks*, 7 C. D. 68; *Elias Griffiths*, 46 L. J. Ch. 806. An application for leave to read the fidavit of a witness at the trial should be made before the trial; *Drewitt Drewitt*, 58 L T. 684.

Where application is made to a Court to declare certain persons to touts, it is desirable that the Court should hear oral evidence, though is open to a Court under this rule and r. 2 to act upon affidavits filed, support.—*Banu Sahib* v. *D. J. of Madura*, 26 M. 596.

When a petition to the High Court states facts which are matters f records and which are supported by copies of the order passed by the ourt below, such a petition need not be supported by an affidavit.—*amiran* v. *Fateh Ali*, 32 C. 146

Service of summons or notice on the defendant, or notice on the espondent may be proved by affidavit —See *Calcutta High Court C O. f 6th April, 1871.* Instructions regarding the reception of affidavit.—ee *Calcutta High Court C O. No. 32 of 10th September, 1880.* Rules or the guidance of officers administering oath to declarants in the case f affidavits under the C. P. Code.—See *Calcutta High Court Circular Order No. 32 of 10th September, 1880.* Fee for administering oath to eclarant in an affidavit.—See *Calcutta High Court Circular Order No. 2 of 20th September, 1878.* In uncontested probate and certificate pro-

ceedings, the Court may direct that the facts may be proved by affidavit. —See *Calcutta High Court's Rule No. 2 of March, 1907*

Affidavit When Admissible in Evidence.—An affidavit is ordinarily not evidence unless person seeking to use it complies with the requirements of Or XIX, C. P Code, *Krishna Ayyar* v. *Madhava Panikkar*, 63 I. C. 258.

Affidavit Evidence by Agreement.—Parties may agree to take evidence by affidavit But unless the agreement specifies that the evidence is to be upon affidavit *alone* it may be supplemented by oral evidence, *Glossop* v. *Heston & Isleworth Local Board*, 47 L. J Ch. 536 If the affidavit evidence is unsatisfactory the Court has power to order oral examination of the witnesses notwithstanding the agreement; *Lovell* v. *Wallis*, 53 L J Ch 494

Cross-examination upon Affidavit.—When an affidavit has once been filed, the opposite party is entitled to cross-examine the deponent (except that on interolcutory applications there is a discretion, *see* next *rule*), whether a pary or a mere witness and whether the affidavit has been withdrawn without being used or not, *Clark* v *Law*, 2 K. & J. 28; *Re Quartz Hill & Co.*, 21 C D. 642 The Court may refuse to act upon an affidavit when the deponent cannot be examined; *Shea* v. *Green*, 2 Times Rep. 533, *The Parisian*, 18 P. D 16

2. (1) Upon any application, evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.

Power to order attendance of deponent for cross-examination

(2) Such attendance shall be in Court, unless the deponent is exempt from personal appearance in Court, or the Court otherwise directs. [S. 195.]

COMMENTARY.

When a party makes any interlocutory application, in the course of a suit, he may file affidavit in support of his allegations; and it is in the discretion of the Court to order attendance of the deponent for cross-examination The opposite party may file counter-affidavits.

Compare R S C, Or XXXVIII, r. 1. The words used in the English rule are "*upon any motion, petition or summons.*" The words used here "*upon any application*" are comprehensive enough to include them. This rule deals with affidavits on summary or interlocutory applications. In England [illegible] affidavit witness for cross- [illegible] as well as by notice to the [illegible] nder R. S. C., Or. XXXVIII, [illegible] As to persons exempted, *see* ss. 133, 13[illegible].

Affidavits on Interlocutory Applications and Cross-examination.—There is a discretion to order cross-examination in such cases There is no obligation on the Court to order cross-examination upon an affidavit filed

on a motion; *La Trinidad* v. *Brown*, 36 W. R. 138 (Eng.). There can be no cross-examination on an affidavit disclosing names of the partners of a firm under Or. XXX, rr. 1, 2; *Abrahams* v. *Dunlop Tyre Co.*, (1905) 1 K. B. 46 (C. A.).

Matters to which affidavits shall be confined.

3. (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted: provided that the grounds thereof are stated.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same. [S. 196.]

COMMENTARY.

Compare R. S. C., Or. XXXVIII, r. 3. The words used in the English rule are "*interlocutory motions*," and it was held by JESSEL, M. R., that these words apply to all *interlocutory applications* and not merely motions; *In re New Callao Co.*, 30 W. R. (Eng.) 647.

Every affidavit shall be instituted in the suit or matter in which it is sworn. Affidavits in suits must be confined to facts within the knowledge of the deponent. Statements of belief are only allowed in affidavits on interlocutory orders provided the grounds thereof are stated

Meaning of Affidavit.—A statement which merely recites facts to the "best of the information and belief" of the deponent, but does not state the source of his information is not an affidavit within the meaning of this rule and cannot be used as evidence in any judicial proceeding; *Doraisami* v. *Govinda*, 15 M. L. T. 377: 23 I. C. 877.

Affidavits, What to Contain.—Every affidavit should clearly express how much is a statement of the deponent's knowledge and how much a statement of belief, in which case the grounds of belief must be stated. Failure to distinguish between the two would be taken to mean they are swearing to facts within their own knowledge, which will entail all its necessary consequences, *Chandrika Prasad* v. *Hira Lal*, 73 I. C. 721.

Statements as to Belief must Contain the Grounds Thereof.—Evidence on information and belief though generally admissible on interlocutory applications as a matter of necessity, is not admissible on a proceeding, which though interlocutory in form, finally decides the rights of the parties.—*Per* WOOD, V.-C., in *Bird* v. *Lake*, 1 H. & M. 118; *Gilbert* v. *Endean*, 9 C. D. 259.

In practice, the grounds of information and belief are frequently not stated. But the opposite party is entitled to object; *Bidder* v. *Bridges*, 26 C. D. 1. In *Quartz & Co.* v. *Beall*, 20 C. D. 508, JESSEL, M. R., impressed on the necessity and importance of the statement of the grounds of information and belief. The practice was strongly condemned by the

Court of Appeal in *In re J L Young Man Co.*, (1909) 2 Ch 753: see *Lumley* v. *Osborne*, (1901) 1 K. B. 582. In *Gobind* v. *Kunj*, 10 C. L. J 414, the High Court commented on the considerable laxity in these matters and pointed out the necessity of the strict enforcement of this rule.

The provisions of this rule should be strictly observed. Every affidavit should clearly express how much is a statement of deponent's knowledge and how much a statement of his belief, and the grounds of belief must be stated with sufficient particularly, *Padmabati* v. *Rasik*, 37 C 259. 6 I. C. 666 *See* also, *Damodar* v *Panalal*, 9 Bom. L. R. 540.

Offensive and Scandalous Matters.—Affidavits should be confined to matters pertinent and relevant, and they may be ordered to be taken of the file if scandalous and irrelevant matters are inserted; *Cracknall* v *Janson*, 11 C. D 12, *Kernick* v *Kernick*, 12 W. R. 835 (Eng.), or they may be expunged, *Warner* v *Mossee*, W. N. (1881) 69. *See* also *In re Jessop*, W. N (1910) 128 Court may strike out scandalous matters from pleading, see Or VI, r 16. Allegations of dishonesty are scandalous, but " nothing can be scandalous which is relevant;" *per* COTTON, L J, in *Fisher* v. *Owen*, (1878) 8 Ch D. 653 The sole question is, as SELBOURNE, L. C., said in *Christie* v *Christie*, L. R. 8 Ch. 503, whether the matters alleged to be scandalous would be admissible in evidence to show the truth of any allegation in the pleading which is material with reference to the relief prayed. Quoted with approval in *Gobind* v *Kunj*, 10 C. L. J. 414: 14 C. W. N. 153 37 C. 259

Defective Affidavit.—Affidavits with defect by misdescription of parties or otherwise in the title of jurat may be received by the Court (*see* English Or. XXXVIII, r 14) Affidavits with the omission of the words " before me," *Eddowes* v. *Argentine Mercantile Agency Co.*, 38 W. R. 629, (Eng), or with interlineation not initialled by the Notary before whom it was sworn were received, *In re Cloake*, 61 L. J. Ch. 69.

As to the duty of solicitors in preparing affidavits to see to their accuracy, see *Rummens* v *Cecil*, 129 L. T. J. 263.

ORDER XX.

JUDGMENT AND DECREE.

Judgment when pronounced.

1. The Court after the case has been heard, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders. [S. 198.]

COMMENTARY.

"After the case has been heard."—The meaning of this rule is that the judgment is to be given upon the examination of witnesses by the Judge himself and not upon perusal of depositions taken before another officer, except where such evidence is expressly allowed by the Code to be taken (*e.g.*, in Or. XVIII, r. 15 or in Or. XXVI).—*Naranbhai* v. *Naroshankar*, 4 Bom. H. C. 98.

A Judge may at the close of the hearing, state at once orally the judgment which he intends to record and deliver —*Anonymous*, 5 Mad. H. C. Ap. 8.

Or. XX, r. 1, C. P. Code contemplates that all arguments should be heard before the case can be regarded as ripe for judgment. Where a party to a suit died after arguments were partly heard but not completed and the Court pronounced judgment without bringing his legal representative on record, the judgment is a nullity; *The American Baptist Foreign Mission Society* v *Ammalanadhurni*, 48 I. C. 859.

Delivery of judgment in a S. C. C. case seven months after the hearing, is an illegality; *Rajab Khan* v. *Langdaji*, 8 N. L. R. 91. 15 I. C. 938.

Pronounce.—Pronouncing a judgment within the meaning of Or. XX, does not require a reading out of the whole judgment by the Court, *Kutuabuddin* v. *Gulam Rabbani*, 94 I. C. 121

Judgment in Open Court.—This rule should be strictly followed. The practice not uncommon of omitting to pronounce judgment in open Court is not only in direct opposition to this rule, but is highly inconvenient and deprives the Court and the litigants of a valuable safeguard against error Such delivery enables immediate rectification of slips or errors that may occur and which may be pointed out by the pleaders This saves trouble, expense, and delay of rectification by review or appeal; *Bai Dahi* v *Hargovandas*, 30 B. 455· 8 Bom L R 229 Pronouncing of judgment out of Court, though an irregularity was held to be no ground of appeal, *Nilmoney Singh* v. *Bhoobany*, Marsh 1864, 327

The posting of a notice on the board of the Court announcing the result of an appeal is not a sufficient compliance with Or. XX, r. 1, C. P.

Code, as to the pronouncement of judgments in open Courts; *Nagiah* v. *Seshamma*, 41 M L J 385 14 L. W. 514.

Judgment on Holiday.—This is not illegal. The English rule with regard to Sundays being *dies non* does not apply in India; *Venkatesa* v. *Kolammal*, (1912) M W N 65, referring to *Sheo Ram* v. *Thakur*, 30 A. 186, where it was held that disposal of a suit on a Sunday is no irregularity.

Due Notice.—Omission to give notice of delivery of judgment is a serious irregularity, *Kamoory* v *Kasa Subbiah*, 17 I C. 278: (1912) M W. N. 999, *Ma Hla Dun* v. *Moung Shwe Ya*, 9 Bur. L. T. 250; 38 I C 575. A judgment delivered without notice to parties is not a judgment pronounced within the meaning of this rule; *Kharak* v. *Lachman*, 47 A 332: 86 I. C 869 A I R 1925 A 293 If an appeal is filed beyond time through the negligence of the Judge in not giving notice of the date fixed for delivery of judgment, the appellant cannot be held responsible, and the appeal should be admitted under s 5, Limitation Act; *Ma Me Thin* v. *Mg San*, 27 I C 784, 8 Bur L T. 99. Absence of plaintiff to hear judgment, does not justify dismissal of suit; *Nundlal* v. *Shankru*, 165 P. W. R. 1911

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original Civil jurisdiction [Or XLIX, r 3, cl (5)]

Power to pronounce judgment written by Judge's predecessor.

2. A Judge may pronounce a judgment written but not pronounced by his predecessor. [S. 199.]

COMMENTARY.

Predecessor's Judgment.—A judgment written by a Judge, and pronounced by his successor in open Court, was held to be a valid judgment *Parbutti* v. *Bhukun*, 8 B L R Ap 98: 17 W. R. 475. *See* also, *Dulal Chandra* v. *Ram Narain*, 31 C. 1057 (1060); *Sheikh Ala Bux* v *Sheikh Kadir Ahmed*, 29 C L J 568, *Abdul Majid* v. *Nur Mahomed*, 50 I. C 641. A Full Bench of Calcutta High Court *held* that a judgment written ten months after the Judge was transferred and had ceased to have jurisdiction in the particular division fulfilled the conditions of this rule, *Satyendra* v. *Kastura*, 35 C. 756 F B 12 C. W. N. 682: 7 C. L J. 666 (9 W R. 1 *not applicable*, 17 W R 475 *followed*). Followed in *Basant* v. *Secy. of State*, 35 A. 368: 11 A. L J. 411: 19 I. C. 785 *See* also *Rani Sundar Koer* v *Chandreshwar*, 34 C 293: 11 C. W. N 501, *Narpat Rai* v. *Davidas*, 14 I. C. 871, *Dayaram* v *Musst. Jatti*, 80 P. R 1916: 43 P. L R. 1917: 35 I C 938

Where the arguments in a suit were heard by an officiating Subordinate Judge who then reverted as Munsif and the judgment written by him was pronounced by his successor in office, *held* that even if he wrote the judgment after he ceased to be a Subordinate Judge and reverted as Munsif, the judgment would not thereby be vitiated in any way; *Lilawathi Kuar* v *Chootey Singh*, 42 A. 362: 18 A. L. J. 356 (35 A. 368 and 35 C 756 F B. *refd. to*); *see* also, *Musst. Kishin Bai* v. *Budhuram*, 35 P. W. R 1919: 49 I. C. 724.

Where the Judge who had heard the evidence and arguments in a case was then succeeded by another Judge and subsequently wrote out and signed judgment in the case which was pronounced by his successor after notice to the parties, *held* that the judgment was valid; *Lakhiama Jin* v. *Lok Nath*, 5 Pat. L. J. 147: 1 Pat. L. T. 77.

Separate Judgment by Successor.—Where a Judge wrote out a judgment placed it upon record and was transferred before the date of delivery, his successor took a different view and delivered his own judgment.—*Held* that he was competent to do so. The words "*may pronounce*" are not mandatory; *Lachman* v. *Ram Kishan*, 33 A. 236: 7 A. L. J. 1189; [*Nicholas* v. *Baker*, (1899) 44 Ch. D. 262 *referred to*].

Legality of Judgment Recorded and Dated by Predecessor but Pronounced by Successor.—See *Bhalla* v *Fazal Muhammad*, 58 I. C. 143: 97 P. L. R. 1920.

One Judge Ceasing to be Judge from a Bench of Five.—Where after hearing a case, one Judge from out of a Bench of five Judges ceased to be a Judge before he could deliver the judgment which he had already written, *held* that his judgment will not be a legal judgment; *Chinnu Pillia* v. *Kalimuthu*, 21 M. L J. 216: 9 I. C. 596. *Quære*: Whether the judgment of a Bench consisting of four Judges where the question was referred to the decision of a Bench of five Judges would be valid?

An appeal was heard by a Bench of two Judges one of whom subsequently went on temporary leave. In his absence the judgment signed by him was read out by his colleague who delivered a separate dissenting judgment. *Held* that the judgments were valid in law, *Adwaita* v. *Saroj*, 23 C. L. J. 592.

Order XX, Rule 2, If Mandatory.—Or. XX, r. 2 is not mandatory, and a Judge may, if he sees reason to do so, refuse to pronounce a judgment written by his predecessor. The pronouncement of a judgment is the last act of the trial of a suit and is a material part of the trial. It is not an act which can be performed by any other person than a Judge of the Court in which the suit was tried. Where, however, the predecessor in office has ceased to exercise judicial function, his order is a nullity; *Maung Ba* v. *Maung Ye*, 76 I. C. 170.

Rule Applies to Order.—A written order deciding one of several issues in a case is a judgment within the meaning of s 2 and can under this rule be pronounced by the successor of a Judge who passed it; *Narpat* v. *Devi Das*, 14 I. C. 371.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original Civil Jurisdiction [Or XLIX, r 3, cl (5)]

Judgment to be signed.

3. The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review. [S. 202.]

COMMENTARY.

This rule is distinct prohibition against any alteration of a signed judgment *save as* provided by s. 152 or on review; *Mt. Husaina* v. *Sahib Nur*, 20 I. C. 3. 159 P W. R 1913. The Court has inherent power to amend a decree even when s. 152 has no application; *Mohabir* v. *Chandra Sekhar*, 19 C. W. N 1021. 28 I C 304 Sec. 152 relates to amendment of judgments, decrees or orders All the rulings regarding alteration or amendment of decree, etc , are noted there. As to Court's inherent power, *see* notes to s. 151.

Chartered High Courts.—This rule does not apply to Chartered High Courts (*see* Or. XXLIX, r 3, cl. 5)

" Dated and signed."—The judgment is to be signed at the time of pronouncing it.—*Dulal* v *Ram Narain*, 31 C 1057, p. 1064.

Interpretation of the terms " date of judgment " and " judgment shall be dated by the Judge in open Court at the time of pronouncing it "—*Mamtazal Huq* v. *Nirbhai Singh*, 9 C. 711, F. B. 12 C. L. R. 318 (7 C. 127: 8 C. L R. 409 *dissented from*).

" Shall not afterwards be altered."—It is irregular to add to a judgment once delivered when the effect of the addition is to alter the grounds on which the judgment proceeded A Judge may append to his judgment additional reasons, merely to show more fully the correctness of the decision at which he has arrived, although such a course is not strictly warranted by the C. P. Code.—*Snadden* v *Todd Finalay & Co* , 7 W. R. 286.

Immediately after the judgment was pronounced, the plaintiff's pleader stated that there were errors in the judgment The Judge at once corrected two errors and came to a final conclusion *Held*, there was no error of procedure vitiating the judgment —*Ram Prosad* v. *Sham Narain*, 6 C. L. J. 22 (24-25). The provision for delivery of judgment in open Court (r. 1) is intended as a safe guard against errors which may be pointed out by the pleaders or parties, *Bai Dahi* v. *Hargovan*, 30 B. 455.

Where a judgment is dictated to a shorthand writer, the revision contemplated cannot be of the effective part of the judgment and must be of the nature referred to in s. 152 and one relating to " clerical and arithmetical mistakes arising from any accidental slip or omission "; *Hari Krishna* v. *Arur Pandither*, 18 L. W. 105: (1923) M. W N. 354.

Where a judge delivered a judgment but deferred passing a decree pending the production of succession certificate, it was not competent to cancel that judgment and to pronounce a second judgment inconsistent therewith; *Kishan* v. *Ganga*, 31 A 153: 6 A. L J. 54: 1 I. C. 810

Where a Court records findings on some out of several issues it cannot afterwards add to his judgment further findings on the remaining issues although they lead to the same conclusions as before; *Shedaya* v. *Shivaya*, 4 Bom L. R. 129.

A Judge sitting on the Original Side may revise his judgment after delivery, and in so doing may add to it —*Per* WOODROFFE & COX, JJ, *Weston* v. *Peary Mohan*, 40 C. 89. 18 C W. N. 185

Where it is held by one Judge that the Court-fee paid on a plaint is insufficient, his successor has no power to alter that judgment and hold that it is sufficient; *Harihar* v. *Maheswari*, 8 Pat. 651: 82 I. C. 813: A. I. R. 1925 Pat. 47.

Loss of Judgment.—Where a judgment has been lost, it is open to the Judge to re-write from memory the substance of it. It cannot be expected that the C. P. Code would provide for such a contingency.—*Narsingh* v. *Harkhan*, 8 C. L. J. 521. A Court has inherent power to reconstruct its records when destroyed; *Raj Gir* v. *Iswardhari*, 11 C. L. J. 243.

Effect of Contravention of Provisions of Rules 1, 2 & 3.—The infringement of a procedure prescribed by Or. XX, rr. 1, 2 and 3 of the C. P. Code constitutes an irregularity which may be waived by the parties; *Fort Gloster Jute Manufg. Co.* v. *Chandra Kumar*, 46 C 979: 29 C. L. J. 438.

Judgments of Small Cause Courts.

4. (1) Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon.

Judgments of other Courts.

(2) Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. [S. 203.]

COMMENTARY.

Chartered High Courts.—This rule does not apply to Chartered High Court, *see* Or XLIX, r. 3, cl. (5).

Contents of Judgment of S. C. Courts.—This section does not relieve the Judge of Small Cause Court from the necessity of giving some indication in his judgment that he has understood the facts of the case in which such judgment is given. Where a judgment in a Small Cause Court suit was in the following words· "It is not proved that the defendant paid the debt to the plaintiff. Ordered the claim be decreed with costs." *Held* that this was no judgment at all.—*Malik Rahmat* v. *Siva Prasad*, 13 A. 533. *See* also *Bai Jasoda* v. *Bamansha*, 23 B. 334 (13 A. 277 *folld.*); *Shah Jahan* v *Jahande*, 18 I. C 216: 109 P. L. R. 1913; *Kandaswami* v *Ramalinga*, 12 L. W. 285. But see *Denonath* v. *Ram Kumar*, 6 C. L. J. 527, where it has been held that a Small Cause Court Judge is no bound to fully set out the reasons for his findings and *Ahmed* v. *Asiatic Petroleum Co* 7 I C. 591: 4 S. L R. 17, *Protap Chandra* v. *Abhimani*, 48 I C. 752.

No judgment of a S C Court which does not specifically set out the points for determination is a legal decision, *Hasan* v *Jasraj*, 7 N L. R 146 Where a Judge in a judgment of a Small Cause Court clubs together all points for determination and makes a statement merely to the effect that he finds all the issues in favour of the plaintiffs, it cannot be regarded as a compliance with the provisions of Or. XX, r 4; *Moideen Koya* v. *Moideen Kutti*, 49 M. L J 354: 90 I C. 968. A I. R. 1925 M 1229.

Para. 1 of the rule applies also to Courts invested with S. C. Court powers, *Narayan* v *Bhagu*, 31 B. 314: 4 Bom. L. R. 327.

Although under the law, a Small Cause Court is not required to frame issues, yet where the matter in dispute is not very simple and various questions arise for decision, the Court should indicate to the parties what the points are on which evidence has to be adduced and give them an opportunity to produce their evidence thereon; *Pir Muhammad Sadr-ud-din* v. *Khair-ud-din*, 59 I. C. 703

Under Or XX, r 4, a Judge in a Small Cause suit may reduce his remarks to a minimum and they need not contain more than the points for determination and the decision thereon, but this minimum must be intelligible; *Srimati Suradhani* v *Hari Charan*, 3 Pat L. T. 122: 64 I. C. 226. *See* also, *Baul Chandra* v *Sheikh Abdul*, 67 I C 851: *Koppa Kurup* v. *Velavi Chettichiar*, 42 M L J 583 15 L W. 642: 31 M. L. T. 124 (H. C).

"Need not contain."—As a matter of practice, however, it is usual, except in comparatively unimportant cases of every day occurrence such as those for the recovery of petty debts, to set out the particulars of the suit and to give reason, *for the decision*, *arrived at*, thus enabling the High Court, in revision, to satisfy itself that the decree or order was according to law without the necessity of perusing the whole record. This practice should be followed. The words "need not" were not meant to be read as shall not in Or XX, r 4, C P Code The matter is largely within the discretion of Judges of Small Cause Courts, but their discretion should be exercised with due regard to the circumstances of each case; *Maung Sa* v. *Ma U Ma*, 1 Rang 274 A I R. 1923 Rang. 252: 2 Bur. L. J. 108

Judgment of Appellate Courts.—See s 96 and Or. XLI, rr. 4, 32 and notes. In reversing a decision, the Appellate Court should state the *facts*, and *also the points* which are raised before it, and then *its decision* on such points and the reasons, *Basarat* v *Roshan*, 7 I. C. 421.

Contents of Judgments of Other Courts—Grounds to be Stated.—There must be a distinct finding one way or other on all material issues.—*Shumo-Moyee* v. *Joy Narain*, 8 W R 481 The reasons for their decisions must in all cases be recorded by the Judges of the High Courts in India.—*Kachekalyana Rungappa* v *Kachivigajaya*, 2 Bom L. R. 72, P. C.: 11 W. R 33 P C Judgment unsupported by reasons cannot be accepted as legal findings of fact.—*Nigappa* v *Shivappa*, 19 B 323.

A Judge ought not to import his own private knowledge or opinion into a case, but ought simply to decide the issues before him and on the evidence before him —*Mehcroonissa* v *Bhashaye Merdha*, 2 W. R., Act X, 29; *Lalla Mewa Lall* v *Sree Mahota*, 25 W. R. 152; *Hurpurshad* v. *Sheo Dyal*, 26 W. R. 55, L R. 3 I A 259 *See* also *Meethun Bibee* v. *Busheer Khan*, 7 W. R 27: 11 M. I A. 213; *Vallabha* v. *Madhusudanan*, 12 M 495, and *Durga* v *Ramdoyal*, 39 C. 153

Where a judicial officer decides a dispute solely on knowledge gained by him on personal inspection and without any reference to the evidence in the case, the judgment is liable to be set aside on revision; *Abhul Huq* v. *Mahamed Din*, 67 I. C. 302: A. I. R. 1923 Cal. 311.

A Court is not precluded from basing its decision upon a ground not specifically pleaded by either of the parties.—*Thakuri* v. *Kundun*, 17 A. 280.

Where specific issues were not framed, but the points had in fact been determined the judgment was not defective; *Hussan* v. *Asiatic Petroleum Co.*, 5 M. L. T. 215.

There is nothing uncommon for the Court to arrive at a conclusion that the truth is not what either party says, but that it is something else; *In re Gopala Aiyar*, 2 M W N. 197

Where Court Omits to Give Reasons for Decision.—Where the lower Court omitted to record a decision on material points; the case was sent back to state the points for decision on those points consecutively.—*Tatur Khawas* v. *Jagannath*, 7 Bom L. R. App. 14: 15 W. R. 131.

A Deputy Collector having died before giving his reasons for a decree, the whole of the subsequent proceedings was held to be bad, and the case was remanded to the Collector to be tried *de novo* upon the evidence on the record; *Golam Hossein* v. *Ram Doyal*, 12 W. R 152.

Written Opinions are Not Judgments.—Written opinions sent to the Registrar by Judge who had retired or died before the judgment are not judgments, but merely memoranda of the opinions and arguments of such Judges.—*Mahomed Akil* v. *Asadunnissa Bibee*, Bom. L. R. Sup. Vol. 774: 9 W. R. 1. *See* also *Rohilkhand and Kumaon Bank* v. *Row*, 6 A. 468.

One Judgment in Several Cases.—A Judge should not allow his judgment in one case to govern his decision in another, even if the subject of dispute is of a similar nature, and the evidence similar in character, when the parties are not the same, and the subject-matter of the suit is different. —*Surenrdanath* v *Purmanund*, 15 W R. 342.

In analogous cases, where the parties applied to have them all tried together, and that the evidence in one case shall be made use of in the trial of others, the Judge should try all the cases together.—*Nehal Singh* v. *Ali Ahmed*, 15 W R. 10 *See* also, *Enayetoollah* v. *Radha Charan*, 15 W. R. 395.

Where a judgment in one case governed other cases. *Held* that the filing of that judgment was a substantial compliance with the requirements of the law, and that the filing of a short judgment referring to the other judgment was merely formal, and the delay excusable —*Mothoora* v. *Kishen*, W R 1864 Mis 9, and *Bhyrab Nath* v *Huro Soondaree*, W. R (1864), 28.

Full Bench Decision.—A decision of a Full Bench is binding on all Division Courts, unless it is by Special Bench or unless a contrary rule is laid down by the Privy Council; *Kishen* v *Tipan*, 5 C L. J. 569.

Construction of Judgment.—In construing a judgment, if difficulty is found in reconciling the conclusion ultimately arrived at with the previous part, such part must be rejected; *Byhunt* v *Dhunput*, 19 W R 104

Where the final sentence in a judgment of the High Court made no mention of a matter specified in the previous words, the District Judge

was held entitled to follow the effect of previous judgments delivered by the same Judge of the High Court.—*Tarachand* v. *Ramjeeban*, 22 W. R. 202.

Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found.—*Kishen Pershad* v. *Tipan Pershad*, 5 C. L. J. 569.

"Unintelligible judgment."—Where a judgment is meagre, unsatisfactory [illegible] and the case to the lower Co[illegible] hearing arguments afresh; [illegible] R. 1922 Lah. 122.

Mode of Considering the Weight and Value of Evidence.—Evidence of relatives—Ground for discrediting evidence—Mode of dealing with evidence—Credibility of witnesses.—*Debi Pershad* v. *Radha Chowdhrani*, 62 C. 81 P. C.

Where the witnesses cited on either side directly contradict each other and it is impossible to reconcile these conflicting statements the only safe guide to follow in such a case is that afforded by the action and conduct of the parties and the contents of the documents produced—*Kishori Lal* v. *Chunni Lal*, 13 C. W. N. 370, P. C.: 9 C. L. J. 172.

The testimony of a person who swears that a certain conversation took place, is of more value than that of one who says that it did not.—*Chowdhry Deby* v. *Chowdhry Dowlut*, 6 W. R. 55, P. C.: 3 M. I. A. 347.

Although it may be a legitimate objection to the credibility of a witness, yet to state broadly and generally that because a witness had given evidence in other cases therefore he is unworthy of credit, would only tend to increase the indisposition of respectable persons to come into Court as witnesses.—*Lall Beharee* v. *Gopee Beebee*, 18 W. R. 285, P. C.

Admissibility of Judgments Inter Partes.—*See* notes to s. 11.

Court to state its decision on each issue.

5. In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of issues is sufficient for the decision of the suit. [S. 204.]

COMMENTARY.

"Shall state its finding or decision."—Where the finding upon any one or more of the issues is sufficient to dispose of the case, it is unnecessary to determine the other issues.—*Barham Deo Narain* v. *Mackenzie*, 10 C. 1095. *See*, however, *Tarakunt* v. *Puddo Monee*, 5 W. R. 63, P. C.: 10 M. I. A. 476. Followed in *Esmail Khan* v. *Hari Charan*, 9 C. W. N. 60, where it has been held that this rule makes it imperative upon the Court to pronounce its opinion upon such issues as may be necessary for

the disposal of the suit, but it does not disable it from determining the other issues also. *See* also, *Devara Konda* v. *Devara Konda*, 4 M. 194 (2 A. 497 and 6 C. 919 *dissented from*). *See also*, 1 L. W. 416: 24 I. C. 87, where it has held that in appealable cases the Courts below should pronounce judgment on all points raised so as to obviate any necessity for remand.

A finding unaccompanied by the reasons for it, as required by this rule is not a conclusive finding of fact binding on a Court of second appeal. —*Kamat* v. *Kamat*, 8 B. 368 (370). *See* also, *Purshotam Sakharam* v. *Durgoji*, 14 B. 452, and *Ningappa* v. *Shirappa*, 19 B 323 [9 B. 452 (454) *referred to*].

Where a suit is dismissed on a preliminary objection, the Judge should not record any findings on the merits, and if he does so, such findings will, on appeal be expunged from record.—*Nanda* v. *Banamali*, 11 C. 544. *See* also *Baldev* v. *Dharam*, 26 A. 204 (5 W. R. 63, P. C., *explained*).

Findings in Judgment to be Definite and Precise.—The findings of fact should be specifically and precisely stated, whatever reasons therefor may be contained in the judgment; *Balak* v. *Aly Husain*, 87 I. C. 304.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original Civil jurisdiction [Or. XLIX, r. 3, cl. (5)].

Contents of decree.

6. (1) The decree shall agree with the judgment: it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit. [Para. 1, s. 206.]

(2) The decree shall also state the amount of costs incurred in the suit and by whom or out of what property and in what proportions such costs are to be paid. [Para 2, s. 206.]

(3) The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter. [S. 221.]

COMMENTARY.

In sub-rule (1) the words "*as stated in the register,*" which followed the word "claims" in the old Code, have been omitted. The contents of the decree therefore are not prepared by reference to register but by reference to the pleadings, so that they may be clear and unambiguous.

In sub-rule (2) the words "*by whom or out of what property*" are new. The addition is no doubt an improvement. The other changes are only verbal. Sub-rule (2) also includes the provisions contained in 219 of the old Code. *Cf.* s. 33.

Chartered High Courts.—This rule does not apply to Chartered Courts; *see* Or. XLIX, r. 3, cl. (5).

Forms and Contents of Decree.—(*a*) *General Cases.*—It is ess that under the C P Code a decree should be drawn up —*Ranjit* v. *Ilahi Buksh*, 5 A 520 But in *Niaz Begam* v. *Abdul Karim*, 560, it has been held that in a partition proceeding under N. W. P (XIX of 1873), a Collector is not bound to cause a formal decree drawn up.

The duty of Judges in seeing that decrees are properly draw pointed out —*Rustom Ally* v *Ameer Ally*, 10 W. R. 487. Decre Court should be drawn up in such a way as to make them self-cont and capable of execution without referring to any other document.— *tara* v. *Mahomed Mobaruck*, 8 C. 975: 11 C. L. R. 399. *See* also, *Di* v. *Kamala*, 3 Bom. L. R. Ap 128 · 12 W. R. 99.

In an administration suit, the first Court recorded a finding on a stantial question of right between the parties and appointed rece The plaintiff did not apply to have a formal decree drawn up. *Held* was no decree, and no formal decree was drawn, and no appeal lay.- *Divali* v. *Shah Sishnav*, 33 B 182

When a Court passes an order under s. 47 it is not necessary to a decree —*Khirode Sundari* v. *Jnanendra*, 6 C. W. N. 282. Distingu in *Gopal Chandra* v. *Preo Nath*, 32 C 175

In the case of an original civil suit the decree must be quite di from the judgment. A paragraph in a judgment not drawn up in the of a decree and not embodied in a separate form is not a decree.—*Gela* v. *Ganga Ram*, 54 I. C. 913.

It is the duty of the judgment-debtor, as well as the decree-h to see that the decree is properly drawn up; and if he does not do s Court will execute it according to its terms.—*Krishto Kishore* v. *Roop* 8 C. 687: 10 C. L. R. 609.

By consent of parties and by leave of the Court, the parties to can get a decree for greater amount of money or land than that orig asked for.—*Mohibullah* v *Imami*, 9 A. 229. *See* also *Sakharam Ma* v. *Harikrishna*, 6 B. 113.

(*b*) *In account suit.*—In an account suit, the Court should ord account to be taken of the agent's dealings before the final dec *Hurro Nath* v. *Krishna Coomar*, 14 A. 147 P. C.

A decree for account of a dissolved partnership should be pass accordance with the prescribed forms and should direct an account taken of the dealings between the parties —*Thiru Kumaresan* v *Subb* 20 M. 313.

In a suit for delivery of account papers, the decree ought to con specific order to deliver up the papers.—*Ram Coomar* v. *Kalee*, 10 279.

The trespasser is not liable to account, but is liable for damages; fore no preliminary decree for account can be passed against him.— *bash* v *Nogendra Nath*, 4 C. W. N. 105.

(c) *In a suit on a bill of exchange.*—In a suit on a bill of exchange, a decree containing a condition exempting the endorser from liability until the plaintiff has exhausted his remedies against the drawer and acceptor is illegal.—*Bank of Bengal* v *Kartic Chunder*, 16 C. 804.

(d) *In terms of compromise* —Where the parties present a petition of compromise extending beyond the scope of suit, the decree should be passed embodying the whole of its terms, but the decree should be passed in terms of such of the provisions agreed upon as relate to relief which the Court can give in the suit.—*Venkatappa Nayanim* v *Thimma Nayanim*, 18 M. 410. *See notes to* Or. XXIII, r. 3.

(e) *In contribution suits* —In a suit for contribution a decree cannot be passed jointly against all the defaulters. It should specify the particular sums to be paid.—*Bama Soonduree* v. *Anundmoyee*, 3 W. R 170; *Pitambar* v. *Bhoyrubnath*, 15 W. R. 52; *Mahadeo* v *Lahoree*, 21 W. R. 250. *See* also *Kristo Monee* v. *Buroda Dassi*, 14 W. R. 149. A decree in a suit by a debtor against his co-debtors for contribution should order payment separately by each defendant of the amount only of his just proportion of the debt.—*Tarasi Talavar* v *Palaniandi*, 3 Mad. H. C. 187; *Rajput Rai* v. *Mahomed Ali*, 5 N. W. P 215; *Olioola* v. *Asscrun*, 7 W. R. 194; *Kristo* v. *Anund Moyee*, 7 W. R. 300; *Mohessur* v *Muthoora*, 8 W. R. 515; *Nobin Mohun* v. *Gopal Chunder*, 11 W R. 538, *Rushmunjoore* v. *Radha Soonduree*, 23 W. R. 283; *Bhurut* v *Munthoora*, 23 W R. 421.

Parties liable for contribution were held to be liable according to their respective share in a property, and not simply *per capita* —*Murdan Ali* v. *Tuffussal Hossein*, 16 W. R 78

Suit for contribution in respect of money deposited by the plaintiffs to save the property, of which they were co-sharers, from being sold for arrears of revenue—Personal liability—Form of decree.—*Upendra* v. *Girindra*, 25 C. 565: 2 C. W N 425.

(f) *In suits for damages* —Where plaintiffs in separate interests sue for and obtain damages, the decree should not be a joint one for a lump sum, but should apportion the damages.—*Triloki Nath* v *Hurdutt*, 9 W. R. 290.

(g) *In suits to set aside deeds* —In a suit to set aside a deed of sale, if it be found that a portion of its consideration was valid, it is a correct principle to uphold the deed as to that portion of the land, which bears same proportion to the whole quantity conveyed, as the amount of the valid consideration bore to the whole amount of the consideration — *Rajaram* v *Luchmun*, 4 B L R A C 118 · 12 W. R. 478

In a suit by the heirs of a *purdanashin* lady to set aside a deed of sale executed by her whilst living in the house of the purchaser *Held* that where the substantial relief prayed for is that the deeds should be set aside, the Court is not justified in substituting therefor a mere declaration of the plaintiff's title —*Thakoordeen* v *Ali Hossein*, 13 B L R. 427, P. C.: 21 W. R 340, P C (8 W R, 311 *modified*).

(h) *In suits for ejectment.*—The decree for ejectment passed under s 66 (2) of the B. T. Act (VIII of 1885), need not incorporate the terms

as to the ejectment being avoided by payment within 15 days from the date of the decree These terms are rather in the nature of a direction to the Court of execution.—*Bodh Narain* v. *Mahomed Moosa*, 26 C. 689: 3 C W. N. 628.

In a suit for ejectment, where no notice to quit was served, a decree directing to vacate the land at the expiry of six months from the date of the decree cannot be passed.—*Abu Bakar* v. *Venkataramana*, 18 B. 107. But see *Ram Narain* v. *Fatema Sogra*, 23 W. R. 399.

(i) *Endowment* —Form of decree in a suit for management of charitable trust for account and for drawing up a scheme for future management of the temple and its funds.—*Chota Lal* v. *Monahar*, 24 B. 50, P. C . 4 C. W. N. 23, P. C.

(j) *Against heirs* —In a decree in a suit upon a bond against the heir of the deceased obligor, the decree should direct that the debt is to be realised from the assets of the deceased in the hands of the heir.—*Anund* v. *Munarut*, Marsh. 611 *See* also *Girdar* v *Bai Shiv*, 8 B. 809 (2 M 336 *followed*).

(k) *Against a Hindu widow* —In a decree against a Hindu widow it should be stated whether the decree is a personal decree or one against her as representing her deceased husband —*Ram Kishore* v. *Kally Kant*, 6 C. 479. 8 C L R. 1.

In a suit by a reversioner against a Hindu widow to set aside her alienation, the Court cannot direct possession to be given to the reversioner but can only declare the sale invalid.—*Goluck* v. *Gopal*, W. R (1864), 250.

(l) *For removal and worship of idol.*—In a suit by the plaintiffs for a declaration of their right to remove an idol to their house, and keep it there for the period of their turn of worship. *Held* that the Court should define the precise period for which the plaintiffs were entitled to worship the idol.—*Ram Soondar* v. *Taruck Chunder*, 19 W. R. 28.

(m) *Value of improvements.*—In a suit for possession of immoveable property, enquiries as to the value of improvements must be held before decree, and cannot be reserved for determination in the execution department; *Nellaya Variyath* v *Vadikapat Manakeal*, 3 M. 382.

(n) *Against a Mahomedan widow* —Where a woman is in possession of her husband's estate as security for unpaid dower, the proper decree in a suit against her for possession by the heir is a decree for possession subject to the amount due, with a direction for an account as to mesne profits received by her.—*Mahomed Ameerodeen* v. *Mozuffer Hossein*, 5 B. L. R. 570; 14 W. R. 5, P. C

(o) *For maintenance.*—In a decree for maintenance, Courts should insert words which would enable them on application to set aside or modify their orders, by altering the rate fixed in the decree, as circumstances might require.—*Gopikabai* v. *Dattatraya*, 24 B. 386.

A prospective decree for contingent arrears of maintenance is quite irregular; the non-payment of any arear due would be fresh cause of action, consisting a basis for a suit.—*Julobai Chitta Kooer* v. *Bhagee*

Kooer, 6 N.W. P. 41. But in *Bishnoo Shambhog* v. *Manjamma*, 9 B. 108, it has been held that decree declaring a right to maintenance, and directing payment of arrears should contain an order directing future maintenance. *See* also *Ashutosh Bannerjee* v. *Lukhimoni*, 19 C. 139, F. B.

To avoid any difficulty in executing a decree for maintenance out of property charged with payment of the allowance, and make a fresh suit unnecessary in case of default in payment, a receiver should be appointed by the decree itself with directions to take possession of the estate out of the sale-proceeds to pay the allowance for maintenance.—*Hemanginee* v. *Kumode*, 26 C. 441: 3 C. W. N. 139 (8 C. 703: 14 C, 661; 15 C. 667; 17 C. 699; 21 C. 31; 22 C. 813 and 903; 16 M. 436, and 16 A. 415 *referred to*).

(*p*) *In Mortgage suits.*—See *notes to Order XXXIV.*

(*q*) *In Partition suits.*—In a suit for partition, the Court shall determine whether the plaintiff is entitled to a partition, and shall ascertain who the several persons entitled to the property are, and shall direct by a preliminary decree that commissioners be appointed to make the partition.—*Gyan Chunder* v. *Durga*, 7 C. 318; 8 C. L. R. 418. *See* also, *Bhoobun Moyi* v. *Shurut Sundery*, 12 C. 275; and *Krishnasami* v. *Rajagopala*, 18 M. 73.

In a suit for partition, by a purchaser from a co-sharer, the decree need not be for a general partition of the entire property. In the absence of any request, the Court is not bound to determine what is the share of each co-sharers to compel him to take that share by making a general partition.—*Murarrao* v. *Sitaram*, 23 B. 184 and 188.

(*r*) *In suits for possession.*—If a plaintiff in joint possession has been illegally ousted from possession of any portion of the property by a co-owner, he is entitled to be restored to such joint possession.—*Bhairon Rai* v. *Saran Rai*, 26 A. 588, F. B. Followed in *Ram Charan* v. *Kauleshar Rai*, 27 A. 153, and distinguished in *Jagarnath* v. *Jainath*, 27 A. 88.

In a suit for exclusive possession of immoveable property, if the Court finds that the property belongs to the parties jointly, the Court is competent to give the plaintiff a decree for joint possession.—*Wahid Alam* v. *Safat Alam*, 12 A. 556 (10 A 627 *distinguished*). *See*, however, *Antu Singh* v. *Mandil Singh*, 15 A. 412; and *Parashram* v *Miraji*, 20 B. 569; and *Nana* v *Appa*, 20 B 627.

A purchaser at a Court sale ought not to be put in exclusive possession of the whole undivided land by virtue of a decree against one coparcener only —*Kallapa* v *Venkatesh*, 2 B. 676

In a suit by a purchaser of undivided property, the plaintiff's remedy is in a suit by partition .He cannot be put in joint possession with the other members of the family.—*Balaji Anant* v. *Ganesh Janardan*, 5 B 499. But see *Indrasa* v *Sadu*, 5 B. 505 (*note*), and *Antaji* v. *Duttaji*, 19 B. 36.

In a suit by a member of an undivided Hindu family for a declaration of his right to a portion of the joint estate sold in execution of a

decree against another member, the plaintiff should have a decree declaring that he is entitled to joint possession along with the execution purchaser.—*Babaji Lakshman* v. *Vasudeb*, 1 B. 95 (12 B. 188 *followed*); *see* also *Ramchandra Kashi* v. *Damodhar*, 20 B. 467.

In a decree for possession under a *mokarrari* lease a condition as to the payment of rent should be omitted.—*Imambandi* v. *Kamleswari*, 14 C. 109, P. C.

Where a Court in a suit for possession and mesne profits passes a decree for possession, and directs inquiry into the amount of mesne profits the direction for inquiry as to mesne profits need not necessarily be contained in the decree.—*Fatima Bibi* v. *Abdul Majid*, 14 A. 531 (19 C. 182 *referred to*).

If a stranger builds on the land of another, although believing it to be his own, the owner is entitled to recover the land with the building on it, unless there is delay and laches of owner in suing for possession. The decree in such a case should be that the plaintiff should recover the land with liberty to the defendant forthwith to commence to remove his building and to restore the property to its former condition, the same to be completed within a fixed period from the date of the decree, and in default the plaintiff to be at liberty to remove the building at the expense of the defendant.—*Premji Jivan* v. *Cassum Juma*, 20 B. 298.

(*s*) *Under the Specific Relief Act.*—In a suit for specific performance of contract, where insufficient Court-fee was paid, the procedure to be adopted in preparing the decree and directing payment of Court-fees.—*Krishnasami* v. *Sundarappayyar*, 18 M. 415.

Suit to recover specific goods in hands of third parties—Alternative claim for value as compensation—Form of decree—*Murugesa* v. *Jotharam*, 22 M. 478.

Where a decree was passed under s. 9 of Act I of 1877, giving the plaintiff possession, and directing that the costs of removing huts and filling up excavations should be paid by the defendant; *held* that the latter portion of the decree was beyond the scope of a possessory decree under the above Act.—*Tilak Chandra* v. *Fatik Chandra*, 25 C. 803.

Construction of Decree.—(*a*) *General cases.*—In execution, a decree must be construed by its own terms, and not by the plaint.—*Nubo Kishore* v. *Anund Mohun*, 17 W. R. 19. A decree cannot be extended beyond the real meaning of its terms.—*Budun* v. *Ram Chandra*, 11 B. 537. *See* also *Muhammad Sulaiman* v. *Muhammad Yar*, 6 A. 80. But in *Lachmi Narain* v. *Jwala Nath*, 18 A. 344, it has been held that where the decree is ambiguous in its terms, it is competent to the Court executing it to refer to the pleadings to ascertain its precise meaning. In construing a decree the terms of which are ambiguous, the Court should put such a construction upon it as would make it in accordance with law.—*Bakur Sajjad* v. *Udit Narain*, 21 A. 361, *see* also *Jirbhu Narain* v. *Rup Singh*, 20 A. 397; *Amolak Ram* v. *Lachmi Narain*, 19 A. 174 and *Jawahir Mal* v. *Kastur Chand*, 13 A. 343. It is open to an execution Court to construe the decree in the light of the plaint and judgment.—*Yagnarayana* v. *Makyya*, (1915) M. W. N. 914.

Directions to pay money by instalments and in default the property on which decree-holder had a lien to be sold. *Held that the defendants* were made personally liable; *Aruna Chelam* v. *Atmakumar*, 10 M. L. T. 218.

The principle of construction applies equally whether the decree is declaratory or executory.—*Thayamalachi* v. *Seru*, 10 M. L. T. 326: 2 M. W. N. 827.

In interpreting a decree the pleadings and recorded judgment may be referred to.—*Balbhaddar* v. *Jagpal*, 14 I C. 130; *Promoda* v. *Alamgir*, 13 I. C. 82.

Courts are not bound to construe a decree in the mode in which the parties intended it to operate. It is the duty of the executing Court to execute it as it finds and not as understood by the parties; *Lodd Govinda* v. *Raja of Karvetnagar*, 29 M. L. J. 219 (19 C 312, P C.: 26 M. L. J. 474 *referred to*).

Where the terms of the decree are uncertain, it is not competent to the Court in execution to make any enquiries, by taking oral or documentary evidence, to ascertain the meaning of such terms.—*Nuddyar Chand* v. *Gobind Chunder*, 10 C 1092, *Dwarka Nath* v. *Kamala Kanth*, 8 B. L. R. Ap. 128 12 W R. 99; and *Kalee Debee* v *Mudoosoodun*, 16 W. R. 171.

A decree is to be understood as referring to the claim as stated in the plaint, and not as described in the paper-book.—*Soude Shrinivasapa* v. *Krishnapa*, 11 B. 177

A note of the judgment of the Court taken by the Deputy Registrar cannot be consulted for the purpose of explaining or adding in the construction of a decree.—*Sumar Ahmed* v *Haji Ismail*, 1 B 158

Where there is discrepancy between the decree and judgment, the decree is to be construed by reference to judgment.—*Medhee Bey* v. *Zellal*, 15 W R 530; *Chunder Mohun* v *Amrita Chunder*, 19 W R 343.

The order of the Judicial Committee was that a decree-holder should recover what was demarcated by the " the *thakbust* map and proceeding of 1889 " *Held* that the above words did not include survey map, which differed from it.—*Radha Pershad* v *Torap Ali*, 18 C 108.

Where the first Court puts upon its own decree a construction which to the Appellate Court appears to be erroneous, and the decree on the face of it admits of another construction, which to the Appellate Court appears to render the decree correct, the Appellate Court will adopt the latter construction.—*Hirji Jina* v *Naram Mulji*, 1 B 1.

(*b*) *Account—Decree for*.—A decree for an account is not a mere direction to enquire and report It must always proceed upon the assumption that the party calling for it is entiled to the sum found due It is a decree affirming his rights only, leaving it to be enquired into how much is due to him from the party accounting.—*Janokey Das* v. *Bindabun*, 3 M. I. A. 175

(*c*) *Ejectment*.—A consent decree provided that the defendant should retain possession of certain land in perpetuity on payment of a fixed

annual rent to the plaintiff, but the plaintiff might re-enter in case the defendant failed to pay the rent. The rent was not paid, and in a suit for possession it was contended that the above clause was a penal stipulation which the Court would not enforce. *Held* that the doctrine of penalties was not applicable to stipulations contained in decrees, and that the plaintiff was entitled to recover.—*Shirkuli Timappa* v. *Mohablya*, 10 B 435

(*d*) *Endowment* —Construction of a decree as to the appointment of a manager of the property of a religious institution where the decree directs the appointment of a fit man to fill the vacant office.—*Ponnambala Tambirdu* v *Sivagnana Desika*, 17 M 343.

(*e*) *Instalments* —Decree for payment of money by instalments—Provisions for default in payment—Right to take out execution for the whole decretal money in default of payment of two consecutive instalments—Construction of the decree —*Balkishen Das* v. *Runbahadur*, 10 C 305, P C 13 C L R 418, P C

Construction of a decree for money payable by instalments—Term making the entire sum payable in default in payment of some of the instalments at certain dates—Default in payment—Right to take out execution for the entire amount —*Shamkishen* v. *Ram Bahadur*, 15 C 751

See notes to r 11.

(*f*) *Mesne profits* —A decree stated that mesne profits were to be recovered "with interest from the date of their ascertainment" *Held* that the Court executing the decree had no authority to allow interest year by year upon the collections which ought to have been received—*Hurro Durga* v *Surut Sundari*, 8 C. 332

Where a decree is silent as to the time down to which mesne profits were given *Held* that the decree could not be construed as giving mesne profits for a period longer than 3 years from the date of the decree—*Uttamram* v. *Kishoredas*, 24 B 149 and 345.

A decree for possession of land with mesne profits from a date named directed that "the amount thereof to be ascertained in local enquiry, and to bear interest from the date of ascertainment until payment" *Held* that the decree-holder was entitled to mesne profits until the date of delivery of possession to him —*Fakharuddin Mahomed* v. *Official Trustee*, 8 C. 178, P C . 10 C L R 176. *See* also *Bijai Bahadur* v *Bhup Indar*, 19 A 296 (19 C 132 *referred to*). Affirmed in 23 A. 152, P C. · 5 C W. N. 52, P C

See notes to r. 12

(*g*) *Mortgage* —See *notes to Or XXXIV*.

(*h*) *Possession.*—Where a decree in a suit for possession declared that the defendant had a right of occupancy, and was liable for rent from the date of suit, without defining the date of rent *Held* that the decree was imperfect and that the rent could not be ascertained in execution—*Kalee Narain* v. *Chunder Narain*, 23 W, R. 228,

A decree for possession of a village passes with it the village account-books and other documents relating to the management of the village.—*Bhavani Devi* v. *Devnao*, 11 B. 485.

In the execution of a decree for possession of land, it was held that evidence of witnesses could be taken to ascertain the boundaries and the subject on which the decree operates.—*Kalee Dabee* v. *Modhoo Soodun*, 16 W. R. 171; and *Bhugobat* v. *Ramadhin*, 22 W. R. 330.

(i) *Pre-emption*.—A decree for pre-emption, conditional on payment within a fixed time, omitted to state consequence of non-payment. *Held* that the plaintiff, unless he had paid the pre-emptive price before the expiry of the fixed time, could not enforce his decree for pre-emption.—*Jai Kishen* v. *Bholanath*, 14 A. 529 (13 A. 376 *referred to*).

A Court granting a decree in a pre-emption suit is competent to grant the decree subject to the payment of the purchase-money within a fixed period, and if the decree-holder fails to comply with the condition, he loses the benefit of the decree.—*Ewaz* v. *Mokuna Bibi*, 1 A. 32. Followed in *Ram Sahia* v. *Gaya*, 7 A. 107. *See* also *Hingan Khan* v. *Ganga Pershad*, 1 A. 293; and *Narain Das* v. *Lachman Singh*, 5 A. 185. *See* notes to r. 14, *post*.

Amendment of decree.—*See* notes to s. 152

Sub-rule (2). "Decree shall state costs, and by whom and in what proportion to be paid."—It is the duty of the Court to draw up after the decision, a decree showing the amount of costs incurred. An application to add to the decree the costs which were omitted, lies in the Court which passed the decree; *Sagar* v. *Digambar*, 38 C. 25 · 10 I. C. 858.

The mere specification of costs in a decree without any allotment of responsibility is not sufficient.—*Janokee Nath* v. *Joykishen*, 15 W. R 4.

A copy of the judgment, with the schedule of costs appended, does not constitute a proper decree.—*Purmessuree Dutt* v *Joynauth*, 15 W. R. 326.

When an Appellate Court decrees an appeal, and gives costs of its own Court, the costs of the first Court should be included in the decree. —*Mahomed Bussecroollah* v. *Ramkant*, 16 W. R. 266 See *Raghunandan* v. *Rajendra*, 14 C. W N 556: 11 C L J. 207.

A decree which ordered the defendants, speaking of them, collectively, to be paid their costs by the plaintiff, was held to mean that each defendant who appeared in the suit as a separate party, was to be paid his separate costs.—*Gunesh Dutt* v *Mungay Ram*, 21 W R. 288.

Where a decree of the High Court directed that the plaintiff (respondent) should pay to defendants (appellants) the costs incurred by them in the lower Court. *Held* that the costs referred to were those which were specified in the decree appealed against —*Ram Chunder* v. *Doorganath*, 2 C. L. R. 152.

Where a decree was passed "with usual costs and interests" without any specification of the costs. *Held* that the decree was meant to give

the successful party all the costs incurred with interest at 12 per cent on the amount decreed.—*Broughton* v. *Perhlad Sen*, 19 W. R. 152.

A Court decreeing a suit for arrears of rent has no right to impose a condition as to the mode of execution of the decree by making the decree executable only against the defaulting *Jama; Chandra Kumar* v. *Aswini Kumar*, 45 I. C. 250.

Where a mortgage-decree contained a clause to the effect "that the defendant aforesaid do pay to the plaintiffs aforesaid the sum of Rs. 876-8, the amount of costs incurred by them in this Court." *Held* that the clause was not intended to be a direction for the recovery of costs personally from the judgment-debtor.—*Maqbul Fatima* v. *Lalta Prasad*, 20 A. 523, F. B.

In a suit against a minor, if the Court considers that the guardian should be personally ordered to pay the costs, it should be so stated in the decree order.—*Komul Chunder* v. *Surbessur*, 21 W. R. 298; and *Brijessuree Dassia* v. *Kishore Doss*, 25 W. R. 316.

If the Official Assignee defends a suit, he is liable, in the event of failure, to pay the plaintiffs, costs in the same way as any other defendant: and if the estate be insufficient to pay the costs, he will have to bear them personally.—*Bevis* v. *Turner*, 7 B. 484.

Costs awarded in a decree for foreclosure is not a part of the money due upon the mortgage, and can be recovered by the mortgagee in execution after obtaining possession under the decree.—*Damodar Das* v. *Budh Kuar*, 10 A. 179 (14 C. 185 *referred to*).

Costs by Third Persons.—As to this and all other questions relating to costs, *see* notes to s. 35.

Costs may be Set off Against Sum Admitted or Found Due.—The decree in a redemption suit directed the plaintiff (mortgagor) to pay the mortgage-money and interest to the defendant, and directed the defendant to pay the plaintiff the costs of the suit. *Held* that the plaintiff was *entitled to set-off* the amount of his taxed costs against the mortgage-money which he was liable to pay under the decree.—*Brij Nath* v. *Juggernath*, 4 C. 742: 4 C. L. R. 122; see *Sidu* v. *Bali*, 17 B. 32.

A prior decree having given the costs incurred on the disposal of a preliminary point to the party successfully *raising it*, a latter decree, without expressly referring to the former, gave the costs of the suit, generally to the opposite party. *Held* that the costs due under a prior decree should be set-off against those due under the latter.—*Radha Pershad* v. *Ram Parmeswar*, 9 C. 797: 13 C. L. R. 22.

Where one party to a suit was entitled to recover certain costs by sale of hypothecated property, and the other party under the same decree was entitled to recover a smaller sum as costs from his opponent personally. *Held* that the costs recoverable personally could be set-off against the costs recoverable by sale of the hypothecated property.—*Bhagwan Singh* v. *Ratan*, 16 A. 395 (5 A. 275 *dissented from*).

Remedy.—Proceedings under this rule terminate in an order and can be dealt with in revision under s. 115, *e. g.*, an order making addition to

the decree not warranted by the judgment; *Bai Shri Vaktuba* v. *Agar Sangji*, 31 B. 447. *See* also *Nalinakshya* v. *Mafakshar*, 28 C. 177; *Hasan Shah* v. *Sheo Prasad*, 15 A. 121.

7. The decree shall bear date the day on which the judgment was pronounced, and when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree. [S. 205.]

Date of decree.

COMMENTARY.

Chartered High Courts.—This rule does not apply to Chartered High Courts, *see* Or. XLIX, 3, cl. (5)

Object of the Rule.—The object of Or XX, r. 7, which provides that the decree shall bear the date of judgment, is that the decree should take effect from the date of judgment —*Muthiah Chetti* v. *Suppan Servai*, 38 M. 291: 14 M. L. T. 160

Date of Decree.—The date of the decree does not mean the date on which the decree is reduced in writing and signed by the Court, but the date on which the Court delivered judgment and expressed what the decree is.—*The Owners of the ship " Brenhilda "* v. *British India Steam Navigation Company*, 7 C. 547 (551); *Narayanaswamy* v *Krishnasami*, 25 I. C. 67; *Narain* v *Ram Dulare*, 66 I C. 7

Whatever may be the day on which the actual signature is made, the date of the decree for all purposes is to be the date on which the judgment is pronounced. Where a suitor is unable to obtain a copy of the decree by reason of its being unsigned he is entitled to deduct the time between delivery of judgment and that of signing of the decree in computing the time take in presenting his appeal.—*Bani Madav* v *Matungini*, 13 C. 104, F. B (18 W. R 512 *followed*, 10 C 652 *impliedly overruled*). Referred to in 12 A 81, and 18 M 374 (376). *See* also *Golam Goffar* v. *Goljan Bibi*, 25 C 109. For purposes of limitation for appeal, time should be calculated from the date on which the judgment was actually pronounced in Court —*Sagarmall* v *Lachmi Saran*, 1 Pat 771 But see *Yamaji* v. *Antaji*, 23 B. 442, and *Beche* v *Ashanulla Khan*, 12 A. 561, and 1 C W N. 93

A decree takes priority over other decrees in respect of the date on which it was passed; and not in respect of the priority of the date which it enforces —*Gherau* v *Kunj Behari*, 9 A. 413

For the purposes of s 77 of the Registration Act (1908) it is desirable that the Judge should put after his signature the date on which he signs the decree; *Muthia* v *Suppan*, 20 I C 914 14 M L T 160 38 M. 291.

Date of Decree of High Court.—The decree of Original Side should bear the same date as the judgment, and limitation should not be calculated from the date when it was signed by the Registrar —*Hajoo Aboobuckor* v. *Official Assignee*, 25 M. L. J. 560: 1913 M W. N 868.

"Satisfied himself."—It is the duty of the Judges as well as the pleaders to see that decrees are drawn up properly and according to the judgments. The pleaders do not perform their duty simply by arguing their cases.—*Ram Lochan* v. *Munsoor*, 10 W. R. 96. *See* also *Taru Ram* v. *Mari*, 7 A 492, 495, *Goluk* v. *Gunga*, 20 W. R. 111; *Rahimuddin* v. *Beer Protap*, 18 W. R. 303.

"Sign."—Decree cannot be added to or altered after signature, save under s. 152 (*see* notes to that section) or on review (*see* Or. XX r. 3).

Duty to Draw Up Decree.—Although the statutory obligation lay on the Court to draw up a preliminary decree to entitle the plaintiffs to appeal, yet it was equally their duty to ask the Court to draw that up. This duty they failed to discharge, and reasonable inference is that they waived the right to appeal against the preliminary decree.—*Govind* v. *Vithal*, 36 B 536 16 I C. 159: 14 Bom. L. R. 560.

Procedure where Judge has vacated office before signing decree.

8. Where a Judge has vacated office after pronouncing judgment, but without signing the decree, a decree drawn up in accordance with such judgment may be signed by his successor or, if the Court has ceased to exist, by the Judge of any Court to which such Court was subordinate. [New.]

COMMENTARY.

Chartered High Courts.—This rule does not apply to Chartered High Courts, see Or. XLIX, r 3, cl. (5).

Decree for recovery of immoveable property.

9. Where the subject-matter of the suit is immoveable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by boundaries or by numbers in a record of settlement or survey, the decree shall specify such boundaries or numbers. [S. 207.]

COMMENTARY.

The words "*the decree shall contain a description of such property sufficient to identify the same,*" have been added after the words "immoveable property;" and the words "*can be*" have been substituted for the words "*is identified*" in the old section. This rule is similar to rule 3 of Order VII.

"Where such property can be identified by boundaries."—A decree which was passed for a specified quantity of land contiguous to the plaintiff's estate, but which gave no boundaries of such land, was held to be indefinite and incapable of execution.—*Dwarkanath* v. *Jannobee*, 19 W. R. 81; *Darbaree* v. *Fatu*, 23 W. R. 285; *Sristeedhur* v. *Kalee Dat*, 24 W. R. 479. See *Ismail* v. *Lalla Dhundur*, 25 W. R. 30; *Karasji* v. *Hormasji*, 29 B. 73.

A decree which did not specify the particular lands decreed, and directed them to be ascertained in execution, was held bad.—*Kangal Chandra* v. *Kanye Lal*, 4 C. 69.

In the execution of a decree for possession of land, it was held the evidence of witnesses could be taken to ascertain the boundaries.—*Kalee Dabee* v. *Modhoosoodun*, 16 W. R. 171. *See* also *Bhugbat Singh* v. *Ramadhin*, 22 W. R. 330; *Doyal* v. *Kanri*, 25 I. C. 531.

Where a decree is so uncertain that it is impossible to ascertain what is decreed, a plaintiff cannot be put into possession of any other thing by execution than that which the decree describes. Evidence cannot be given in the execution department to amend any uncertainty in the decree.—*Dwarkanath* v. *Kamalanath*, 8 Bom. L. R. Ap. 128: 12 W. R. 99.

In a suit for possession of lands after partition, where the boundaries have been confused and cannot be identified specifically, the principle upon which remedy is to be given to the plaintiff pointed out.—*Robert Watson & Co* v. *Judistir Bauri*, 8 C. W. N. cclxxxvii (287-n) *See* also *Khemamoyee* v. *Shoshee Bhusan*, 9 W. R. 94.

Discrepancy in Decreed Area and Decreed Boundaries.—For the procedure to be followed in identifying land in execution proceedings where the decreed area happens to be larger than the area according to the decreed boundaries of the land, see *Haji Abdul* v. *Khanumal*, 8 I. C. 941.

Decree for delivery of moveable property.

10. Where the suit is for moveable property, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had.

COMMENTARY.

"*Moveable property*" in this rule means specific moveable property.

Decree for Delivery of Moveable Property.—Where a decree is for delivery of moveable property, and states the amount to be paid as an alternative, if delivery cannot be had, the goods must be delivered if capable of delivery; otherwise the assessed damages should be paid.—*Kasheenath* v. *Debkristo*, 16 W. R. 240.

The Courts should fix the price of moveables as the alternative damages in cases of non-delivery.—*Bombay Burmah Trading Corporation* v. *Mahomed Ali*, 10 Bom. L. R. 345. 19 W. R. 123.

Decree in terms of an award ordering delivery of moveable property.—Loss of part of such moveable property and consequent failure to deliver—Application to insert in decree an order to pay the value of such moveable property in the event of failure to deliver. *Held* that the award could not be modified by the Court, nor could the decree, which must be in accordance with the award.—*Ahmed Bin* v. *Shaik Essa Bin*, 17 B. 657.

In a suit for recovery of certain goods or their value as compensation. *Held* that the alternative prayer for the value of the goods as compensation must be read as ancillary to the main relief asked for, with reference to this rule.—*Murugesa Mudali* v *Jotharam*, 22 M. 478.

Decree may direct payment by instalments.

11. (1). Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

Order, after decree, for payment by instalment

(2) After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments, on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit. [S. 210.]

COMMENTARY.

This rule corresponds to s 210, C P Code, 1882, but material changes have been introduced in it. The words "*shall be postponed*" in sub-rules (1) and (2) are new The words "*notwithstanding anything contained etc*., *payable*" in sub-rule (1) are also new.

This rule not only authorizes the Court to direct the amount of a money decree to be paid by instalments, but it also authorizes the Court to make an order postponing the payment of the decretal amount for a specified time.

"**Decree for payment of money.**"—The provisions of this rule are not applicable in a suit for the recovery of money by the sale of the property mortgaged in the bond.—*Hardeo Das* v. *Hukam Singh*, 2 A. 320, *Bachchu* v *Madad Ali*, 2 M. 649; *Tata Charlu* v. *Konadula*, 7 M. 152 But in *Karvalho* v. *Nurbibi*, 3 B 202, the Court passed an instalment decree in a suit on a mortgage-bond, reducing the contract rate of interest; and the decision was upheld by the High Court. *See* also, *Abir Pramanik* v. *Jahor Mahomed*, 34 C. 886: 11 C. W. N 879: 6 C. L. J. 95, where it has been held that an instalment decree in a mortgage suit on the basis of a *solenama* was a valid decree and can be enforced by sale of the mortgaged properties.

"**With or without interest.**"—Where one of the conditions of the granting of time to pay the decretal amount was that the amount of interest should be increased from 6 per cent. to 12 per cent. per annum, and although it received the sanction of the Court, yet as the increase in

the rate of interest seemed to be a penalty, the High Court disallowed the increased rate of interest; *Rai Brnode Behary* v. *Hira Singh*, (1918) Pat. 76: 44 I. C. 726.

"Notwithstanding anything in the contract."—These words have been added to override the ruling of the Bombay High Court in *Ragho Gobind Paranjpe* v. *Dip Chand*, 4 B 96, as the practice inculcated by that ruling seems to prevail only in the Presidency of Bombay and not in the rest of India. It was held there, that an agreement by the debtor to pay by instalments with an undertaking that, on default, the creditor may demand immediate payment of the whole balance due with interest cannot be relieved against, and on default by the debtor the Court cannot lay aside the express contract of the parties as to the consequences of such default.

"Court."—This means the Court passing the decree; *Gandharap* v. *Sheodarshan*, 12 A. 571 If it is not competent for the original Court to pass an instalment decree, much less can the execution Court give any such relief; *Mahadaji* v. *Hari*, 7 B 332 Under this rule the High Court has the power to make its money decrees payable by instalments; *Poma Dongra* v. *Gillespie*, 31 B. 318: 9 Bom L R 143

"Shall be postponed."—The introduction of these words now enables the Court to direct that the decretal amount should be paid within a particular period, and no execution can be taken out before that time. The Court has inherent power to stay execution at the time of decree, *Palaniappa* v. *Velayutha*, 7 M L T. 151 · 5 I. C. 421 A judgment-debtor who had the benefit of delay in execution which was sanctioned by Court cannot resile from it; *Subbaraya* v. *Ramasamy*, 22 M. L J 166 (14 M. L. J. 359; 18 M. L. J 548 *overruled*).

"For sufficient reason."—The discretion vested under this rule to allow instalments is a judicial discretion and cannot be arbitrarily exercised; *Mohessur* v *Jhubboo*, 2 Hay 68; *Subatullah* v *Thompson*, 1 Hyde 98; *Ramgopal* v. *Ram Tonoo*, 6 W R 89; *Balgobind* v *Chhedilal*, 11 C. L .J. 431.

The trial Court has the power under this rule to postpone payment of the amount decreed, but it must be exercised judicially. The pendency of an independent litigation between the same parties, in which the present judgment-debtor may possibly obtain a decree against the decree-holder so as to enable the decree to be set off one against another, will not constitute " sufficient reason " within the meaning of this rule so as to postpone payment, *Chuniram Kanhaiya Lal* v. *Bhagwan Das*, 7 Lah 393: 97 I. C. 769: A I R 1926 Lah 604

Where a Court, on the ground that defendant was " hard pressed," directed the amount to be paid by instalments extending over ten years, and allowed only one-half of the usual rate of interest *Held* that there was no " sufficient reason " for directing payment of the amount by instalments —*Binda* v *Madho*, 2 A 129 Followed in 11 C. L J. 431.

The fact that the estate of the defendants has been brought under the management of the Court of Wards, is not a reason for allowing instalments; *Walidad Khan* v. *Mani Ram*, 73 I. C. 800: A I R 1923 Lah. 256.

Where principal sum lent was Rs 40 and a sum of Rs. 74-10 had already been paid as principal and interest, instalment was allowed; *Govindjee* v. *Ko Po Vee*, 11 I. C. 891.

Payment by Instalments—Grounds for Lenient Treatment.—The burden of proving that the defendant is entitled to the indulgence of a decree in instalments rests upon him. Where he has resisted the suit on frivolous grounds and has subsequently to the institution fraudulently disposed of the property and the interest agreed upon between the parties was moderate, *held*, that there was no ground for passing a decree for payment of the amount by instalments; *Gelaram* v. *Jhangi Ram*, 71 I. C. 803.

Rule Applies to Decrees under XXXIV, Rule 6.—A decree under Or XXXIV, r. 6 is not directed against the mortgaged property, but in virtue of the contract it binds the judgment-debtors personally. The Court in passing such a decree may under this rule direct the payment of the decretal amount in instalments, *Bidhusekhar* v. *Sudhury*, 15 C W. N 1083. 11 I C 736.

Order for Payment by Instalments After Decree.—By this rule the Court may, *after* the passing of a decree in money-suits, with the consent of the decree-holder, order the amount to be paid by instalments.—*Shankarapa* v *Davapa*, 5 B. 604, *Hurdeo Das* v. *Hukum Singh*, 2 A 320. But not without his consent; *Ram Chand* v. *Moti Lal*, 4 Bom. H C 77.

After the decree, a *kistibundi* was filed by the parties agreeing that the decretal amount should be paid by instalments with interest, and the judgment-debtor had for several years treated the *kistibundi* as if it were a decree. *Held* that the decree-holder was entitled to take out execution on the *kistibundi* as if it were a part of the original decree.—*Dinonath Sen* v. *Guru Churn Pal*, 14 Bom L R 287: 21 W. R. 310; *Jankee* v *Sreenath*, 5 W. R. Mis 19; *Tarif Biswas* v *Kalidas*, 2 Bom. L. R. A. C. 223: 11 W. R. 86. But in *Madhub Chunder* v. *Madhab Lal*, 14 Bom. L. R. 288-*n*: 15 W R. 542, it has been held that execution cannot be taken out upon a *kistibundi* filed in Court after decree which has not been incorporated with the decree The same view appears to have been taken in *Kanhyalal* v *Collector of Cuttack*, 14 Bom. L R. 291-*n* 16 W. R. 275; and *Dwarka Nath* v *Doorga Churn*, 6 W. R. S. C C. Ref. I.

An arrangement by the parties to pay the decretal amount by instalments, unle[illegible] by order of Court, does not amount [illegible] by instalments within the meaning [illegible] will therefore run from the date of [illegible] v. *Dullaram*, 14 C. 348 But see *Jati Sahu* v. *Bhugun Gir*, 11 C. 143.

In execution of a decree the parties presented a petition to the Court making certain arrangement for payment of the decretal amount by instalments. *Held* that the decree-holder's remedy was by execution of the decree and not by a fresh suit to enforce the terms of the agreement.—*Dharbha Venkama* v. *Rama Subbarayadu*, 1 M. 387; *Debi Rai* v. Gokul Prasad, 3 A. 585; *Ganga* v. *Murlidhar*, 4 A. 240; *Champat Rai* v. *Pitambar Das*, 6 A. 16; *Makund Ram* v. *Makund Ram*, 6 A. 228 (3 A. 781 *distinguished*); *Ameerunnissa* v. *Meer Mahomed*, 2 C. L. R. 143.

See, however, *Ramlakhan Rai* v. *Bakhtam Rai*, 6 A. 623 (3 A. 585 *followed*), in which it has been held that the agreement could not be treated as an instalment decree, and was therefore incapable of execution.

An arrangement to pay by instalments the amount of a decree obtained upon a bond does not effect an extinction of the original debt or the mortgagee's lien upon property mortgaged to him by the bond.—*Ram Churn Lall* v. *Koondun*, 14 Bom. L. R. 423-*n*; 11 W. R. 481.

Where, on the application of the judgment-debtor and his surety, a decree for money was ordered to be paid by instalments in proceedings in which the decree-holder was not a party. *Held* that the liability could not be enforced against the surety in execution of the decree under s. 253, C. P. Code, 1882 (*cf.* s. 145)—*Chandan Kuar* v. *Tirtha Ram*, 3 A. 809.

An instalment-bond by a judgment-debtor acknowledging a balance to be due under the decree, but executed without consideration, and after the decree is barred by limitation, and cannot either revive a decree, or be legally binding on his representative —*Heera Lall* v. *Roy Dhunput Singh*, 24 W. R. 282.

A judgment-debtor, on being arrested, presented a petition asking for 15 days' time to pay the decretal amount, and the decree-holder consenting, the Court made an order in the terms· "Let the petition be filed." *Held* that the order did not amount to one directing payment of money to be paid at a certain date.—*Jagobundhoo* v. *Hari Rowoat*, 16 C. 16 (4 A. 155 *folld.*).

Decree Awarding Payment by Instalments—Limitation.—Where a decree awards payment by instalments, the limitation is six months from the date of the decree. *See* Art. 175 of the Limitation Act (IX of 1908).

A decree which directs payment to be made annually to the decree-holder creates a periodically recurring right and should be executed as an instalment-decree on default of payment of each year's annuity.—*Lakshmibai Bapuji* v. *Madhabraj Bapuji*, 12 B 65 (3 B 193 *followed*). *See* also, *Kuppu Ammal* v *Saminath*, 18 M 282. But see, *Subba Natha* v *Subba Lakshmi*, 7 M. 80; and *Yusaf Khan* v *Sirdar Khan*, 7 M. 83, where it has been held that the decree should be executed within three years from the date of the decree, or from the date of the last preceding application for execution.

On the application of the judgment-debtor under this rule, an *ex parte* order was passed granting him two years' time to pay the decretal money but the decree was not altered Three years after the date of the decree, the decree-holder applied for execution *Held* that the application was not barred by limitation —*Tata Charlu* v. *Konadala Ram Chandra*, 7 M. 152. Distinguished in *Perumal Naicker* v. *Davood Rowther*, 34 I. C. 393.

A decree directing payment of a certain sum every month for life by way of maintenance is more than a declaration of right, and is a decree for payment of money by instalments; and the decree-holder can obtain the amount ordered in execution of the decree —*Mansadebi* v. *Jiwanlal*, 9 A. 33 (15 W. R. 128 *referred to*).

If it can be gathered from a decree that payments are directed to be made on dates or at periods which are sufficiently indicated by the terms of the decree, the requirements of the Limitation Act, 1877, Art 179 (*b*) are satisfied —*Kaveri* v. *Venkamma*, 14 M. 306

Where after the judgment was passed, an arrangement by the parties to pay the decretal amount by instalments was filed, but no formal order was passed under this rule and decree was drawn up according to the original judgment, but the judgment-debtor paid the instalments regularly *Held* an application by the decree-holder for execution, for the balance after three years from the date of the decree was not barred — *Kedar Nath* v *Kulman Sardar*, 5 C L J 25

The Court cannot recognize any arrangement between the parties enlarging the period of limitation, allowed by law for the execution of decrees, or which alters the terms of the decree —*Krishna Kamal* v *Hira Sirdar*, 4 Bom L R (F B) 101 18 W R 44 *See also*, *Meheroonnissa* v *Raushan Jehan* 17 W R 396; and *Ram Runjan* v. *Jowharujumah Khan*, 23 W R 129

Rent-decree Payable by Instalments—Limitation.—The period of limitation for execution of decree for arrears of rent payable by instalments runs from the date of the decree, and not from the date fixed for payment.—*Ramsadoy* v *Dwarkanath*, 22 C 644. *See* also, *Mamtazul Huq* v. *Nirbhai Singh*, 9 C 711 F B (7 C 127: 8 C. L. R. 49 *dissented from*)

A decree for rent under the B T Act cannot be made payable by instalments, this rule not applying to such a decree.—*Shib Narain* v. *Bykuntha Nath* 11 C W N 857

Where Decree Provides that in Default of One Instalment Whole Amount shall be Payable—Limitation.—Where a decree is payable by instalments, with a proviso that in default of payment of any one instalment the whole amount shall become payable at once, limitation runs from the date of the first default —*Bholanand* v. *Padmanand*, 6 C. W N 348 *See* also, *Dulsook* v *Chugon*, 2 B 356; *Gumma Bhiku*, 1 B. 356; *Zahur Khan* v. *Baktawar*, 7 A 327, *Sham Lal* v. *Kanahia Lal*, 4 A 316, *Radha Prasad* v *Bhugwan Rai*, 5 A. 289, *Asmutulla* v. *Kally Churn*, 7 C 56, and *Shib Dat* v *Kalka Prasad*, 2 A. 443

The decree provided that, in default of two instalments in succession, the whole amount will be recoverable The decree-holder applied for execution, alleging default of 9th and 10th instalments *Held* that the application, being made within three years from the default of 9th and 10th instalments, was within time, and that whether former instalments had been paid or not was immaterial —*Kanthan Singh* v. *Sheo Prasad*, 2 A 291.

Where an instalment decree contains a proviso as to execution of entire decree on default in payment of instalments, the decree-holder may execute it on the happening of the first, second or any subsequent default, and limitation will run in respect of each instalment separately from the time when such instalment may become due.—*Shankar Prasad* v. *Jalpa Prasad*, 16 A. 371. *See* also, *Ajudhia* v. *Kunj Lal*, 30 A, 123 (31 C. 297:

21 C. 542 *dissented from*); *Maharaja of Benares* v. *Nand Ram*, 29 A. 431, and *Girindra Mohan* v. *Bocha Das*, 9 C. L. J. 220: 36 C. 894: 83 C. W. N. 1004.

Taking of Security.—Security given by a judgment-debtor in execution for due performance of the decree can be enforced, and the property covered by the bond can be sold in execution by the decree-holder, without being compelled to file a regular suit for the purpose. The fact that the security bond is taken under Or. XX, r. 11, makes no difference; *Official Receiver* v. *Nagaratna*, 49 M. L. J 648 · 92 I C. 497: A. I. R. 1926 M. 194.

Right of Waiver of Default.—The waiver contemplated by the provisions of the limitation Act must be either an agreement between the parties or such conduct as will itself afford clear evidence of a legal waiver.—*Khankuchand* v. *Rustomji*, 20 B 109. Mere acceptance of overdue instalments does not amount to waiver without proof that it was for any specific instalment.—*Balaji Ganesh* v. *Sakharam*, 17 B. 555; *see* also, *Mohesh Chandra* v. *Prosanna Lal*, 31 C. 83; 8 C. W. N. 66; *Srinivasa* v. *Sheo Gobind*, 20 I. C. 156, and *Kashiram* v. *Pandu*, 27 B. 1, F. B., where it has been held that it is a fundamental proposition of law that payment and acceptance of overdue instalments cannot by themselves prove a waiver. The point has to be determined on the circumstances of each suit. In this case all the rulings on the point have been considered and discussed. Followed in 15 C. W. N. 10 where the true test of waiver has been explained. The mere fact that plaintiff waited for a long period after the last instalment had fallen due did not indicate waiver; *Baburam* v. *Jodua*, 11 A. L J. 89: 18 I. C 690. As to meaning of default, see *Sitarama* v *Colta*, 25 M. L. J 264: 21 I C. 24.

Held that proof of a part-payment towards an instalment due, accepted by the decree-holder would be material as evidence of waiver.—*Rajeswara* v. *Hari Babandhu*, 19 M 162

Where a decree provides that, in default of payment of any one instalment, the whole amount of the decree shall be payable, the decree-holder is entitled to exercise his right of waiver, and may execute his decree within three years from the date of default of each instalment.—*Nilmadhub* v. *Ramsodoy*, 9 C. 857, *KaraLavalasa* v *Karanam*, 3 M 256. But see *Judhistir* v *Nobin Chandra*, 13 C 73, and *Radha Prosad* v. *Bhagwan Rai*, 5 A. 289 Followed in *Sakhawat Hussain* v *Gajadhar Prasad*, 28 A 622

A proviso in a decree made payable by instalments, by which the whole amount is to become due on default of any one instalment, is a proviso enuring for the benefit of the decree-holder alone, and he is at liberty to take advantage of it, or to waive it as he thinks fit —*Ram Culpo* v *Ram Chunder*, 14 C 352. *See* also, *Budhu Lal* v *Rekkhav*, 11 A. 482 (2 A. 857, and 7 C 56 *distd*), *Sitab Chand* v *Hyder Mulla*, 24 C. 281 1 C W. N 229.

When a decree payable by instalments on certain dates provides that, in default in payment of any instalment the whole of the money shall become due and recoverable in execution, limitation begins to run from the date of the first default, unless the right to enforce payment in

default has been waived by subsequent payment of the overdue instalments on the one hand and a receipt on the other.—*Monmohun* v. *Durga Churn*, 15 C. 502 (2 B. 356; 2 A. 443; 5 C. 97; 7 C. 56; 9 C. 857, 14 C. 352; and 13 C. L. R. 243, *referred to*). Followed in 13 C. W. N. 1010. Referred to in *Bir Narain* v. *Darpa Narain*, 20 C. 74. *See* also, *Hurri Pershad* v *Nasib Singh*, 21 C. 542 (13 C. L R. 243 *dissented from*), and *Jadub Chundra* v *Bhairab Chandro*, 31 C. 297 (13 C. L. R. 243, *dissented from*). *See* also *Rup Narain* v. *Gopinath*, 11 C. W. N. 903. Not followed in *Girindra Mohan* v. *Bocha Das*, 9 C. L. J. 226: 36 C. 394: 13 C. W. N 1004 and in 13 C. W. N. 1010.

For the meaning of the word " waiver " and its effect, see notes to section 11.

Consent Instalment Decree—Penalty Clause.—In a consent instalment decree it was provided that on failure to pay two instalments, the plaintiff was to recover possession of certain lands. *Held* that on default, the penalty clause could be enforced. A consent decree can only be varied by consent —*Lachiram* v *Jana Yesu*, 16 Bom. L R. 668.

Appeal.—There is no appeal from an order refusing to allow the decretal amount to be paid by instalments; *Md. Ibrahim* v. *Subbiah*, 20 I. C 673. 6 Bur L. T 133. An appeal lies from an order directing payment of decretal amount by instalments. But whether or not the Court exercised a sound judicial direction in making the order cannot be reviewed in second appeal; *Bidhusekhar* v *Sudhury*, 15 C. W. N. 1083 (*Balgobindram* v.*Cheddilal*, 11 C. L. J 431 *distinguished*). The appellate Court is slow to interfere with the exercise of a discretion by the lower Court; *Ahmed Musaji* v. *Mamooji*, 22 C L. J. 293.

Court-fee.—As to Court-fee in an appeal from a decree fixing instalments; see *Gobind* v. *Bardeo*, 24 I. C 931: 226 P. L. R. 1914

Decree for possession and mesne profits.

12. (1) Where a suit is for the recovery of possession of immoveable property and for rent or mesne profits, the Court may pass a decree—

(*a*) for the possession of the property;

(*b*) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;

(*c*) directing an inquiry as to rent or mesne profits from the institution of the suit until—

(*i*) the delivery of possession to the decree-holder,

(*ii*) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or

(*iii*) the expiration of three years from the date of the decree,

whichever event first occurs.

(2) Where an inquiry is directed under clause (*b*) or clause (*c*), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.

[Ss. 211 and 212.]

COMMENTARY.

Alteration—Effect and Scope.—This rule corresponds to ss. 211, 212 of the old Code with several additions and alterations and introduces a change of an important character. Formerly, mesne profits were ascertained in execution proceedings, but under this rule mesne profits shall be ascertained *under the decree itself*, by an enquiry, *and not in execution.* The intention is to make a substantial saving of time, trouble, and expense. That portion of the decree directing an enquiry as to mesne profits will be of a preliminary nature, after which a final decree will follow in accordance with the result of the enquiry. Order XXVI, r 9 provides for the issue of a commission for ascertaining mesne profits or damages The Court may of course pass a final decree for rents or mesne profits, if it can do so without directing an enquiry.

Clause (*ii*) of sub-rule 1 (*c*) is new. It has been inserted for the benefit of the judgment-debtor whose liability for mesne profits will cease after giving notice through Court of his relinquishment of possession. *Sub-rule* (2) is also new.

Difference between Old Section and this Rule.—Under the old Code (s. 211) the grant of future mesne profits was purely discretionary with the Court and could not be claimed as of right and no cause of action would accrue in respect of them But under the new rule, the Court's power to direct an enquiry into future mesne profits is put on a par with its power to pass a decree for possession or past mesne profits and there is nothing in the latter to indicate that the one relief is more a matter of discretion and less of right than the other; *Ramasawmi* v *Srirangaraja*, 26 I. C. 622 · 2 L W 8

The effect of the new rule is to make the decree so far as mesne profits are concerned complete only when the amount has been ascertained while not making the rest of the decree incomplete till then, *Ramana* v. *Babu*, 37 M 186.

Applicability—Mesne Profits in Partition Suits.—The provisions relating to mesne profits are applicable to suits for land or other property in which the plaintiff has a specific interest and not to a suit for declaration of right or to a suit for partition of joint family property where he has no specific interest until decree, *Pirthipal* v. *Jowahir*, 14 C 489, 509 P. C But where the members of the family live under the most distinct agreement that they are entitled, not as ordinary joint family, but in specific and definite shares, if the enjoyment of those shares is in any way disturbed, the right to sue for mesne profits as well as partition will arise;

Shankar v *Hardeo*, 16 C. 397, P. C. Mesne profits may be allowed on partition when one member has been entirely excluded from the enjoyment of the property, or where it has been held by a member of the family who claimed a right to treat it as impartible and therefore exclusively his own, *Bhurrar* v *Sitaram*, 19 B 532.

Where a preliminary decree in a partition suit has either intentionally or inadvertently omitted to direct an enquiry into mesne profits, the final decree cannot award mesne profits or direct an enquiry regarding the same; *Ghulzam Bibi* v *Ahamadsa Rowther*, 42 M. 296: (1919) M. W. N. 284

There is nothing in this rule to suggest, that it applies between co-defendants *Surendra* v *Dijendra*, 29 I. C 464

Inquiry as to Mesne Profits Not a Proceeding in Execution.—A decree directing the ascertainment of mesne profits continues the suit Proceedings for the ascertainment of mesne profits are in continuation of the original suit So the mesne profits must be determinable in the suit itself and not by way of execution *Lis pendens* applies to mesne profits: *Midnapur Zemindary Co* v *Naresh Narain*, 16 C. W. N. 109; *Rudra Partap* v *Sarda*, 47 A 543 87 I C 322 A. I R 1925 A. 588

Order XX, r 12 directs that mesne profits should be assessed by an enquiry in the suit itself and not in execution, and mesne profits so assessed from part of the money recoverable under the decree. Under the new C. P. Code a Court, therefore, acts in excess of its powers, if it passes a decree directing that mesne profits should be ascertained in execution.—*Ganga Prasad* v *Hemangini* 37 I. C. 997. *See* also, *Muhammed Abdul Ghafoor* v *Mahsab Choudhry*, 2 Pat L. J. 394: 41 I. C. 231

Mesne Profits.—As defined in s (2), cl. (12), mean "those profits which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession." Wrongful possession by the defendant being the very essence of a claim for mesne profits and the very foundation of a decree therefor, a defendant cannot be made liable for mesne profits during the period the property was under attachment by virtue of an order made under s. 146 of the Criminal Procedure Code; *Chhagmull* v. *Amanatulla*, 51 C 853: 83 I. C. 529: A. I. R 1924 C 1010, *Kali Charan* v *Ashutosh*, 25 C. L. J. 140: 38 I C. 600 Mesne profits are in the nature of damages which the Court may mould according to justice of the case. Hence in calculating mesne profits, payment of revenue and cesses made by the defendant should be deducted, *Dakina* v. *Sarada*, 21 C. 142. 20 I. A. 160: *Kachar* v. *Oghadbhai*, 17 B 35 But unless the defendant entered on the property in the exercise of a *bona fide* claim of right, the costs of collecting the rents and profits should not be deducted; *Dungar* v. *Jairam*, 24 A. 376; *Raja Sashi Kanta* v. *Raja Sarat Chundra*, 34 C. L. J. 415 70 I. C. 6.

Decree for Mesne Profits—When operates.—A decree for mesne profits in general terms does not become operative till after the amount has been ascertained by the Court and the Court-fee prescribed by s 11 of the Court-fees Act has been paid.—*Jitendra* v. *Rasik*, 27 I. C. 300 (24 C. 173, 1 C. W. N. 243 referred to).

" Delivery of possession."—The mere filing of a petition stating that the plaintiff might take possession, of which no notice went to the plaintiff, would not be tantamount to delivery of possession and the defendant would continue to be liable for mesne profits till actual delivery; *Malladi* v. *Brundavanam*, 2 M. W. N 258.

" Relinquishment of possession."—If the notice of relinquishment is given at a time when it is too late to cultivate, a party does not escape liability to pay mesne profits, *Naina* v. *Arumuga*, 2 L W 1129.

Second Application for Assessment of Mesne Profits if maintainable.—An application for assessment of mesne profits is an application in the suit; so where such an application is dismissed for default, it is equivalent to a dismissal of the claim for mesne profits, and fresh application is not maintainable.—*Upendra Chandra* v. *Sakhi*, 16 C. L. J. 8 (*followed* in *Ganga Prasad* v. *Hemangini*, 27 I. C. 997.) On the dismissal of the former application for ascertainment of mesne profits under Or. IX, r. 2, the only available remedy open to the plaintiff against the order was that provided by Or. IX, r. 4, and as the plaintiff did not apply to set aside the order of dismissal his second application for assessment of mesne profits was not entertainable —*Kapilman Misser* v. *Kokilman Misser*, (1921) Pat. 25 · 62 I. C 747

Suit for Mesne Profits Without Declaratory Suit Not Maintainable.—If a person dispossessed from immoveable property brings a suit for recovery of mesne profits, it is not maintainable The proper remedy is to institute a suit for declaration of title and recovery of possession with mesne profits The symbolical possession by plaintiff is effective as against the judgment-debtor though it may not be operative as against strangers —*Giri Narain* v. *Modhusudan*, 17 C W. N. 324 . 18 I. C. 751 Although one may perhaps recover mesne profits, though out of possession, still, in order to recover damages in a case where he was out of possession, he must show that he has a right to immediate possession —*Elahi* v *Ram Narain*, 16 C W. N. 288.

Mesne Profits Against Co-sharers.—A co-sharer is not entitled to get mesne profits from his co-sharers on account of their cultivating lands in excess of their shares.—*Debnarayan* v *Kali Das*, 6 B. L R. Ap 70: 14 W. R 397 (*affirming* 13 W R 412)

Mesne profits may be awarded to a co-sharer suing another for recovery of possession when there is ouster. Mere excess of enjoyment is not ouster.—*Gora Chand* v *Keshab*, 23 I C. 122

Right to and Liability for Mesne Profits.—A decree-holder, after obtaining possession, is not at liberty to sue the tenants for rents falling due before the date of his taking possession His proper course is to sue the wrongful possessor for mesne profits —*Woomesh Chunder* v. *Markuna*, 12 W. R 34 · 3 Bom. L. R. Ap 99

A lessor preventing ryots from paying rent to the lessee, when the latter comes to take possession, is liable for mesne profits, even though he may not himself collect the rents.—*Bheekumbur* v. *Raj Chunder*, 15 W. R. 196. *See*, however, *Churn Singh* v. *Rungoo*, 15 W. R. 221, where it has been held that obstruction to possession may be a good ground for a

claim for damages, but it cannot support a claim for mesne profits unless there has been dispossession

Possession in execution of decree subsequently set aside is lawful The right to mesne profits accrued from the time when the decree has been set aside —*Holloway* v *Guneshur*, 3 C L J. 182.

A party who has been active in wrongfully keeping another out of possession is liable for damages, whether he derived any profits himself from the possession of the land or not —*Ghoogly* v. *Chundee*, 21 W. R. 246 They should only be calculated for any period during which the defendant was active in keeping the plaintiff out of possession —*Indurjeet* v. *Radhey*, 21 W. R. 269

Where possession was taken by a third party after suit in satisfaction of some other claims against the defendant *Held* that under the circumstances the defendant could not be held liable for the mesne profits. *Haradhun* v. *Joykisto*, 11 W R 444

As a general rule, a suit for mesne profits will lie against persons who have been found to be in wrongful possession. If the plaintiff has obtained a decree against several joint wrong-doers, he cannot single out one or more of them only as defendants in a suit for mesne profits.—*Suttya Nundo* v. *Suroop Chunder*, 14 W R 76

Where lands are wrongfully withheld, the actual occupiers, as well as the person who leased the lands to them, are jointly liable for the damages caused by such trespass —*Muddun Mohun* v. *Ram Dass*, 6 C. L. R. 357.

Where intermediate holders combine wrongfully to keep an auction-purchaser out of possession, they must all be held liable for mesne profits; the Court need not apportion their liability in proportion to the extent of the property respectively held by them —*Ram Chunder* v. *Ram Chunder*, 23 W. R 226.

In a suit for mesne profits against a number of defendants who have taken possession of distinct portions of lands forming parts of newly-formed *chur*, to which they have no title, it is fair and equitable in such a case that they (defendants) should be severally liable for mesne-profits in respect of the parcels occupied by them respectively.—*Krishan* v *Kunjo*, 9 C. L R. 1.

In a suit for mesne profits, where there are several defendants, their liability should be assessed in proportion to the amount of profits which each had derived from his wrongful possession.—*Nawab Nazim of Bengal* v. *Raj Coomaree*, 6 W. R 113; and *Collector of Bogra* v. *Shama Sunkur*, 6 W. R. 230. *See* also *Ramratan* v *Aswini*, 14 C. W. N. 849; 11 C. L J. 503; 6 I. C 69.

Unless the landlords combine with the tenure holders in dispossessing the plaintiff, they cannot be made jointly and severally liable for the mesne profits; *Salimulla* v. *Sibsundari*, 8 I. C 707 · 37 C. 559; 11 C L J. 603.

An *ijaradar* taking an *ijara* lease from a party in wrongful possession pending litigation is liable for mesne profits in a decree against his landlord —*Bidyamayi Debia* v. *Ram Lall*, 8 Bom. L. R. Ap. 80; 17 W. R 148.

Where, in a suit for partition, it appeared that the vendor of the portion sued for had kept the vendee out of possession, the vendor, though liable for mesne profits, was not in the position of trustee of the rents for the party kept out of possession.—*Nilkamal* v. *Gunomani*, 7 Bom. L. R. 113: 15 W. R. 38, P. C.

Where, upon the expiry of the term of a lease, but without a notice of ejectment having been given by the lessor, possession was taken and rents were collected by a person claiming under a subsequent lease. *Held* that second lessess were wrong-doers, and were liable for damages by way of mesne profits.—*Sitab Dei* v. *Ajudhya Prasad*, 10 A. 18.

A minor who had been adopted by a widow was not made a party to an appeal, preferred by her after the adoption, from a decree made against her when she represented the estate. *Held* that the minor by his adoptive mother, as his guardian, was liable to a suit for mesne profits brought after the decree upon title, it being made clear that the suit for mesne profits was substantially brought against the minor.—*Hari Saran* v. *Bhubaneswari*, 16 C. 40, P. C. (8 M. I. A. 229, and 14 C. 201, *referred to*).

A purchaser at a sale for arrears of revenue, who enters into possession of the purchased property is bound to account for mesne profits to the person in whose favour the decree is subsequently reversed.—*Perumal Udayar* v *Krishnama*, 17 M 251 (21 C. 142, P C. *followed*).

A plaintiff may perhaps recover mesne profits even though he be out of possession. But to recover damages for fish said to have been caught, he must at least show that he has an immediate right of possession, if he were claiming it.—*Elahi Baksh* v *Ramnarayan*, 10 I C. 117.

A *benamidar* can apply for ascertainment of mesne profits.—*Prasanno* v. *Ashutosh*, 18 C. W. N. 451.

Decree for Mesne Profits Without Mention of Period.—Where the decree does not state from which period, and up to what period, the plaintiff was entitled to mesne profits, he was entitled to mesne profits up to the date of delivery of possession.—*Beni Prosad* v. *Ramchandra*, 13 C. W. N. 43-*n* (8 C. 178, P. C. *folld*).

Where a decree awarded mesne profits without mentioning whether it was future or past, the reasonable construction would be that the Court intended to award mesne profits up to the time of possession.—*Kishan* v. *Suraj*, 16 I. C. 866.

A decree for possession and mesne profits must to be held to mean mesne profits down to the date of delivery of possession —*Dhurm Narain* v. *Bundhoo*, 12 W. R. 75, and *Hurcchur* v *Mollah Abdoolbur*, 17 W. R. 209

Mode of Assessment and Calculation of Mesne Profits.—The Court should take into consideration what the defendant made and not what the plaintiff lost; *Anukul* v. *Nabin*, 15 I. C. 1.

Cultivating expenses ought to be deducted.—*Sankara* v. *Venkalaratnam*, 21 M. L. J. 30: 18 I. C. 615.

A decree-holder is entitled, as mesne profits, to whatever the wrong-doer has collected, though it be more than what the decree-holder himself might have ordinarily collected.—*Chunder Coomer* v. *Kashee Nauth*, 5 W. R. Mis. 37.

When a person in wrongful possession of land has himself occupied and cultivated it, the proper principle on which the amount of mesne-profits is to be calculated is to ascertain what would have been fair and reasonable rent for the land if the same had been let to a tenant during the period of unlawful occupation of the wrong-doer.—*Raghu Nandan* v *Jalpa Patap*, 3 C. W N. 748. *See* also *Luckmeswar Singh* v. *Chairman of the Durbhanga Municipality*, 18 C. 99, P. C. (107); *Bindabun Chunder* v. *Roberts*, Bom L R. Sup Vol. 1004-*n*; *Chardon* v *Ajeet Singh*, 12 W. R. 52, *Tripoora Soonduree* v *Pramotho Nath*, 11 W. R. 533; *Bisheswree* v. *Mohun*, 5 W. R. Mis. 35, *Madhub* v. *Haradhun*, 14 W. R. 294; *Promotho* v *Tripoora Soonduree*, 10 W. R. 463. Where the decree-holder was in constructive possession by letting out the lands to tenants, before dispossession, the mesne profits should be measured by what would be a fair and reasonable rent for the lands if the same had been let out to tenants during the period of unlawful occupation of the wrong-doer. The principle of assessing mesne-profits in such cases will depend upon the character of the possession held by the decree-holder before ouster.—*Surja Pershad* v *Reid*, 29 C. 622: 6 C. W. N. 409 (3 C W N. 748 *distinguished*)

The character of possession before trespass should be ascertained, because such possession is a fair index of intention as to the mode of occupation if there were no trespass. The character of the land and its use for a long series of years indicating that the plaintiff, if he had been in possession, would have used the land for cultivating it himself with ordinary food crops *Held* that the mesne profits should be assessed on the basis of the produce and not rent—*Lachmi Naran* v. *Jotindra Mohan*, 35 C. 1000 12 C W N 650. *See* also 30 C. 536.

A landlord who dispossesses a ryot is liable, not merely for the profit which he makes by letting the land, but to make good the loss which the ryot sustains by being dispossessed.—*Hurruck Lall* v. *Sreenibash* 15 W R. 428, *Bhero Chandra* v. *Bamundas*, 3 B. L R. 88: 12 W. R 481; and *Mahomed Azmul* v *Chedee Lall*, 12 W. R. 104 But when the position of the plaintiff is that of landlord and tenant combined and the defendant a sub-tenant, the mesne profits must be assessed on the value of the crops raised by the defendant, and not upon the basis of the rent.—*Gopal Chunder* v *Bhuboon Mohun*, 30 C. 536.

In determining the mesne profits of *khamar* land, 5 per cent on the value of the actual produce is sufficient allowance to meet the costs of supervision and any other incidental charges—*Ejatulla Bhuyan* v. *Chandra Mohan*, 12 C W. N 285 7 C L J 197.

In determining the amount payable to the decree-holder for mesne profits, the Court is bound to consider, not what has been, or what, with good management, might have been, realized by the party in wrongful possession but what the decree-holder would have realized if he had not been wrongfully dispossessed—*Luckhy Narain* v *Kally Puddo*, 4 C. 882 4 C L. R. 60.

The use which the trespasser actually made is not a determining factor. The question is, what would the plaintiff have made out of it but, for defendant's trespass. The nature of plaintiff's possession before dispossession is ordinarily the determining factor.—*Maharaja of Vizianagaram* v. *Alam*, 9 A. L. J. 774: 16 I. C. 126.

Mesne profits liable in execution of a decree are the rents of an estate, *minus* costs of collection, Government revenue, losses by desertion, and death of ryots, by drought, etc. The *onus* of proving the actual amount of mesne profits lies with the wrong-doer, who must produce his accounts of collection.—*Dinobondhoo* v. *Keshub Chunder*, 8 W. R. Mis. 25; *Ram Nath* v. *Digumbar*, 8 W. R Mis 30.

On failure of decree-holder to prove the rates at which the rents were realized the judgment-debtor was held liable for the amount stated in [illegible] *minus* the cost of collection.—*Palmer* v. [illegible]

The rule for the assessment of mesne profits is, that the right of the true owners is to all the profits of the land, and the trespasser must be held responsible for all that he had realized, and receive credit for everything for which he is entitled to credit, such as the rents paid and charges for collection. He does not lessen his responsibility by remitting rent or neglecting to make collection.—*Kalee Debee* v *Modhoo Soodun*, 16 W. R. 171.

Mesne profits should not be estimated on the gross produce of an estate except when all other means of ascertaining them failed —*Khemon Kuree* v. *Modhoo Mutty*, 4 W. R Mis. 23

When a ryot, himself an actual cultivator, is dispossessed, the measure of damages should be the value of crops The mode of assessment of mesne-profits of *zerait* lands pointed out.—*Laljee Shahay* v. *Walker*, 6 C W N. 732.

In executing a decree for mesne-profits, a Court is justified in excluding from the account unprofitable lands —*Becharam* v *Brojonath*; 9 W. R. 369.

In assessing mesne profits of *julkar*, the nearest approximate value of the produce indicated by the evidence and plaintiff's statement should be allowed —*Enaet Ali* v. *Sobhnath Misser*, 15 W R. 258.

Ordinarily in the case of a decree for mesne profits against a trespasser in possession of immoveable property, the collection expenses incurred by him during the period of his possession will be allowed, it is only when the trespass is of a very aggravated character, that the Court, in the exercise of its discretion, may refuse such expenses —*Abdul Ghafur* v. *Raja Ram*, 23 A. 252. *See* also *Dungar Mal* v *Jairam*, 24 A. 376 (1 A. 518 F B. *followed*). In the absence, of evidence, collection charges were allowed 10 per cent.—*Girish Chunder* v *Soshi Shikhareswar*, 27 C. 951, P. C.: 4 C. W. N 631, P C, *Vidyaram* v *Mohan*, 6 A L J 827; *Kishen* v. *Suraj*, 16 I. C 866 But collection charges should be allowed upon the amount actually collected and not upon the net proceeds coming to the zemindar.—*Erfoonissa* v. *Rukeehoonissa*, 9 W. R, 457.

Duty of Appellate Court When Mesne Profits Not Ascertained.—In cases falling within Or. XX, r. 12, C. P. Code, the proper course for the Appellate Court to take is, not to remand the suit where it finds that a person is entitled to possession, but to pass a preliminary decree so far as possession is concerned and direct an enquiry as to the mesne profits in cases where the lower Court has not dealt with the question.—*Subba Goundan* v. *Krishnamachari*, 45 M. 419: 42 M. L. J. 372: (1922) M. W. N. 269.

Award of Larger Amount of Mesne Profits Than Claimed.—The Court cannot give a larger amount of mesne profits than is claimed, although more is proved.—*Sooriah Row* v. *Cota Jhery*, 5 W. R. 127, P. C., *Gooroo Dass* v. *Bunshee Dhur*, 15 W. R. 61, and *Karoo Lall* v. *Forbes*, 7 W. R. 140. In *Baboo Janjha* v. *Byjnath Dutt*, 6 C. 474: 7 C. L. R. 530, it has been held that the amount of mesne profits recoverable by a plaintiff must be limited to the amount claimed in the plaint. But in *Jadoomoney* v. *Hafez Mahomed*, 8 C. 205, and in *Gouri Prasad* v. *Reily*, 9 C. 112: 12 C. L. R. 41, it has been held that a plaintiff is not limited to the amount or rate stated in the plaint, but he is entitled to recover the larger amount found due on payment of further Court-fees. *See* also *Peary Soonduree* v. *Eshan Chunder*, 16 W. R. 302; and *Hurro Gobind* v. *Digumburee*, 9 W. R. 219.

As to awarding mesne profits in excess of the Court's pecuniary jurisdiction, see *post*.

Interest on mesne profits.—Notwithstanding the provisions of section 211, C. P. Code, 1882, the Court has discretion to give or refuse interest at it chooses. A decree which merely grants mesne profits, and is silent as to interest, must be taken to mean that mesne profits shall carry interest on them. Where the Court does not intend to give interest, it should expressly refuse it.—*Grish Chunder* v. *Soshi Sikhareswar*, 27 C. 951, P. C.: 4 C. W. N. 631. Followed in *Hurmonoje Narain* v. *Ram Prasad*, 6 C. L. J. 462, in *Grish Chunder* v. *Sasi Sekhereswar*, 33 C. 329; and in *Vidya* v. *Mohan*, 6 A. L. J. 327: 2 I. C. 464. *See* also *Aruna Chelam* v. *Aruna Chelam*, 15 M. 203, *Banwari* v. *Rama*, 10 A. L. J. 533. But see *Abdool Ghafur* v. *Raja Ram*, 22 A. 262; and *Huroo Durga* v. *Surut Sundari*, 8 C. 332, P. C. (*reversing* 4 C. 674: 3 C. L. R. 517), in which it has been held that where interest on mesne profits is not given by a decree, it is not obtainable in execution. In *Kishnanand* v. *Partab Narain*, 10 C. 785, P. C., it has been held that there is no rule of law obliging the Court to allow interest on mesne profits, it is a matter for the discretion of the Court to allow interest or not. Interest on mesne profits ought to be allowed.—*Ram Charan* v. *Annada Moyee*, 18 C. W. N. 76-*n*.

Interest should ordinarily be allowed on mesne profits, though, inasmuch as the interest forms an integral part of mesne profits, the interest is as much in the discretion of the Court as the mesne profits themselves.—*Raja Sashi Kanta* v. *Raja Sarat Chandra*, 31 C. L. J. 415.

A claim for mesne profits includes interest on such profits. Interest as forming a part of the mesne profits or damages cannot be allowed for any period subsequent to that limited by this section. Interest at 6 per cent. should be allowed after delivery of possession, and 12 per cent. to

continue till the obtaining of possession.—*Ijjutulla* v. *Chandra Mohan*, 7 C. L. J. 197: 12 C. W. N. 285

It is discretionary with the Court to allow interest on mesne profits beyond three years, *Nama* v. *Arumuga*, 2 L. W. 1129.

Interest on mesne profits may be allowed year by year, on the amount found to be due, during the period of dispossession.—*Radharaman* v. *Surnomoyi*, 30 C. 506, 7 C. W. N. 437 (8 C. 332, P. C., *explained and distinguished*) Interest on mesne profits may be allowed from the commencement of the suit at the usual rate allowed by the Court.—*Hurropershad* v. *Shamapershad*, 3 C. 654, P. C. 1 C. L. R. 499. Followed in *Mudun Mohun* v. *Ram Dass*, 6 C. L. R. 357.

A Court of Revenue is competent, in a suit for profits under section 93, Act XVIII of 1873, to award the interest claimed on such profits.—*Totaram* v. *Sher Singh*, 1 A. 261

Where the lower Court did not award interest, the Appellate Court cannot add interest; *Subramania* v. *Varadarajulu*, 8 M. L. T. 356

The Court may reduce the Court-rate of 6 per cent. under reasonable circumstances; *Mahaju* v. *Narayanasami*, 22 M. L. J. 253: 14 I. C. 396

Three years from decree.—The plaintiffs, having obtained a decree for possession with mesne profits till delivery of possession, applied for execution. An obstruction having been caused, they applied under Or. XXI, r. 99 and thereupon their application for execution was dismissed. After the disposal of their application under Or. XXI, r. 99, they applied for execution more than three years after dismissal of the first application for execution. *Held* that mesne profits for more than three years from the date of the decree should not be awarded, even though possession was not delivered during that period; *Narayan* v. *Sono*, 24 B. 345. Followed in *Trailokhya Nath* v. *Jogendra Nath*, 35 C. 1017.

The period of three years for payment of mesne profits should be calculated from the date of the ultimate decree which is the only decree capable of and brought in execution. In no case can the plaintiff claim mesne profits for any period subsequent to an offer by the defendant to restore him possession.—*Raja Sashi Kanta* v. *Raja Sarat Chandra*, 34 C. L. J. 415

Mesne profits cannot be given for more than three years after decree.—*Grish Chunder* v. *Soshi Shikhareswar*, 27 C. 951, P. C.: 4 C. W. N. 631, P. C. *See* also, *Uttamram* v. *Kishordas*, 24 B. 149. In *Basantakumari* v. *Kamikshyakumari*, 33 C. 23, P. C.: 2 C. L. J. 238: 10 C. W. N. 1, mesne profits for more than three years before suit were allowed. *See* 35 C. 1017.

If there has been an appeal from a decree for mesne profits, and has been confirmed, in executing the decree the three years is to be completed from the date of the appellate decree.—*Radhanath* v. *Chandi Charan* 30 C. 660; *see* also *Bhup Indar* v. *Bijai*, 23 A. 152.

Limitation for Ascertainment of Mesne Profits.—Applications to determine mesne profits are to be treated as applications for execution of the

decree in which the mesne profits have been allowed, and their striking off does not prevent the decree-holders from making a further application of the same nature.—*Ram Kishore* v. *Gopi Kant*, 28 C. 242. Followed in *Upendra Chandra* v. *Sakhi Chand*, 7 C L J. 301: 13 C. W. N. 4. *See* also, *Mantina Ramachandra* v. *Sri Raja Mantripagoda*, 46 M. L. J. 46: 19 L. W. 69: (1921) M. W N. 115.

Where a decree for possession is given, and an enquiry as to the amount of mesne profits is reserved, the decree for possession is only a partial decree in the suit, and there is to be a further enquiry and further decree in respect of mesne profits. Limitation for execution of such decree runs from the date of the final decree, that is, from the ascertainment of mesne profits.—*Dildar Hossein* v. *Mujeedunnissa*, 4 C. 629; *Krishnan* v. *Nilakandan*, 8 M. 137, *Anando Kishore Dass* v. *Anando Kishore Bose*, 14 C. 50; *Puran Chand* v. *Roy Radha Kishen*, 19 C. 132 F. B.; *Prayag Singh* v *Raju Singh*, 25 C 203; *Fatima Bibi* v. *Abdul Majid*, 14 A. 531; *Prosanno* v *Asutosh*, 18 C W. N. 451. *See* also *Muhammad Umarjan* v. *Zinat Begam*, 25 A. 385 (13 A. 35 and 19 C. 132, *followed*); *Gopal Chandra* v. *Preo Nath*, 32 C. 175; and *Waliga Bibi* v. *Nazar Hasan*, 25 A. 623

Mesne profits can be recovered only for a period preceding three years next before the institution of the suit.—*Kishnanund* v. *Partab Narain*, 10 C. 785, P. C ; *Peary Mohan* v. *Khelaram*, 8 C. L. J. 181: 35 C. 996: 13 C. W N 15. *See* also, *Appa Rao* v *Court of Wards*, 5 M. 236.

Under Art. 109, of the Limitation Act, a defendant is liable for the mesne profits received by him, or which he might have, with due diligence, received during the three years before the date of suit and not before. The period of three years fixed, has no reference to the time when rents fall due —*Abbas* v. *Fassihuddin*, 24 C. 413. *See* also *Hays* v. *Padmanund*, 32 C. 118, (24 C 413, *referred to*, 22 W. R. 126, *distd.*)

See Art 109 of Act IX of 1908

The fact that a particular year for which mesne profits were awarded by the decree is more than three years before the date of the execution application, which is itself in time, will not render the decree for that year time-barred; *Malladi* v. *Brundavanam*, 2 M. W. N. 258.

Burden of Proof.—The burden of proving the amount of mesne profits actually received, is on the person who received them, but the burden of proving the profits that the person in occupation might with ordinary diligence have received therefrom, is on the person claiming them, *Ramakka* v. *Nagesan*, 47 M. 800 92 I C 133 A I R 1925 M 145, *Muhammad Abdul Gaffar* v. *Muhammad Samsuddin*, 47 M L J 730: 92 I C 139 A. I. R. 1925 M. 297

Jurisdiction in Suits for Mesne Profits Antecedent and Pendente Lite.—Where in a suit for possession and mesne profits or in execution the amount assessed together with the value of the suit exceeds the pecuniary jurisdiction of the Court *held* that the Munsif had jurisdiction to ascertain the mesne profits, and give effect to the order made in his decree.—*Rameswar* v *Dilu*, 21 C 550 (*doubted in Ijjatulla* v *Chandra*, 34 C. 954: 11 C. W. N 1133, *distd in* 13 C. W. N. 493.

a decree for possession and mesne profits the mesne profits ascertained was more than Rs. 1,000: *held* the Munsif had jurisdiction to award the sum; *Panchoram* v *Kinu*, 40 C 56. 15 I. C 252 (21 C. 550 *folld*; 8 I C. 34, 13 C L. J. 132, 15 C. W. N. 500, *distd.*). But see *Golap Singh* v *Indra*, 9 C. L J 367· 13 C. W N. 493. Mesne profits antecedent to the suit and mesne profits *pendente lite* stand on very different grounds A munsif cannot entertain the application for mesne profits *pendente lite* when the claim is laid at over Rs. 1,000 and the proper course is to return the plaint for presentation to the Sub-Judge's Court But mesne profits antecedent to the suit can be mentioned approximately and if a plaintiff brings a suit for possession and mesne profits in a Court of limited pecuniary jurisdiction, he may be deemed to have limited his claim with his eyes open and cannot afterwards put forward a claim in excess of the jurisdiction of the Court; *Bhupendra* v. *Purna*, 13 C. L. J 132 8 I C 34 (13 C W. N 493 *folld.*; 7 I. C. 385 *dissented from*).

Proceedings for ascertainment of mesne profits *pendente lite* are proceedings in the suit, and under Or XX, r. 12, C. P. Code, the Munsif's Court which passed the decree for possession is quite competent to entertain the application for ascertainment of mesne profits *pendente lite*, although the amount of such mesne profits be estimated at over Rs 5,000 beyond the maximum pecuniary limit of Munsif The jurisdiction limited under ss 18 and 19 of Act XII of 1887 does not curtail the special power conferred under Or XX, r 12 of the C P. Code, under which the trial Court competent to pass a decree for possession, is also competent to pass a decree for mesne profits irrespective of the amount claimed by the decree-holder, *Dina Nath* v *Musst. Mayavati*, 2 Pat L T. 143. A I R 1921 Pat 69 6 Pat. L. J. 54. *See* also *Suraj Prasad Panday* v *Somra Mahton*, 2 Pat. L T 648

Held by the Full Bench (Ghose and Bannerjee, JJ, *dissenting*) that suit for mesne profits is cognizable by Small Causes Courts —*Kunjo Behary* v *Madhub Chundra*, 23 C 881, F B (18 C. 316 *overruled*; 17 C. 541 and 707, and 15 M. 298 *referred to* by Ghose, J.); *followed in Seshagiri Ayyar* v *Marakathammall*, 22 M. 196; and *Subba Rao* v *Sitaram Ayyar*, 24 M 118 But see *Antone* v. *Mahadev*, 25 B. 85

A suit by mortgagor against the mortgagee for mesne profits for the period he was in wrongful possession is maintainable in a S. C. Court. Art. 31 of Sch II of Prov S C C Act does not apply, *see* 14 C. W. N. 1001

A suit for mesne profits was within jurisdiction at the time of institution, but subsequent mesne profits increased its value beyond the jurisdiction of the munsif. Objection was not taken in lower Court, but was urged in appeal; *held* that it was not tenable; *Jamiruddin* v. *Aswini*, 14 I. C. 34.

A munsif has no jurisdiction to entertain a claim for mesne profits in excess of the limits of his pecuniary jurisdiction; *Bhupendra* v. *Purna*, 21 I. C. 232.

Court-fee in respect of Future Mesne Profits.—Where a decree directs that mesne profits accruing subsequent to the institution till delivery of

possession should be ascertained, no further Court-fee is leviable on such future mesne profits.—*Rama Krishna* v. *Bhimabai*, 15 B. 416. But it has been recently held by a Full Bench of the Patna High Court that Court-fee is payable in respect of a claim for future mesne profits, that is to say, mesne profits from the date of the institution of the suit up to the date of realization. The Court has no jurisdiction to require the plaintiff to pay additional Court-fee upon his claim for future mesne profits as a condition for proceeding with the investigation of the claim, and has no jurisdiction to dismiss the proceedings if the additional Court-fee is not paid; *Golam Sahu* v. *Chintaman Singh*, 5 Pat. 301: 93 I. C. 939: A. I. R 1926 Pat. 218 F B (15 B. 416 *not followed;* 33 C. 1232 *followed*).

Where the Court executing the decree has assessed the mesne profits, but the necessary Court-fees have not been deposited within the time fixed as provided by section 11 of the Court Fees Act (VII of 1870), the claim in respect to those mesne profits must be dismissed; after such dismissal, no application for execution of the decree for mesne profits can be entertained, as no such decree is in existence.—*Kewal Kishan* v. *Sookhari*, 24 C. 173 · 1 C W N 243 *approved* in *Dwarkanath* v. *Debendra Nath*, 33 C 1232 *See*, however, *Periannan Chetty* v. *Nagappa*, 30 M. 32: 16 M L J 513

In a suit for possession and mesne profits, the value of the original suit for the purpose of section 21, Act XIII of 1887, depends not merely upon the value of the property sought to be recovered, but also upon the value or amount of the profits recoverable —*Mohini Mohan* v. *Satis Chandra*, 17 C. 704

When Separate Suit for Mesne Profits Lies.—In a suit for possession and mesne profits, the Court has power either to award mesne profits up to the date of institution of the suit, or up to the date of delivery of possession; but where a decree for possession is silent as regards mesne profits which have accrued between the date of the institution and delivery of possession a separate suit will lie for such subsequent mesne profits.—*Mon Mohun* v *The Secretary of State*, 17 C 698 Followed in *Ram Doyal* v. *Madan Mohan*, 21 A. 425, F B, and in *Hays* v. *Padmanund Singh*, 32 C. 118; *applied* in *Lalessor Babui* v *Janki Bibi*, 19 C. 615; *distinguished* in *Jiban Das* v *Durga Pershad*, 21 C 252, and *approved* in *Bhivrav* v. *Sitaram*, 19 B. 308 *See* also *Rama Bahadra* v. *Jagannatha*, 14 M. 328. 41 M 188: 33 M. L J. 699 · 42 I. C. 929. But see *Kachu* v *Lakshman Singh*, 25 B 115

Where a decree declares plaintiff's right to receive mesne profits, they cannot be assessed in execution, but by a seperate suit.—*Vinayak Amrit* v. *Abaji*, 12 B 416

Where a plaintiff in 1907 sued for possession and future mesne profits till delivery of possession and possession was only decreed and no mesne profits were awarded, subsequent suit for mesne profits of the same period is barred by *res judicata*, *Ramaswami* v. *Srirangaraja*, 26 I. C. 622 Where the decree is silent as to future mesne profits though asked, a fresh suit is not *res judicata*.—*Misau* v. *Nga Meik*, U. B. R. (1915), 2nd. Qr., 81.

to in clause (*a*), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

(2) Where the Court has adjudicated upon rival claims to pre-emption, the decree shall direct—

(*a*) if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect; and,

(*b*) if and in so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions. [S. 214.]

COMMENTARY.

Alterations and Their Effect.—Sub-rule (1) is somewhat similar to s. 214 of the Code of 1882, but material changes have been introduced The words "*whose title thereto shall be deemed to have accrued from the date of such payment*" are new, and have been added to supersede the ruling in *Ramasami* v *Chinnan*, 24 M. 449, where it was held that title to pre-empted property could not vest without an instrument of transfer as required by the Transfer of Property Act.

Sub-rule (2) and its clauses (*a*) and (*b*) are altogether new.

"These amendments are based on the rulings contained in the decisions of the High Court of Allahabad at 6 A. 370, 455 and 11 A. 164 Having regard to the opinion expressed in 24 M. at p. 463, we have thought it right to make it clear that title vests without an instrument of transfer. To require a transfer now might throw a cloud over a numberless titles rest on the assumption by long practice that no instrument of transfer was necessary"—See *Notes on Clauses.*

In the Madras case above referred to, BHASHYAM AYYANGAR, J., observed as follows: "I may here observe that the form of decree prescribed by s. 214, C P. Code, in a suit to enforce the right of pre-emption is based on the decision of the Allahabad High Court (1 A. 132), which was passed prior to the Transfer of Property Act and which followed an

earlier decision (3 Agra 231). In cases in which the right of pre-emption has to be enforced subsequent to the T. P. Act, the form of decree prescribed by s. 214 has to be supplemented by directing the execution of a registered instrument of sale by the defendant. Though the contract for sale may have been entered into prior to the T. P. Act, yet if the sale itself had not been effected prior thereto, no subsequent sale can be effected unless it complies with the provisions of s 54 of the T. P. Act IV of 1882."—*Ramasami* v. *Chinnan*, 24 M 449 (463).

In 6 A. 370, MAHMOOD, J., observed as follows: " The decree in cases where two rival pre-emptors of the same degree seek to enforce pre-emption, as each of them necessarily must do, in respect of the whole property conveyed by one transfer, are defective if they dismiss the suit for any portion of the property, without providing for the contingency of the rival pre-emptor decree-holder omitting to enforce his decree in respect of the share decreed to him And it follows, *a fortiori*, that when the rival pre-emptors possess different degrees of pre-emption, the decree, at least in one of the rival suits, must be essentially defective if no provision is made for the contingency of the superior pre-emptor never enforcing his right."

The provisions of s. 214, C. P. Code, fall short of lying down any rules as to the form of decree in cases where rival pre-emptors, possessing equal rights of pre-emption come forward to enforce the right in respect of the same sale, and the section is equally silent in respect of cases like the present, where one of the rival pre-emptors possesses superior right of pre-emption to the other. The question is being left unprovided for by the Legislature, the Courts have to fall back upon the general principles of equity in passing decrees such as would suit the exigencies of each case " Clauses (*a*) and (*b*) of sub-rule (2) have been added in accordance with the observations of MAHMOOD, J., in the above Allahabad cases.

Applicability of Order XX, Rule 14.—Where the vendee is not entitled to present possession, the provisions of Or XX, r. 14 are not applicable; *Raghubir Singh* v *Jodha Singh*, 45 A. 482. 21 A. L J. 417: 73 I C 646.

Decree in Pre-emption Suit.—The decree in pre-emption suit should direct that the amount awarded as well as the costs decreed against plaintiffs if any, should be paid within a specified time Where the Court omitted from the decree any mention of the sum awarded as costs the payment into Court of the decretal amount only was excusable, *Baghela* v. *Musst. Sallo*, 18 I C 994 · 3 P R 1913

Jurisdiction in Pre-emption Suit.—In a pre-emption suit jurisdiction of the Court is to be decided by the valuation set forth in the plaint, and not by the price set out in the sale deed upon which the suit is based; *Baldeo* v *Har Ratan*, 9 I C 414

Conditional Decree in a Pre-emption Suit for Payment of Money—Compliance.—The terms of the decree must be strictly complied with. Where the pre-emptor had paid one anna less than the decretal amount, he was made to restore the property and was not allowed to make up the deficiency; *Kanhyalal* v *Shafi*, 18 I. C 600. 141 P L R. 1913.

In decreeing a right of pre-emption civil Court has no power to make the decree-holder's right depend on payment of the purchase-money within

a specified time.—*Ashan Aly* v. *Subokhee Bibee*, 10 W. R. 53. *Contra* in *Ewaz* v. *Mokuna Bibi*, 1 A 132, where it was held that the Court was competent to make such a condition, and if the decree-holder fails to comply with such condition, he loses the benefit of the decree. *See* also *Mahabir Parshad* v *Debi Dial*, 1 A. 291.

A decree in a pre-emption suit directed that the purchase-money should be paid within a certain period from the date the decree became ' final ' The period of limitation prescribed from an appeal from this decree expired on a day when the Court was closed. *held* that the decree did not become final before the day the Court re-opened.—*Ram Sahai* v. *Gaya*, 7 A. 107 (1 A 132 *followed*)

When a direction contained in a decree referred to the time at which such decree should become final *held* that such decree became final on being affirmed by the lower Appellate Court, where, although a special appeal was preferred by the plaintiff against the decree of the lower Appellate Court, the same was subsequently allowed to be withdrawn.—*Hingan Khan* v *Ganga Pershad*, 1 A. 293. *See* also *Narain Das* v. *Lachman Singh*, 3 A. 135

A decree in a pre-emption suit directed the plaintiff to pay the purchase-money within 30 days, and in default the suit should stand dismissed The last day for payment being Sunday, the plaintiff paid the money into Court on the next day *held* this was a sufficient compliance with the condition imposed by the decree.—*Dabi Din* v. *Muhammad Ali*, 3 A 850 Where the amount of the price was paid out of Court by the plaintiff and the vendees came into Court and certified within the 30 days that they had received payment of the amount due from the plaintiff: *held* that the plaintiff had fully complied with the decree and was therefore entitled to possession; *Sukhpal Singh* v. *Abdul Rahman*, 19 A. L J 493 63 I C. 889 Where money was tendered on the last day of payment and was not deposited through mistake of Court officers, and the next day was a holiday and payment was made on the first opening day, *held* it was sufficient compliance, *Prabhu* v *Nihala*, (1916) 3 P. W. R. 12: 36 I. C 183, *Gaya Baksh* v *Tilak Singh*, 2 O. L. J. 151: 28 I. C. 379.

A conditional decree in a pre-emption suit for payment of a certain sum of money with costs was modified in appeal, and within the period specified in the Appellate Court's decree, the pre-emptor paid the sum into Court *held* that this was a sufficient compliance with the terms of the decree —*Balmukund* v *Pancham*, 10 A. 400; *followed* in *Bhagwana* v. *Goru*, 56 P. R. 1910 6 I C 954.

Plaintiff obtained a decree for pre-emption on condition of paying the amount of the decree into Court within a certain period and he raised the amount by simple mortgage of the decreed property itself and paid it into Court *Held* that it was sufficient compliance with the terms of the decree; *Lakhpat Singh* v *Babu Ram*, 40 I. C. 35.

Where a decree in a pre-emption suit was conditional upon payment of the purchase-money within one month from its date: *held* that the period allowed for payment of the purchase-money must be calculated from the date of the Appellate Court's decree.—*Rup Chand* v. *Sham Shul Jehan*, 11 A. 346, F. B ; *see* also *Nanachand* v. *Vithu*, 19 B. 258; *Sakhal*

Chand v. *Velchand*, 18 B. 203; *Bhup Indar* v. *Bejay*, L. R. 27, I. A. 209; and *Satwaji* v. *Sakharlal*, 39 B. 175 (4 A. 370; 8 C. 218; 7 A. 866; 13 C. 13, and 11 B. 172, *referred to*). *See*, however, *Jaggar Nath* v. *Jokhu Tewari*, 18 A. 223, and *Ramaswami* v. *Sundara*, 31 M. 28.

A decree for pre-emption conditioned on payment of the pre-emptive price within a fixed time omitted to mention the consequence of non-payment. *Held* that the plaintiff unless he had paid the pre-emptive price before the expiry of the fixed time, could not enforce his right of pre-emption.—*Jaikishan* v. *Bholanath*, 14 A 529 (13 A. 370 *referred to*).

In a pre-emption decree on payment of Rs. 324-12 the plaintiff paid Rs. 324 within time. *Held* that he was entitled to set off the balance, As. 12, against the cost payable to him; *Becha* v. *Shami*, 10 I. C. 454.

Deposit of decretal amount excepting costs of suit is a sufficient compliance; *Ali Husain* v. *Aminullah*, 34 A. 596: 10 A. L. J. 153: 15 I. C. 337; *Nil Kanth* v. *Mahabir Singh*, 26 O. C. 345· 74 I. C. 558.

Money was deposited within time—Decree set aside in appeal—A decree-holder of pre-emptor takes out portion of the money—Decree restored in second appeal. *Held* that the full money having been deposited originally, the pre-emptor is entitled to possession, *Najib* v *Shiva Gopal*, 11 A. L. J. 668: 21 I. C. 67.

The question as to whether the purchase-money under a conditional decree in pre-emption suit has been paid into Court within time is not one relating to the execution of the decree within the meaning of s. 47, but is one which should be decided in the suit itself.—*Muhammed Ali* v. *Debi Din*, 4 A. 420.

In depositing the purchase-money under a conditional pre-emption decree the plaintiff is entitled to deduct therefrom the sum awarded to him as costs, and therefore the decree does not become null and void by reason of his not depositing the full amount of the purchase-money within time —*Ishri* v. *Gopal Saran*, 6 A. 351; *folld* in *Parmanand* v. *Gobardhan*, 28 A. 676. *See* also *Abdus Salam* v. *Wilayat Ali*, 19 A. 256, in which after the payment of the pre-emptive price into Court by the pre-emptor a portion of the money was attached and withdrawn by his creditor.

Where a plaintiff in a pre-emption suit obtained a decree, and paid into Court the pre-emptive price as stated in that decree: *held* that he is entitled to a refund of the money with interest after reversal of that decree on appeal —*Bhagwan Singh* v. *Ummatul Husain*, 18 A 262. *Contra* in *Chaudhuri Bahal* v *Nait*, 19 I C. 1.

"Whose title thereto shall be deemed to have accrued from the date of such payment."—These words have been added to supersede the ruling in *Ramasami* v *Chinnan*, 24 M. 449, in which it was held that the title to a pre-empted property could not vest in the plaintiff without an instrument of transfer as required by the Transfer of Property Act. The addition of these words makes it clear that the title to the property vests in the plaintiff on payment of the purchase money. The plaintiff's title accrues on payment of the purchase-money and not from the date of sale; *Nadir* v. *Wali*, 5 L 486· 85 I C. 182. A I R 1925 L 202 The plain-

tiff's title is also complete from the date of payment; *Raghubir Singh* v. *Jadha Singh*, 45 A 482; 73 I C. 646; A. I. R. 1923 A. 507.

Extension of Time for Payment.—It has been held in *Ramlal* v. *Har Narain*, 18 A 400, and in other decisions under the old Code, as also in some cases under the new Code that the Court has no power to extend the time for payment after the period mentioned in the decree has elapsed (*see* the cases noted under s 148) It seems however that s. 148 of the new Code is no bar to extension of time The recent case of *Abu Muhammad* v. *Muchut*, 20 C. W N. 860; 1 Pat L J. 92 supports the view. *See* also *Naba* v *Pathana*, 18 I C 86 60 P. R 1913; *Girdhari Singh* v. *Bhupal Singh*, 45 A 456 74 I C. 745

An Appellate Court is competent to extend the time for making the deposit where the time fixed by the decree of the lower Court expired without any deposit having been made owing to the pendency of the appeal, *Parshadi Lal* v *Ram Dial*, 2 A 744 (3 Agra 254 *folld.*). When the Appellate Court has, in the exercise of its judicial discretion, extended the time for payment, the High Court will not interefere in second appeal; *Girdhari Singh* v *Bhupal Singh*, 45 A 456 74 I. C. 145: A. I. R. 1923 A. 516.

Where the decree directed payment of money within a specified time but the Court omitted from it any mention of the sum awarded against the plaintiff as costs, the Court can allow further time under s 151 for payment of the sum due as costs, *Baghela* v *Mt. Sallo*, 18 I. C 994: 8 P. R. 1913

Pre-emption Under the Mahomedan Law.—The Mahomedan Law is the only system which provides substantive rules relating to the rights of pre-emption, *Zamir* v *Daulat*, 5 A. 110, 113

Under the Mahomedan law, if a co-sharer alienates his interests to a co-sharer and stranger, the purchasing sharer, by joining an outsider in the purchase, forfeits his right as a sharer, and another co-sharer has the right of pre-emption —*Saligram* v *Rhubardyal*, 15 C. 224.

A suit for pre-emption brought by a Sunni claimant against a Shia vendor and Hindu purchasers is governed by the Sunni Hanafi law—Formalities to be observed—Purchasers, if must all be named.—*Jug Deo Singh* v. *Kazi Sayed Mahomed*, 9 C. W. N. 826; 32 C. 982.

Under the Muhammadan law of pre-emption, the owner of the dominant tenement has in respect of a sale of the servient tenement a right of pre-emption as a *Shafi-i-khalit* which is preferable to the right of one who is merely a neighbour as regards the property sold —*Karim* v. *Priyo Lal*, 28 A 127 (3 Bom L R. 396 *referred to*).

Where an estate, originally one, has been divided into two separate *mahals*, no right of pre-emption under the Mahomedan law will subsist on behalf of one of such *mahals* in respect of the other, merely by reason of vicinage.—*Abdul Rahim* v. *Kharag Singh*, 15 A. 104.

No right of pre-emption arises upon a sale which, according to Mahomedan law, is invalid, for instance, as by reason of uncertainty in the price, or the time for delivery of the thing sold —*Najmunnissa* v. *Ajaib Ali*, 22 A. 343.

A Mahomedan of the *Shia* sect cannot maintain a claim for pre-emption on the ground of vicinage under the Mahomedan law, when both the vendors and the vendee are *Sunnis*.—*Qurban Husain* v. *Chote*, 22 A. 102.

The prevalent doctrine of the Mahomedan law governing the *Shia* sect is that no right of pre-emption exists in the case of property owned by more than two co-sharers.—*Abbas Ali* v. *Moga Ram*, 12 A. 229.

The rights of pre-emption under the Mahomedan law is not recognized in the Madras Presidency as it imposes a restriction on the free disposition of property; *Ibrahim* v. *Mum Mir*, (1870) 6 M. H. C. 26.

As to Punjab and Oudh, *see* Punjab Laws Act IV of 1872, Punjab Pre-emption Act II of 1905, Oudh Laws Act XVIII of 1876.

Ceremonies under Muhammadan Law.—A pre-emptor claiming pre-emption under the Muhammadan law is bound at the time when he makes his *talab-i-ishtishhad*, to state distinctly that he has already made *talab-i-mawasibat*.—*Abbasi Begum* v. *Afzal Husen*, 20 A. 457; *folld.* in *Abid Husen* v. *Bashir Ahmed*, 20 A. 499. On this point see *Rujjub Ali* v. *Chundi Churn*, 17 C. 543 (10 C. 1008 *overruled*). *Followed* in *Mubarak Husain* v. *Kaniz Bano*, 27 A. 160.

The manner in which *talab-i-ishtishhad* is to be performed according to Muhammadan law, pointed out.—*Ganga Prosad* v. *Ajudhya Prasad*, 28 A. 24 (W. R. 1864, p. 351 *followed*).

The ceremony of *talab-i-ishtishhad* must be duly performed with the utmost promptitude—Withdrawal from Court by pre-emptors of money paid by purchaser to redeem mortgage on property sold—Waiver of right of pre-emption.—*Baijnath* v. *Ramdhari*, 35 C. 402, P. C *See* also *Jadu Lal* v. *Janki Koer*, 35 C. 575 (8 W. R. 255; 17 C. 543 *referred to*; 16 W. R. 13, F. B., *followed*; 27 A. 160 *not followed*).

Rival Claims to Pre-emption.—*Held* that decrees in cases where two rival pre-emptors of the same degree seek to enforce pre-emption in respect of the whole property conveyed by one transfer are defective if they dismiss the suit for any portion of the property without providing for the contingency of the rival pre-emptor decree-holder omitting to enforce his decree in respect of the share decreed to him.—*Kashinath* v. *Mukta Prasad*, 6 A 370; *Hulasi* v. *Sheo Prosad*, 6 A 455; and *Arjun Singh* v. *Sarfaraz Singh*, 10 A. 182. But see *Abdulla* v. *Amanatulla*, 21 A. 292.

Where, pending a suit brought by one co-sharer for pre-emption another co-sharer having equal rights with the first, filed a similar suit for pre-emption of the same sale. *held* that the second plaintiff was entitled to a decree for pre-emption in respect of one half of the property sold.—*Salig Ram* v. *Kali Shankar*, 27 A. 465 (7 A. 720 *followed*).

In the case of two rival pre-emptors, each having an equal right to claim pre-emption, the Court must provide in the decree that the whole share must be purchased by both pre-emptors, or, on the default of one by the other, or that neither of them should obtain any interest in the property in respect of which the suits are brought. The decree should not allow either claimant to pre-empt part only of the property over which

he has a pre-emptive right. The rule of law is that a pre-emptor must buy the whole, and not part only of the property.—*Arjun Singh* v. *Sarfaraz Singh*, 10 A. 182. The above rule has also been laid down in *Muhammad Wilayat Ali* v. *Abdul Rab*, 11 A. 108. *Followed* in *Mujibullah* v. *Umed Bibi*, 21 A. 119.

Custom of Pre-emption.—The law of pre-emption was introduced by the Muhammadan Government. In the province of Behar, which was an integral part of the Muhammadan Empire, the right to pre-emption is enforceable irrespective of the persuasion of the parties concerned, and exists among the Hindus of Behar, *Jadu Lal* v. *Janki Koer*, 16 C. W. N. 554, P. C : 39 C. 915: 15 C. L J. 483: 15 I. C. 657.

Though there may be a custom of pre-emption amongst the Hindus of Behar, it cannot be availed of by persons who are neither natives of, nor domiciled in, the district in which the property is situate. Where the sale is not a *bona fide* one but a sham transaction no right of pre-emption arises.—*Dhanai Ojha* v *Dewkinundan Misser*, 9 C. W. N. 874: 32 C. 988.

The existence of the custom in the Champaran district has been judicially recognized —*Jadu Lal* v. *Janki Koer*, 35 C. 575 (1863) W. R., F. B, 143 *followed*) Affirmed in 39 C 915 P. C

In order to establish a custom of pre-emption, it is not necessary to prove that the custom was immemorial, but the Courts can give effect to it, if it is proved that the custom existed for a sufficiently long period —*Lakhraj Bharthi* v *Anrud Tiwari*, 28 A 484 (17 A. 87 and 23 B 666, *referred to*).

In the absence of allegation or proof as to any custom different from, or not co-extensive with the Muhammadan Law of pre-emption, that law must be applied between Hindus—Statement of claim—Meaning and not form of the statement to be considered.—*Chakauri Devi* v. *Sundari Devi*, 28 A. 590 (28 A 60 *referred to*).

A Hindu widow in possession of the property of her husband, but not as his heir, there being a son living, has no right of pre-emption as a co-charer, even though she may be recorded as co-sharer in the village papers —*Bhupal Singh* v *Mohun Singh*, 19 A. 324. *See* also 6 A. 17: 17 A 860 *See*, however, 1 A. 452 and 20 A. 148.

There is nothing to prevent a person having his claim in the alternative on contract, custom or Mahomedan Law. But where there is an established custom of pre-emption and pre-emptor fails to bring himself within it he cannot fall back on Mahomedan Law; *Ashanullah* v. *Shamsunnissa*, 36 A. 456 (7 A. L J. 660 *distinguished*)

Pre-emption under Contract.—Pre-emption can be claimed on the basis of a contract between parties See *Kalimoddin* v. *Reazuddin*, 10 C. L. J. 626: 14 C. W. N 295. Such an agreement gives a right of pre-emption in case of private and voluntary sales, and does not apply against a third person who purchases at a court sale; *Vithal* v. *Maruti*, 34 B. 567.

Miscellaneous Cases on Pre-emption.—Where a co-proprietor does not part with his entire interest in land by an absolute sale, but merely grants

a perpetual lease, the doctrine of pre-emption will not apply.—*Dewanutulla* v. *Kazem Molla*, 15 C. 181 (8 W. R. 106, and 25 W. R. 43 *followed*).

Acquiescence in a mortgage by conditional sale does not involve relinquishment of the right of pre-emption upon the conditional sale eventually becoming absolute.—*Ajaib Nath* v. *Mathura Prasad*, 11 A. 164 (4 Bom. L. R. A. C 219: 6 A. 314 *distinguished*; 8 A. 388, *referred to*).

A secret purchase of *benami* shares in a village does not constitute the purchaser a co-sharer for the purposes of pre-emption, so as to enable him, upon the strength of the interest so acquired, to defeat an otherwise unquestionable pre-emptive right preferred by a recorded shareholder.—*Beni Shankar* v. *Maphal Bahadur*, 9 A. 480

Conditional sale—Right of pre-emption among co-sharers—Private partition of *puttidari* estate—Effect of such private partition on the right of pre-emption.—*Digambar* v. *Ram Lal*, 14 C. 761.

A co-sharer of an estate, who has a right of pre-emption, does not, merely by joining with himself members of his family, who are not co-sharers in such estate, in a suit to enforce such right, defeat such right.—*Bhurey Mal* v. *Nawal Singh*, 4 A. 259 (4 A. 252 *distinguished*). *See* also *Ram Nath* v. *Badri Narain*, 19 A. 148; *Mustaq Ahmad* v. *Amjad Ali*, 19 A. 311 and 324.

Where a pre-emptor joins with himself a stranger in suing to enforce a right of pre-emption, he thereby forfeits such right.—*Bhawani Prasad* v. *Damru*, 5 A. 197.

An agreement by the mortgagor to give the mortgagee a preference or pre-emption in case of sale may be enforced against a purchaser with notice of covenant —*Haris Paik* v *Jahuruddi Gazi*, 2 C W. N 575.

Where a pre-emptor tranfers his right to a stranger by mortgage, he thereby forfeits such rights.—*Bhajjo* v *Lalman*, 5 A 180 *See*, however, *Ujagar Lal* v. *Jai Lal*, 18 A. 382.

Sale of mortgaged property—Suit by purchaser for redemption—Mortgagee entitled to pre-empt—Claim to pre-empt not put forward in redemption suit—Subsequent suit for pre-emption by mortgagee not barred by *res judicata*.—*Ram Chand* v *Durga Prasad*, 26 A. 61 F. B (1 A 75 and 316, 3 A 189 and 20 A. 516 *overruled*; 12 A. 234 and 11 M I. A. *referred to*). *Referred to* in *Idarat Khan* v. *Ilahi Baksh*, 27 A 78.

In suits for pre-emption, when the Court has come to the conclusion that the price alleged in the deed of sale is not the true contract price, and where both the vendor and the vendee conceal the real price, the Court should ascertain the market price of the disputed property at the time of the sale.—*Agar Singh* v. *Raghuraj Singh*, 9 A. 471.

Where in pursuance of orders passed by the Civil Court in the exercise of insolvency jurisdiction certain revenue-paying property of the insolvent was sold by the Collector, but by private contract and not at public auction, it was *held*, that such a sale did not oust the pre-emptive rights of such persons as were otherwise entitled to claim pre-emption.—*Kanhai Lal* v. *Kalka Prasad*, 27 A. 670 (13 A. 224 at 228 *referred to*).

The holder of a decree enforcing a right of pre-emption by selling the property to a stranger after the decree does not debar himself from obtaining the property in execution of the decree.—*Ram Sahai* v. *Gaya*, 7 A. 107

Neither s. 214, C P. Code, 1882 (Or. XX, r. 14) nor section 28 of the Limitation Act (XV of 1877), is applicable to persons who being in possession of the property, assert the right of pre-emption —*Krishna Menon* v *Kesavan*, 20 M. 805.

In order that a suit for pre-emption may be successfully maintained, it is necessary not only that a cause of action should arise in favour of the pre-emptor at the time of the sale on which the suit is based but that such cause of action should subsist at the time when the suit is brought —*Janki Prasad* v *Ishar Das*, 21 A 374.

No right of pre-emption arises where land is assigned without consideration as *shankalp* —*Harnarain* v *Ram Prasad*, 14 A. 333.

No suit for pre-emption will lie, the basis of which is a decree for pre-emption in another suit.—*Abdur Razzaq* v *Mumtaz Husain*, 25 A. 334.

Appeal.—The plaintiff who had obtained a decree conditional on payment of pre-emptive price within a fixed period, could appeal after the expiry of such period, *Wazir* v. *Kale*, 16 A A 126, *see also Kadai* v. *Jai Sri*, 13 A 189 and 376

A pre-emption decree ordered payment within one month and plaintiff appealed against the condition The month expired during the pendency of the appeal and the amount was not deposited. The condition itself being the subject of appeal, the suit should not be dismissed for non-payment within time, *Kurshed-un-nissa* v *Alim-un-nessa*, 10 A. L. J. 421.

Decree in suit for dissolution of partnership.

15. Where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done as it thinks fit. [S. 215.]

COMMENTARY.

This rule corresponds to s 215, C P. Code, with several additions and alterations. The phrases, "*or the taking of partnership accounts; before passing a final decree, a preliminary decree declaring the proportionate shares of the parties,*" and the words, "*or be deemed to have been dissolved,*" have been added.

The amendments seem to have been made in accordance with the observations in *Ram Chandra* v. *Manick Chunder*, 7 C. 428, in which it was said: "The Subordinate Judge should have followed the course

pointed out in Forms 132 and 133 of Schedule IV, C. P. Code, 1882, (App. D., Forms 21 and 22), and at the first hearing should have determined whether there had been a partnership; what were its conditions; was it dissolved or ought to be dissolved; and who were the parties interested and in what shares; and upon determining these questions, should have directed accounts to be taken; and after the accounts had been taken, should have made a final decree."

"May pass."—It is within the discretion of the Court either to pass or not to pass a preliminary decree, and a preliminary decree for determination of points on which the parties had already agreed would be an improper use of the discretion; *Merha Musst.* v. *Kundan*, 17 O. 193.

"Fixing the day on which the partnership shall stand dissolved."—The discretion given to a Court by Or. XX, r. 15 of the C. P. Code to fix a date from which a partnership, is to be declared dissolved is a judicial and not an arbitrary exercise of discretion. Ordinarily the Court should direct dissolution from the date of any notice given in that behalf by one of the partners from the date of the plaint and where the parties have been at arm's length since the filing of the plaint, it should not declare that the partnership should stand dissolved from the date of the judgment; *Sambasiva Aiyer* v. *Ganapathy Aiyar*, 45 I. C. 727.

"Directing such accounts to be taken."—In a suit for an account of a dissolved partnership, a decree should be passed under this rule in accordance with form No. 21, Sch. I, App. D, and it should direct an account to be taken of the dealings and transactions between the parties, and of the credits, property, and effects due and belonging to the late partnership, and it should direct the appointment of a Receiver of the outstanding debts and effects. Observations on the procedure to be adopted and the burden of proof on the taking of account —*Thirukumaresan* v. *Subbaraya*, 20 M. 313. In *Ram Chunder* v. *Manick Chunder*, 7 C 428: 9 C. L. R. 137, the procedure to be followed in a suit for an account of partnership transactions has been pointed out.

In a suit for dissolution of a partnership and for accounts sufficient time should be given to the parties to produce accounts and a final decree should be passed on evidence taken by the Court. It will not do to pass an *ex parte* final decree on the mere statements of the plaintiff, *Radha Kishen* v. *Tirathram*, 41 P. L R 1918. 31 P. W R. 1918.

In a suit for an account of a dissolved partnership and for recovery of Rs. 200 from the defendant, it was found that nothing was due to plaintiff, but something was due to defendant *Held* that no decree should be made in favour of the defendant but the suit should be dismissed —*Misri Lal* v. *Benrasi Lal*, 3 A L J. 233. A W N (1905), 111. *See*, however, *Surendra Nath* v *Atul Chandra*, 7 C. L J. 87: 34 C. 892.

A provisional decree is allowed to be passed in a partition suit, which is similar to a suit for a dissolution of partnership, under sec 215, C. P. Code, 1882.—*Krishna Sami* v *Raja Gopala*, 18 M 73, p. 87.

As to the form of final decree, *see* Sch. I, App. C., for No. 22.

Appeal.—An appeal lies from preliminary decree under s. 96; *see* also s. 97.

16. In a suit for an account of pecuniary transactions between a principal and an agent, and in any other suit not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit.

Decree in suit for account between principal and agent.

[S. 215-A.]

COMMENTARY.

Applicability of the Rule.—The applicability of Or. XX, r. 16, is not restricted to suits for an account between a principal and an agent but applies also to suits on an account The words of the rule are wide enough to embrace all cases where the Court, instead of itself settling the account, considers it necessary to stay its hand in order to ascertain the amount of money due to or from any party by having an account taken before a commissioner; *Harjimall & Sons* v. *Dhanpat Lal Dewanchand*, 15 S. L R. 16 62 I C 537

Nature of Account Decree.—A decree for accounts is not a mere direction to enquire and report the proceeds and must always proceed upon the assumption that the party calling for it is entitled to the sum found due. It is a decree affirming his rights only leaving it to be enquired into how much is due, and such a decree directing the defendant to account is a final decree and one which is appealable to the Privy Council; *Jasada Dassi* v. *Rameshari*, 14 C L J 603

"Where it is necessary."—A preliminary decree is not necessary in every suit for account. It is only to be passed where it is necessary in order to ascertain the amount due, *Seosaran* v. *Harihar*, 28 I. C. 452.

Order XX Not Exhaustive as to Cases of Preliminary Decrees.—It is not essential that an adjudication should be covered by one of the specific cases of preliminary decrees mentioned in Or. XX of the C. P Code in order that it may form the basis of a final decree, *Raja Peary Mohan* v. *Manohar Mukejee*, 27 C. W N. 989: 38 C. L. J. 255

"The Court shall pass a preliminary decree directing accounts to be taken."—In a suit for an account by a principal against his agent, if the defendant is found liable to render accounts, the Court should make an interlocutory decree, declaring that he is so liable and direct him to file an account within a fixed period. After an account has been filed, the plaintiff should be allowed to examine it. If the objections are numerous, the procedure laid down in Or. XXVI, rr. 11, 12 and Or. XX, r. 17 to be followed —*Degambar* v. *Kallynath*, 7 C. 654: 9 C L. R. 265. *See also Annoda Persad* v. *Dwarka Nath*, 6 C. 754: 8 C. L. R. 32. But before directing an inquiry into accounts, the Court must be satisfied about the *factum* of liability of the agent and that the taking of accounts is necessary; *Bharat Chandra* v. *Kiran Chandra*, 52 C. 766: 90 I. C. 944: A. I R. 1925 C. 1060.

In a suit by a principal against his agent for account, the Court should order an account to be taken of the defendant's dealings with the plaintiff's money.—*Hurrinath* v. *Krishna Kumar*, 14 C. 147, P. C.

In a suit by a principal against an agent for an account, on the fact of agency being established, *it is the duty of the Court to direct* an account to be taken of the defendant's dealings as agent. When once the plaintiff *has shown that the defendant is an accounting party, it is then for the* defendant to prove the amount of his receipts and disbursements.—*Raghunath* v. *Ganapatji*, 27 A. 374 (14 C. 147, P. C., *referred to*).

In a suit against a *gomasta* to obtain accounts of moneys which had come into his hands. *Held* that it was the business of the Court to have these papers brought before it and examined, and to determine whether they were correct and fair accounts between the parties.—*Sushee Shekhur* v. *Suleem Biswas*, 22 W. R. 101.

Stay of Proceedings.—When an appeal against the preliminary decree is pending the Appellate Court may make an order under Or. XLI, r. 5, staying the enquiry into accounts pending the disposal of the appeal; *Balkishen* v. *Khugnu*, 31 C. 722: 8 C. W. N. 572 F B. *See* notes to Or. XLI, r. 5.

Section 10 has no application to suit for account against agent and cross suit by agent; *Chandra Kmar* v. *Pramatho*, 15 C. W. N. 930.

Jurisdiction in Accounts Suits.—In a suit for account, the plaintiff cannot get a decree in excess of the pecuniary jurisdiction of the Court. In a suit for account the claim was valued at Rs. 150 and after the preliminary decree the amount due was ascertained to be Rs. 8,424. *Held* that the plaintiff cannot obtain a decree in excess of Rs 1,000, the jurisdiction of the Munsif, *Golap* v. *Indra*, 13 C. W. N 493, 9 C L. J. 367 (folld. in *Bhupendra* v. *Purna*, 8 I. C. 39) *Contra* in *Gopikisan* v. *Padamraj*, 12 N. L. R. 174.

A S. C. Court has no jurisdiction to entertain suits for account, and consent of parties does not give jurisdiction, *Abdul Kareem* v *Burry Saib*, 27 I. C 803; 8 Bur L T. 96; *Mariappa* v *Arunachalam*, 143 (1916) M. W. N. 169.

Decree in Account Suits.—*A suit for accounts by a principal against* an agent involves an undertaking by the plaintiff to pay to the defendant any sum that may be found due to him and a decree to the agent may be granted although he does not specifically pray for it; *Parmanand* v. *Jagat*, 7 A. L. J. 543: 6 I C 162

In a suit for account by a principal against his agent if it be found that nothing was due to the principal but something was due to the agent, a decree can be passed in favour of the agent.—*Surendra Nath* v. *Atul Chandar*, 7 C. L. J. 87 34 C 892 *See*, however, *Misri Lal* v *Benarasi Lal*, 3 A. L J. 233: 1906 A. W. N 111

A final decree settling the amount due, if passed in the absence of the defendant is a decree passed *ex parte; Jasad Dasi* v. *Rameshwari*, 14 C. L. J. 603.

Whether Decree can be Passed in Favour of Defendant.—In a suit for account between principal and agent, a decree can, if necessary, be passed in favour of the defendant on payment of the necessary Court-fees; *Parmanand* v. *Jagat*, 32 A. 525, 6 I. C. 163.

See also notes under r. 19 *post*.

Appeal.—An appeal lies against a preliminary decree. *See* ss. 96, 97 *ante*.

A final decree was passed in an account suit pending appeal against the preliminary decree *Held* that the passing of the final decree does not take away the jurisdiction of the Appellate Court to hear the appeal against the preliminary decree. And if the preliminary decree is set aside, it supersedes the final decree. *Ramnath* v. *Basanta*, 17 C. W. N. 868; 18 C. L. J 209 19 I C 630; see also *Akhtar* v. *Tasadduk*, 34 A. 493; *Nistarini* v. *Rai Mohan*, 18 C. L. J. 214, where it has been held that if the preliminary decree is varied, a fresh final decree has to be passed

When appealing against the whole decree in a suit for account, the defendant is bound by the valuation in the plaint; *Srinivasa* v. *Perindavenama*, 30 M L. J. 402 (F. B.)

Valuation and Court-fee.—In a suit for account and for balance that may be found due, the approximate amount of the claim as stated in the plaint must be taken to be the value of the subject-matter of the suit for the purposes of jurisdiction —*Khushal Chand* v. *Nagindas*, 12 B. 675 *See* also *Golap Singh* v. *Indra Kumar*, 13 C. W. N. 493; 9 C. L. J. 367. In *Bhagvantrai* v *Mehta*, 18 B. 40, it has been held that valuation for the purposes of Court-fees determines the jurisdiction; and in such case the valuation for both purposes is the same

Special directions as to accounts.

17. The Court may either by the decree directing an account to be taken or by any subsequent order give special directions with regard to the mode in which the account is to be taken or vouched and in particular may direct that in taking the account, the books of account in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised. [New.]

COMMENTARY.

This rule is new

Decree in suit for partition of property or separate possession of a share therein.

18. Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,—

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the

several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of s. 54.

(2) if and in so far as such decree relates to any other immoveable property, or to moveable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required. [New.]

COMMENTARY.

This rule is new, it is to be read with s 54 of the Code. From this rule as well as from s. 54, it is clear that a Civil Court is competent to pass a decree for partition of an estate-paying revenue to Government or for separate possession of a share of such an estate by declaring the rights of the several parties interested in the property, but the partition and separation must be made by the Collector or by any of his subordinate gazetted officers. Section 54 of this Code evidently contemplates two classes of cases, namely, one for partition of an undivided estate paying revenue to Government, and the other for the separate possession of a share of such an estate. The distinction between the two classes of cases and between the words "partition" and "separate possession of a share" has been clearly explained and pointed out in the judgment of BANERJEE, J., in the Full Bench case of *Jogodishury* v. *Kailash Chandra*, 24 C. 725, p. 74: 1 C. W. N. 374 (384).

In the old Code there was no provision prescribing the form of a decree for partition of an estate or the separation of a share The defect has been remedied by this rule.

See notes under s. 54.

Sub-rule (1)—Properties Assessed to Revenue.—In cases of partition of properties assessed to land revenue to Government the Code does not contemplate the passing of final decree by Civil Court. It simply authorises the Civil Court to declare the shares of the parties concerned and to give a direction to the Revenue Courts to give effect to its decree and no further; *Somnath* v *Ram Bailas*, 24 I. C. 113; *Harun Khan* v. *Teju Mal*, 8 S. L. R. 335· 29 I. C. 58.

The mere passing of a preliminary decree under sub-rule (1) declaring the shares of the parties in the estate, and directing partition of the property other than the agricultural land does not render the Court *functus officio;* the Court may therefore grant an *ad interim* injunction restraining a party from interfering with the receivers' possession; *Shankar Das* v. *Behari Lal*, 6 L 442: 89 I C. 932: A. I. R. 1925 L. 445.

Preliminary Decree What to Contain.—Preliminary decree should ascertain the property to be divided, the parties interested, and their

several rights therein. All questions involving the title of the parties and their rights to any relief within the issues are, judicial in character and must be determined by the Court, such determination must be ordinarily made by the Court and incorporated in the interlocutory decree before any partition is made or directed; *Satya Kumar* v. *Satya Kripal*, 10 C. L. J. 503.

Decree Without Direction of Portion.—In a partition suit, the Court gave a decree for possession of one-third share but it was wholly silent as to the manner in which partition was to be effected. *Held*, it was a preliminary decree.—*Dwarka* v *Ram Pat*, 12 A. L. J. 696.

Partition Decree is Pending Litigation—Final Decree or Order to be Engrossed on Stamped Paper.—It is not obligatory, but discretionary with the Court in a partition suit to appoint a commissioner under Or. XXVI, r. 13; and such a decree is not, in all cases, to be considered pending till action is taken under that rule.—*Krishnama Chariar* v. *Kuppammal*, 31 M. 540.

A suit for partition is a pending litigation, until the Court signs the final decree. A decree for partition to be operative must be engrossed on non-judicial stamped paper, as required by the Stamp Act (II of 1899), s. 2 (15), Sch. I, Art. 45, and until the Judge signs the decree so engrossed, it cannot be said that the suit has terminated; and an order directing a party to be added under Or I, rr 8, 10, 11 can be made in such a suit before it has actually terminated.—*Jotindra Mohan* v. *Bejoy Chand*, 32 C. 483.

Where the final order effects *actual* partition, it is chargeable with duty as an instrument of partition; *Tiruvengadathan* v. *Mangayya*, 2 M W. N. 516 (32 C. 483 *folld*).

A decree for partition must be stamped as an instrument of partition under s. 2 (15) of the Indian Stamp Act (II of 1899).—*Balaram* v. *Ram Krihsna*, 29 B 366· 7 Bom. L R. 308

Preliminary Decree in a Partition Suit—Appeal.—The definition of the expression " preliminary decree " is given in the explanation attached to s. 2 An appeal lies against the preliminary decree, but under s 97 no appeal lies against the preliminary decree, after the final decree is passed. See *Mackenzie* v. *Narsingh*, 10 C. L J. 113 (*Madhu* v. *Kamini*, 32 C 1023, and *Baikunta* v. *Salimulla*, 6 C. L. J. 547 *folld; Umar Kumari* v *Jarbandnan*, 30 A. 419 *expld and distd*) even if the final decree is passed after the filing of the appeal no appeal lies; *Narain* v. *Balgobind*, 8 A. L. J. 604; 11 I. C. 517. An opposite view has been taken in the following cases. Appeal against preliminary decree—Final decree passed during pendency of appeal—Cross-objections filed against final decree—Appeal against preliminiary decree maintainable. The final decree depends upon the preliminary decree, and if an appeal is taken to the preliminary decree and succeeds, the final decree necessarily falls; *Akhtar* v. *Tasadduk*, 34 A 493: 10 A. L. J 19: 16 I. C. 157 (32 A. 225; 8 A. L. J. 604 *distd*). *See* also *Ramnath* v. *Basanta*, 17 C. W. N. 868; 18 C. L. J. 209; *Nistarini* v. *Raimahan*, 18 C. L. J. 214.

An order declaring the rights of parties to a partition suit in certain specific shares is a decree within the meaning of s. 2 of the Code,

and is therefore appealable.—*Luthin Golab Koer* v. *Radha Dulari*, 19 O. 403; followed in *Boloram Dey* v. *Ram Chandra*, 23 C. 279, F. B. *See* also *Bhola Nath* v. *Sonamoni*, 12 C. 273; *Bipin Behari* v. *Lall Mohun*, 12 S. 209; *Krishna Sami* v. *Rajgopala*, 18 M. 73; and *Khadem Hossein* v. *Emdad Hossein*, 5 C. W. N. 617, F. B. · 29 C. 758, F. B.

Where a preliminary decree in a partition suit not followed by action under Or. XXVI, r. 13, is treated by the Court and by the parties as a final decree in execution proceedings, it is not open to a party subsequently to contend that the decree had not become final.—*Krishnamachariar* v. *Kuppammal*, 31 M. 540.

Where in a partition suit an order was made in the course of such proceedings by which the position of some of the parties to the suit was determined, but no declaration was made of the exact rights of each of the parties. *Held* that it was a mere interlocutory order and no appeal would lie from it.—*Bhoobun Moyi* v. *Shurut Sundery*, 12 C. 275 *See* also *T. Ramaswami Aiyar* v. *T. Subramania Aiyar*, 48 M. L J 406: 16 L. W. 297.

An order passed in a suit for partition, subsequent to the preliminary decree appointing a commission to make the partition, is an interlocutory order pending the suit which has not been finally decided, and is not an order in execution, and is, therefore, not appealable under s. 244, C. P. Code, 1882 (s. 47). In an appeal against the final decree the appellant can take objection to such an order.—*Jogodishury* v. *Kailash Chundra*, 24 C. 725, F. B : 18 C. W. N. 874 (16 C. 208 *followed*, and 23 C. 679 *overruled*).

See note to s. 97.

The same view has been taken in the Full Bench case of *Bibi Wahidunnessa* v. *Deepnarain*, 20 C. W. N. 1174 F B., where it has been held that where a final decree in a partition suit is passed pending the appeal against preliminary decree, and no appeal has been filed against the preliminary decree the appeal against the preliminary can proceed (36 A. 532, 17 C W. N 868, 18 C. L. J. 209, 18 C. L. J. 214, 18 C. L. J. 223, 22 C. L. J. 90, 37 M. 29 *followed;* 18 C. L. J 321, 27 I. C. 135, 33 I. C. 137, 33 I. C. 146 *distinguished*, on the ground that the final decree was passed before the appeal against the preliminary decree was filed).

In a partition suit a preliminary decree was passed and confirmed on appeal. The first court then passed an order directing actual partition with certain directions given by him *Held* that an appeal lay against that order in as much as no final decree had been made; *Bharatendu* v. *Yaqub*, 35 A. 159: 11 A. L. J. 120: 18 I. C 701.

Costs in Partition Suits.—Ordinarily the parties are to bear their own costs up to preliminary decree But where defendant contests plaintiff's right to partition he is liable for cost unnecessarily incurred by reason of unfounded opposition; *Satya Kumar* v. *Satya Kripal*, 10 C. L. J. 505. *See* also *Shama Soondari* v *Jardine Skinner & Co.*, 5 C L. J. 641.

Limitation for execution of Decree in a Partition Suit.—A decree for partition is a joint declaration of the rights of person interested in the

property of which partition is sought, and is in favour of each share holder or set of shareholders having a distinct share. Therefore, execution-proceedings taken by one shareholder or the other are sufficient to keep the decree alive —*Sheik Koorshed* v *Nubee Fatama*, 3 551: 2 C. L R, 187.

The action of an Amin appointed under the section, in a partition suit to demarcate the shares assigned to the respective parties to the suit is not the executing of a process for enforcing the judgment within the meaning of Article 164 of the Limitation Act, 1877.—*Shah Muhammad Khan* v. *Hanmant, Singh*, 20 A 311 *See* also *Dwarka Nath* v. *Barinda Nath*, 22 C 425, where it has been held that proceedings under this section, for the purpose of effecting partition are proceedings in the suit, itself and not proceedings in execution of a decree. *See* also *Latchmanan* v. *Ramanathan*, 23 M. 127.

Declaratory Decree in a Partion Suit is No Bar to a Subsequent Suit for Partition.—The plaintiffs having obtained a declaration of title to continue to enjoy separate possession of certain land, sued the former defendants again for partition of the same land. *Held* that the suit was unnecessary, and should be dismissed —*Andi* v *Thatha*, 10 M. 347.

See notes under section 11 under the heading " Decree for Partition," where all the cases on the point have been collected.

Order XXVI, Rules 13, 14.—For cases relating to partition, *see* notes to Or. XXVI, rr 13, 14.

19. (1) When the defendant has been allowed a set-off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.

Decree when set-off is allowed.

(2) Any decree passed in a suit in which a set-off is claim shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off had been claimed.

Appeal from decree relating to set-off.

(3) The provisions of this rule shall apply whether the set-off is admissible under rule 6 of Order VIII or otherwise.

[S. 216.]

COMMENTARY.

Sub-rule (1) is the same as para 1 of s. 216; but the language of sub-rule (2), which corresponds to para. 2 of the old section, has been changed.

The amendment has been made to give effect to the view that appeals from decrees relating to set-off should lie to the Courts to which appeals

in respect of the *original claim* would lie and not to the Court to which appeals in respect of the *amount claimed as a set-off* would lie.

Sub-rule (3) corresponds to para. 3 of the old section.

This rule is to be read with Or. VIII, r. 6. *See* notes to that rule.

This rule covers also claims for equitable set-off.—*Vyra Van* v. *Nataraja*, 30 M. L. J. 69.

Appeal from Decree relating to Set-off.—The present rule provides that appeals from decrees relating to set-off shall lie to the Courts to which appeals in respect of the original claim would lie.

A suit for dissolution of partnership, valued at Rs. 2,000, is a suit for money within the meaning of s. 111, C. P. Code, 1882 (Or. VIII, r. 6), and a plea of set-off may be raised in such a suit, and if, in consequence of such plea, the first Court decrees in favour of the defendant a sum above Rs. 5,000, then, by reason of s 216, C. P. Code, 1882 (Or. XX, r. 19) an appeal from that decree will lie to the High Court.—*Ramjivan Mal* v. *Chand Mal*, 10 A. 587.

Decree for Defendant where Set-off is Claimed.—In a suit by a principal against his agent for accounts, it is competent to the Court to grant a decree to the agent for the amount that may be found due to him on the taking of the accounts between the parties; *Darmanand* v. *Jagat Narain*, 32 A. 525: 6 I. C 163 *See* also *Ram Charan* v. *Bulaqi*, 22 A. L. J. 783: 83 I C. 800· A. I R. 1924 A. 854

See also notes under r. 16 *ante*.

The cases in which a decree can be made in favour of the defendant are provided for in this rule —*Missri Lal* v. *Benarasi Lal*, 3 A L. J. 283: (1906), A. W. N. 111.

In a suit for account it is unnecessary that the defendant should plead a set-off or counterclaim, and a decree may be granted for the amount that may be found due in his favour; *Parmanand* v. *Jagat*, 7 A. L J. 543: 6 I. C. 162.

Certified copies of judgment and decree to be furnished.

20. Certified copies of the judgment and decree shall be furnished to the parties on application to the Court, and at their expense. [S 217.]

Parties to a suit are entitled to receive copies of the original judgment not merely a translation.—*Varjivan Ranji* v *Aji Daji*, 1 Bom H. C 165.

Judges of Courts of Small Causes were bound to give copies of their judgments to parties requiring them —*Ibrahim Fatte Ali* v *Chandra Bhan*, 7 Bom. H. C. 130.

Strangers to a suit may obtain, as of course, copies of judgments, decrees orders, at any time after they have been passed or made. *See* Calcutta High Court Circular order, 2nd June 1875 —*In re Rama Churn Ghosal*, 2 C. L. R. 553.

ORDER XXI.

EXECUTION OF DECREES AND ORDERS.

Payment under Decree.

Modes of paying money under decree

1. (1) All money payable under a decree shall be paid as follows, namely:—

(*a*) into the Court whose duty it is to execute the decree; or

(*b*) out of Court to the decree-holder; or

(*c*) otherwise as the Court which made the decree directs. [S. 257.]

(2) Where any payment is made under clause (*a*) of sub-rule (1) notice of such payment shall be given to the decree-holder.

COMMENTARY.

Alterations.—Sub-rule (2) is new It has been inserted for the benefit of both the decree-holder and the judgment-debtor and to relieve the Courts from the difficulty which generally arises with regard to decree-holder's claim for costs and interests After service of notice upon the decree-holder, he will not be entitled to claim any costs or interest

Scope of Or. XXI—It applies to Insolvency proceedings.—The rules under this order do not apply to insolvency proceedings under Provincial Insolvency Act 1907 So when in the case of sale by a Receiver, the highest bidder fails to deposit the one fourth of the purchase-money, the Receiver cannot proceed under Or XX r. 71 —*Chedee Lall* v. *Lachman Parshad*, 39 A. 267: 15 A. L J. 253: 37 I. C. 830. The provisions of Or. XXI do not apply to a sale of property under administration order; *Banarasi Dasi* v. *Bhushan Das*, 40 P L. R. 1922: 69 I. C. 718.

" Money payable under decree."—Where a party was directed by the High Court to pay the costs of the day, and his solicitor paid the money into Court. *Held* that this rule was not applicable as the order was not a decree.—*Shanks* v *Secretary of State*, 12 M. 120.

A decree for mesne profits is a decree for money; *Lachman Ojha* v. *Charitar Ojha*, 48 I. C 183. A I. R 1918 Pat. 257.

Decree Directing Payment to decree-holder.—Payment into Court is a valid compliance even though the decree directs, payment to decree-holder, *Wana* v. *Natu*, 35 B. 35: 12 Bom. L. R. 818; *Sankaran* v. *Raman*, 48 M. L. J. 596: 87 I. C. 560: A. I. R. 1925 M. 743.

Payment by stranger.—Payment by a person who has got a sham sale-deed from judgment-debtor does not satisfy the decree.—*Kasturi* v. *Aruna Chelam*, 34 I. C. 390: (1916) 1 M. W. N. 195.

Payment into Court.—A payment to a Receiver appointed by Court is as good and valid as to the Court itself, and falls under clause (c), *Muthia* v. *Orr.*, 20 M. 224 (231).

If money is brought into Court under process of execution, and the party entitled to it, or his vakil is present to receive it, the Court shall cause it to be paid immediately.—*Muttu* v. *Samu Pillay*, 5 M. H. C., Ap. 2.

If under a decree in a pre-emption suit, limiting payment into Court within certain date, only a receipt for payment is put in on the date fixed but confirmed on notice to judgment-debtor later. *Held* no payment under decree: *Abdul Fatteh* v. *Fatteh Ali*, 35 I. C. 363: 73 P. R. 1916.

On the death of decree-holder, debtor should either pay the decretal amount into Court or ask for direction under cl. (c).—*Narendra* v. *Charu*, 14 C. W. N. 146.

Where a decree is transferred by assignment by the decree-holder but the judgment-debtor having no notice of the assignment pays the decretal amount in full into the Court, the payment operates as a satisfaction of the decree and the assignee is not entitled to execute the decree; *Tata Iron & Steel Works* v. *Baidy Nath*, 2 Pat. 754: 76 I C 55: A. I. R. 1924 Pat. 118.

A payment to one of several joint decree-holders who hold a joint decree is not a discharge of the decree and the certificate given by one cannot bind others in the absence of implied or express authority.—*Thimma Reddi* v. *Subba Reddi*, 49 I. C. 141 1918 M. W. N. 507 *See* notes under Or. XXI, r. 2

Notice—Its Effect.—Notice must be in writing; *see* s. 142. It is the duty of the Court to give notice to the decree-holder though the judgment-debtor may be bound to pay the process fee. In case no notice is served upon decree-holder, the Court is bound to inform the decree-holder about the payment when he applies for execution; *Naryan* v. *Ganpat Rao*, 67 I. C. 242.

When money is paid to a third party without notice of payment to decree-holder and the decree-holder applies for payment of money to him, the Court cannot refer the decree-holder to a regular suit, but it ought to set aside the *ex parte* order authorising payment to third party.—*Bithal Das* v. *Jiwan Ram*, 66 I. C. 744: 20 A. L. J. 353 · 1922 A 190

But Or. XXI, r. 1 (2) has been held inapplicable to mortgage-decree.—*Ambi* v. *Valia Thamberuti*, 45 M. L J. 687: 75 I. C 566.

Whether interest on decretal money is payable up to the date of deposit in Court by the judgment-debtor, or up to the date of withdrawal depends on whether the decree-holder had any notice of the deposit.—*Kalee Dass* v. *Puran Kumaree*, 16 W. R. 304.

Tender must be Unconditional.—A decree-holder is not bound to him in part satisfaction of this decree; and the refusal to receive a part of what is due to him will not deprive him of his right to interest.—*Kunhya Singh* v. *Tooydun Singh*, 7 W. R. 20.

A judgment-debtor must pay the decretal amount to the credit of the decree-holder unconditionally. If he chooses to make a protest, the creditor is not bound to take the money.—*Rajendra Kishore* v. *Pershad Sen*, 2 C. L. R. 183.

Payment into Court by the defendant coupled with a request that the money should not be paid until the decision of certain objections made by him is not legal tender.—*Goluckmonee* v. *Nobungo*, W. R. F. B. 14, Marsh 45; 1 Hay 76.

For Tender and its effect, see section 38 of the Contract Act (IX of 1872) and also notes under Order XXIX, rules 1, 2, 3 and 4.

Limitation.—There is no limitation for application to withdraw money which is in deposit in Court as unclaimed deposit.—*Apurba* v. *Chunder Money*, 10 C. W. N. 354.

Payment out of Court to decree-holder

2. (1) Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

(2) The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree. [S. 258.]

COMMENTARY.

This rule corresponds to s. 258 of the C. P. Code of 1882, with some important additions, alterations and omissions.

Alterations and their Effect—Sub-rule (1).—The words "*of any kind*," have been added after "decree," the words "*or of any payment is made in pursuance of an agreement of the nature mentioned in s. 257-A* have been omitted; and the words "*and the Court shall record the same accordingly*" have been added.

The substitution of the words "*decree of any kind*" for the words "a decree" is material, as it has set at rest the diversity of judicial opinions which hitherto existed. The expression "*decree of any kind*" includes, money decree mortgage-decree, and *all* other decrees under which

money is payable. The substitution seems to have been made by adopting the principles laid down in 28 M. 473, F. B.; 30 A. 218; 7 C. L. J. 581 and 31 C. 863. In all these cases it was held that this section applies to proceedings in execution of mortgage-decree. It has rendered the cases reported 24 M. 412: 8 C. W. N. 102 and 25 C. 703, obsolete and inoperative.

Sec. 257-A has been omitted from the Code, *see* note below.

Sub-rule (3).—Some important change has been introduced, as will appear on a comparison with the provisions of para. 3 of the old section, which ran as follows: "*Unless such a payment or adjustment has been certified as aforesaid, it shall not be recognized as a payment or adjustment of the decree by any Court executing the decree.*" The most important change is the omission of the words "*as a payment or adjustment of the decree*" after the word "*recognized.*" By the above omission it has now become clear that a Court executing a decree cannot recognize a payment or adjustment made out of Court which has not been certified, *for any purpose whatsoever*,. The above change seems to have been introduced by adopting the principle laid down in *Mitthu Lal* v. *Khairati Lal*, 12 A. 509; and although that ruling was subsequently overruled by the Full Bench case of *Roshan Singh* v. *Matadin*, 25 A. 36, the Legislature has adopted the law as laid down in 12 A. 509, where it has been held that a Court executing a decree is not competent to take into consideration, payments made out of Court for the purposq of deciding whether or not the application is barred by limitation By the amendment the rulings of the High Courts in which a contrary view was taken have been superseded; and the superseded rulings have been inserted under the heading "*uncertified payments may be proved to save limitation.*" Those rulings are no longer the law and have become obsolete.

The words of the rule are "shall not be recognised by *any Court executing the decree.*" There is therefore nothing which prohibits any Court other than a Court executing the decree to take cognizance of uncertified payment. *See* notes under the heading "*uncertified adjustment may be recognised by other Courts.*"

Effect of this Rule—Remedy for Uncertified Payments.—The words of the rule are that an uncertified payment "shall not be recognised *by any Court executing the decree.*" There is therefore nothing which prohibits any Court other than executing Court to take cognizance of uncertified payments of a judgment-debtor where the decree has been adjusted outside the Court without certifying and the decree-holder has inspite of such adjustment applied for execution. The judgment debtor cannot raise the plea of adjustment, as sub-rule (3) expressly prohibits the Court to take cognizance of uncertified payment. It has been held that a suit asking for a declaration that a decree has been adjusted and is not executable and for injunction restraining execution; (*Asizan* v *Mauk*, 21 C. 437; *Denobandhu* v. *Hari Maiti*, 31 C. 480: 8 C. W. N. 395; *Bairaguler* v. *Bapanna*, 15 M. 302) or for setting aside an execution sale on the ground that the decree was already satisfied (*Jaikaran* v. *Raghunath*, 20 A. 254; *Prasanna* v. *Kaledas*, 19 C. 683; *Mathura* v. *Akshay*, 15 C. 557; *Vellappa* v. *Ram Chandra*, 21 B. 463) is barred by s. 47. It has been held in numerous cases in Calcutta and Madras that it is not open

to the executing Court to enquire into the fact of payment or adjustment of a decree not certified or recorded as provided in this rule even if there is fraud on the part of the decree holder; see *Kamini* v. *Aghore Nath*, 11 C. L. J. 91: 14 C W. N. 357; *Nistarini* v. *Kasim*, 12 C. L. J. 65; *Monmohan* v *Dwarkanath*, 12 C. L. J. 312; *Heramoney* v. *Musa Khan*, 7 I. C. 625; *Biroo Garain* v *Msst. Jaimurt*, 16 C. W. N. 923; noted under "uncertified payments shall not be recognised by the Court executing the decree" *infra* A contrary view has been taken in *Hansa Godhaji* v. *Bhawa Jogaji*, 40 B 303 where it has been held that it is competent for an executing Court to enquire into uncertified payments under s 47 where the conduct of a decree-holder is fraudulent. *See* further note under "does this rule restrict the operation of s. 47." The defrauded judgment-debtor's only remedy when the decree-holder applies for execution of the decree inspite of adjustment out of Court, is to sue the decree-holder for damages sustained by him by reason of the breach of the contract represented by the adjustment; *Hanmant* v. *Subbabhat*, 23 B. 394; *Viraraghava* v *Subbakka*, 5 M. 397 F. B.; *Periatambi* v. *Vellaya*, 21 M 409, *Krishnasami* v *Ranga*, 20 M. 369; *Paramanund* v. *Khepoo*, 10 C 354, *Gendo* v *Nihal Kumdar*, 30 A. 464; *Krishna* v *Sabirimuthu*, 42 M 338 50 I C 584. To pursue this remedy the judgment-debtor need not wait till the decree is executed because his cause of action arises as soon as the decree-holder files his application for execution; *Media Kahani, In the matter of*, 30 M 545

Remedy under Criminal Law.—A decree-holder can also be dealt with under the criminal law for such fraudulent execution after adjustment of decree, see, *Madhub* v *Novodeep*, 16 C. 126; *R* v. *Bapurji*, 10 B. 288; *R.* v *Mathuraman* 4 M 325, *R.* v. *Pillala*, M. 101; *Trimbak* v. *Hari*, 34 B. 374.

Scope and Application of the Rule.—This rule provides that (1) where any money payable under a decree of any kind is paid out of Court, or (2) where a decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly. Under the Code of 1877, (s. 258), it was held in *Baba Mohamed* v. *Webb*, 6 C. 786; 8 C. L. R. 36, that this rule deals with the adjustment of *any decree* and not merely with the adjustment of money decree. Under s. 258 of the Code of 1882, which is a *verbatim* copy of the corresponding section of the Code of 1877, it was held in *Sankaran* v. *Kanara Karuf*, 22 M. 182: 8 M. L. J. 175, that the rule referred only to the execution of decrees under which money was payable, and was not applicable to decrees for possession of immoveable property. Section 258 of the Code of 1882 was further amended in the present Code by the addition of the words "*of any kind*," in order to reconcile the views of the different High Courts. In *Abdul Latif Sahib* v. *Bathula Bibi*, (1914) M. W. N. 316: 23 I. C. 530, decided under the present Code, it was held by Wallis and Ayling, JJ., that where there was a decree for the delivery of certain immoveable property and for the payment of money, it was not open to the Court to recognize any uncertified adjustment under Or. XX, r 2, cl. (3). This was followed in *Sethurama Sahib* v. *Chhota Raja Sahib*, (1917) M. W. N. 327: 40 I. C. 820, where Sadasiva Aiyar, J., held that where the decree provided for payment of money as well as other reliefs,

the adjustment of such a decree could not be recognized unless certified to the Court.

In *Vaidhinadasamy* v. *Somasundram*, 28 M. 473 F. B.: 15 M. L. J. 126, it was held that this rule applies not only to money decrees but to decrees for the enforcement of a mortgage and other decrees, *e.g.*, a partition decree; *Gharry* v. *Gowrya*, 46 B. 226: 64 I. C. 490: A. I. R. 1922 B. 380; *Rama Krishna* v. *Bala Krishna*, 43 M. 476: 56 I. C. 289. The addition of the words "*of any kind*" after the word "*decree*" in the second line of Or. XXI, r. 2, was intended to set at rest the difference of view between the Calcutta and the Madras High Courts and the conflicting views as regards the meaning of s. 258 of the Code of 1882 By the addition of the words "of any kind," it cannot be said that the Legislature intended that the adjustment of any decree, whatever may be the relief claimed, should be certified to the Court. We are clearly of opinion that Or. XXI, r. 2, refers to a decree under which money is payable whether there are other reliefs or not, and if no money is payable under a decree, then r. 2 cannot be held to apply to such a decree. The words "*payable under a decree*" do not mean any money which the party may, if he choses, pay, but money which is recoverable by a party in execution against the party liable to pay it"; *Narayanaswami* v. *Rangaswami*, 49 M. 716: 50 M. L. J. 547: A. I. R. 1926 M 740: 95 I. C. 731 (*per* Devadoss and Waller, J.J.).

This rule does not prevent a Court from trying whether a valid tender by money-order has been made.—*Kishan Prasad* v. *Beni Ram*, 24 A. 85.

This rule does not apply where the parties agreed that their debts were to be privately adjusted before any decree came into existence; *Contra* BANERJI, J —*Gauri* v *Gajadhar*, 6 A. L. J. 403. 2 I. C. 608

Before an order absolute has been made in a mortgage decree the Court is bound to consider any allegation of payment by defendant after decree *nisi* and before the application for order absolute. But when an adjustment is alleged to have been made *after* order absolute in answer to an application for sale by the mortgagee, the executing Court determines the question only under this rule.—*Hiranmay* v. *Musakhan*, 7 I. C. 625 (8 C. W. N. 102: 29 C. 651 *relied on*: 11 C. L. J. 91. 28 M. 473, F. B. *folld.*).

This rule only authorizes the recognition of payment or adjustment An enquiry into the terms of an alleged compromise and an order on it cannot be made by the executing Court:—*Lodd Govind* v. *Ramdass*, 24 M. L. J. 88.

This rule requiring certifying of payment applies only to money payable under a decree, and is not applicable where decree is for the delivery of rice.—*Krishna* v. *Padmanabha*, 25 M. L. J 442: 21 I. C. 177.

Uncertified payments made after the preliminary decree in a mortgage suit cannot be proved to oppose passing of a decree absolute.—*Piran Bibi* v. *Jitendra*, 21 C. W. N. 920. But see *Mangar Sahu* v. *Bhatoo Singh*, 57 I. C. 472: 1 Pat. L. T. 416 where it has been held that such payments can be proved as the Court granting a final decree is not the executing Court; and this seems to be more reasonable view. *See* also *Ramji* v. *Karam*, 40 I. C. 424: 39 A. 532.

"Otherwise adjusted."—The words "otherwise adjusted" in Or. XXI, r 2 (1), are wide enough to cover an oral adjustment of a decree, *Anandapriya* v *Bijoy*, A I R. 1926 C. 643: 91 I. C. 705.

Judgment-debtor.—The word "judgment-debtor" in this rule should be construed as including those who claim through him or in his right, *e g.*, an assignee from the judgment-debtor of the equity of redemption after decree —*Panduranga* v *Vithilinaga*, 30 M. 537: 17 M. L. J. 417. *See* also *Matharu Suppa Chettiar* v. *Muthu Chettiar*, 50 I. C. 931: 9 L. W. 591, and also his surety So also surety cannot plead uncertified payment —*Onkermal* v *Nitya*, A I R 1923 C. 318.

Decree-holder.—Regard being had to the General Clauses Act (I of 1918), the word "decree-holder" in this rule should be read in the plural —*Taruck* v *Dinendro*, 9 C. 831: 12 C. L R. 566. An assignee of decree is not a decree-holder until he applies and obtains an order in his favour under Or XXI, r 16, and as such applications are made to the Court which passed the decree, and not to the executing Court, a judgment-debtor can plead that the decree has been already satisfied even though the formalities prescribed by Or. XXI, r. 2 (1) and (2) have not been followed —*Raghunath* v *Ganga Ram*, 47 B. 643: A. I. R. 1923 B. 404.

Where there has been an adjustment or certification, as between the judgment-debtor and an assignee who has attained the status of a decree-holder by an order made under Or XXI, r. 16 of the Code, Or. XXI, r. 2 would be clearly applicable Or. XXI, r 2 is not restricted by its terms to the original decree-holder, but extends also to an assignee of the decree who steps into his shoes, as it were, under the assignment; *Brajabashi* v. *Manik*, 31 C W N 921 A I R. 1927 C 694.

"Record."—There was no provision in the old Code requiring the Court to record the payment or adjustment The word "recorded" in sub-rule (2) and (3) is new Sub-rule (3) does not require that the payment must be *both* certified and recorded It is clear that the term "certified" in it refers to sub-rule (1) and the term "recorded" to sub-rule (2). The judgment-debtor does not lose the protection of this rule merely because the Court fails to perform its duty, *viz.*, to record the payment or adjustment It is not necessary that the payment or adjustment should be both recorded *and* certified—what is necessary is that it should be either recorded or certified.—*Tarak Nath* v. *Natobar*, 21 C. L J. 632: 30 I. C. 45 *See* also *Thimma Reddi* v. *Subba Reddi*, 49 I. C. 141: but a casual reference has been held to be insufficient, *Mohamed Khan* v *Nenu Mal*, 52 I. C 901

Adjusted.—An "adjustment" is a transaction which extinguishes the decree as such in whole or in part A transaction agreeing to vary the date and mode of execution is not an adjustment but a transaction varying the terms of the decree, so as to constitute a new executable decree. Such variation is against the policy of the Code·—*Lodd Govindan* v. *Ramdon*, 28 I. C. 376. 17 M. L. T. 222 (16 Cr. L. J. 451, *dissented from*). An arrangement with the decree-holder that if the judgment-debtor make two defaults in the payment of an instalment decree the former should sell only a particular estate, and should be debarred from proceeding with the execution of the balance until further default is an

adjustment and must be certified. A mere agreement to give time would be an adjustment.—*Per* Cox, J., *Shamlal* v. *Hazarimal*, 15 C. L. J. 451: 13 I. C. 326. An agreement to hold property jointly where the decree directs division by metes and bounds falls within the purview of this rule which bars recognition only by the executing Court but not by any other Court.—*Sethu Ram Shahib* v. *Chhota Raja Sahib*, 40 I. C. 820: (1917) M. W. N. 827. But an adjustment prior to decree is superseded by the decree and a decree-holder who obtains a decree cannot when the decree is barred by limitation fall upon prior adjustment.—*Hem Raj* v. *Dost Md.*, 57 I. C. 153.

The words "adjustment in whole or in part" suggest that the Court is not confined to merely entering the figures supplied by decree-holder. It has power to ascertain to what extent the decree has been satisfied when the manner of adjustment has been notified; *Lodd Gobindo* v. *Raja of Karvetnagar*, 20 M. L J. 219.

Purchase by mortgagee holding decree for sale of portion of mortgaged property, subject to mortgage—Petition by mortgagor under this rule claiming that the mortgagee should be called upon to certify satisfaction of his decree. *Quaere* Whether the subject-matter of the petition was an "adjustment" of the decree within the meaning of this rule.—*Erusappa Mudaliar* v. *Commercial and Land Mortgage Bank*, 23 M. 377. Where on a reference to arbitration during the pendency of execution proceedings, an award is made, it is binding upon the parties as an adjustment of the claim; *Raj Kumar Lal* v. *Bulaki Miyan*, 3 Pat. L. W. 146: 42 I. C. 467. In order to make it an adjustment, an agreement must be made *after* the decree; *Chidambaram Chettiar* v. *Krishna Vaithiyar*, 40 M. 233: 32 M. L. T. 18: 37 I. C. 836 (F. B.). An adjustment prior to decree cannot be said to be an adjustment within this rule and executing Court cannot recognise such an adjustment —*Hem Raj* v. *Dost Muhammad*, 57 I C 153 *See* also 46 I. C 880 and *Mallayya* v. *China Kotayya*, (1921) M. W. N. 382 14 L W 317.

Adjustment need Not be in Writing—A Completed Compromise is Sufficient Adjustment.—There is no justification for holding that an adjudgment must be in writing or that the judgment-debter must have carried out all the terms of the arrangements made by him with the decree-holder to satisfy the decree The question really depends upon the intention of the parties at the time when the agreement is entered into, and if they make a final and binding agreement with regard to the decree, then it amounts to an adjustment; *Samer Chand* v. *Chiranji Lal*, 102 I. C 753: A. I R. 1927 L. 544

Adjustment in Part.—Where the decree-holder enters into an agreement with some only of the judgment debtors by discharging them from liability it is an adjustment, in part, of the decree and must be certified to the Court under this rule.—*Mahomed Khan* v. *Mahomed Meenamar*, 31 M. 467

Wh[illegible] out of Court partly satisfied his decree-holder, [illegible] the decree to another Court for execution, [illegible] has been applied for, he is entitled, on execution in full being demanded, to an order of the Court, to which

the decree is transferred, calling upon the decree-holder to certify the fact of such part-payment.—*Rajendra Nath Roy* v. *Cunnoomul*, 5 C. 448.

When the decree-holder, entering into adjustment petitioned the Court for release of the judgment-debtor without certifying it: *held* that the presumption was that the decree had been satisfied in full, and that it would be unjust to allow the decree-holder to take advantage of his own omission —*Chango* v. *Kaluram*, 4 B. H. C. 120.

Adjustment of a decree by a guardian without leave of the Court cannot be certified under this rule; *Aruna Chellam* v. *Ramanadhan Chetty*, 29 M 309.

It is illegal for a Court to refuse to certify payment made to the transferee of a decree on the ground that the transfer was not recognized by the Court. In execution proceeding by the original decree-holder, the judgment-debtor can plead payment to transferee; *Bala Krishna* v. *Mini Reddi*, 14 I. C 702

Effect of Certifying Satisfaction though Amount Not Paid.—If a decree-holder forgives the defendant and certifies satisfaction without receiving payment, a creditor of the decree-holder attaching the satisfied decree cannot prove that it was made fraudulently; *Subba Pillai* v *Alliar*, 5 M. L. T 72· 2 I. C 528.

Certificate—Where to be Filed.—Under this rule the certificate of payment or adjustment should be filed in the Court whose duty it is to execute the decree The filing of a compromise petition in the Appellate Court cannot be treated as the filing of a certificate of satisfaction in the Court of first instance, *Kalu Nair* v. *Meenakshi*, 25 M. L. J. 586; *contra* in *Biroo Gorain* v *Jamwati*, 16 C. L J. 174. 16 C. W. N. 923, *dissented from*. A statement in execution petition that payment towards satisfaction of decree was made out of Court, does not amount to an application for certification; *Dwarika* v. *Bepin*, 64 I C. 32: A. I. R. 1922 C. 200.

Application for Certificate of Adjustment—How to be Made and What is.—This rule contemplates a definite proceeding with a petition by the decree-holder and a formal act by the Court. A decree-holder must do it in some well defined speech or writing. Where a decree-holder stated in an unusal place in his petition for execution that the defendant, had paid some money as interest. *Held* this was not certificate; *Gokul* v. *Bhika*, 12 A. L J. 387 23 I. C. 753 (*referred to* in *Bhajanlall* v. *Cheda*, 24 *I C.* 215) But see *Eusuffzeman* v. *Sanchia*, 43 C. 207: 20 C. W. N 272. 23 C. L. J. 390, where it has been held that the decree-holder may either apply to certify payment before execution or may do so on his application for execution, and the notification to the Court of the receipt of the sum paid is all that he has to do to certify payment. Notification to Court is enough. The Code does not provide for any special form; *Taraknath* v. *Natabar*, 20 C L J 632

A petition signed and filed in Court by a judgment-creditor, certifying payment of the amount due to him is sufficient.—*Saadoollah* v. *Kalee Churn*, 12 W. R. 358.

A letter from a decree-holder to his vakil to put in an acknowledgment into Court is not a settlement out of Court certified to the Court.—*Thakoor Lall* v. *Kanye Lall*, 7 W. R 510.

Endorsement of payment by decree-holder on the back of an Office copy of the decree is sufficient, and no separate petition is necessary; *Lakhi Narain* v. *Felamani*, 20 C L. J 181 · 18 C. W N 196 (n); referred to in 29 M. L. J. 219.

An application stating that the judgment-debtor had paid to the decree-holder a certain sum in different instalments and that he out of kindness agreed to have the execution struck off, is not an application under sub-rule (2) as it did not recite the terms of the adjustment; *Jogendra* v. *Provat*, 19 C. L. J. 126. A judgment-debtor's counter-petition alleging adjustment may be treated as an application to certify but it must be within ninety days; *Budradden* v *Gulam*, 36 M. 357. The written statement under r. 2 (2) alleging adjustment, should be treated as an application; *U. Po. Thaing* v. *Mg. Ba. V.*, 11 I. C. 750.

The decree-holder is not bound to certify in writing a payment or adjustment of his decree. It may be done orally either by himself or by a person representing him; *Mahabir v. K. E.*, 20 C. W. N. 520. Mere notifying to the Court that the Judgment-debtor has done a particular act which he was bound to do under the terms of a consent decree is not compliance with the provisions of Or. XXI, r. 2 and decree-holder, if he disputes the allegation, may file a petition for execution *Ligraj Patjori* v. *Mahadev Ram*, 30 C. L J. 118: 53 I. C. 882.

Effect of Certifying by One of Several Decree-Holders.—The question whether one of several decree-holders can enter satisfaction on behalf of all, is one of procedure, and a rule of decision must be looked for in the C. P. Code. Or XXI, r. 15, and Or. XXI, r. 2 appear to have shown that it is not the act of joint-decree-holders, but the act of the Court executing the decree that is intended to operate as a valid discharge.—*Seshas* v. *Rajagopala*, 13 M. 236.

Satisfaction of entire decree certified by one only of several decree-holders, is not binding on the others.—*Moti Ram* v. *Hannu Prasad*, 26 A. 334. *See* also *Sultan Moideen*, v. *Savalayammal*, 15 M. 343; *Taruck Chunder* v. *Divendro Nath*, 9 C 831 · 12 C. L R. 566, and *Dhanraj* v. *Ujain Singh*, 34 P. R. 1906: 93 P. L R. 1906 Nor can one of several partners or even the manager of a joint Hindu family legally certify so as to bind others unless anything on behalf of others is proved. In the absence of any evidence that they hold any special and definite shares each. Such certificate, if any, has not the legal effect of satisfying or adjusting the decree even in part. *Mahomed Silar Sahib & Co.* v *Nabi Khan Sahib*, 31 M L J 93: 35 I. C. 157

One of two joint decree-holders of a mortgage decree cannot alone certify satisfaction of the whole decree, though he may do so in respect of his own interest. The other decree-holder who refuses to recognise the certificate is entitled to obtain an order absolute for sale of the mortgaged property in respect of his own share of the mortgaged-debt.—*Taman Singh* v. *Lachhmin Kunwari*, 26 A. 318. *See* also *Budhun* v. *Hafezah*, 4 C. L. R. 70; *Brojeswari* v. *Tripoora Soondaree*, 3 C. L R. 518; *Motiram* v.

Honnu Prosad, 26 A. 334 (15 M. 348: 9 C. 831 *referred to;* 22 W. R. 77 *not followed*).

A mortgaged property burdened with the payment of an entire debt to two share-holders, is liable to sale at the instance of both creditors separately so long as their claims remain unsatisfied. The act of one cannot destroy the lien of the other on property pledged to both as security for a joint-debt —*Inderjeet Koonwar* v *Brij Bilas*, 8 W. R. 190.

See also notes to r 15.

Effect of Payment to One of Joint Decree-holders.—*See* notes to r. 15.

Does this Rule Restrict the Operation of S. 47?—Fraud.—This rule lays down a special procedure in cases where money payable under a decree is paid out of Court or the decree is otherwise adjusted, and the judgment-debtor appears as an applicant for praying that the payment or adjustment might be recorded or certified There is nothing in the language of this rule which prevents a judgment-debtor who has not adopted the special procedure laid down in sub-rule (2) from raising the plea of payment or adjustment in answer to a decree-holder's fraudulent application for execution It is only when the judgment-debtor on his own initiative applies under sub-rule (2) for getting the payment recorded, that sub-rule (3) and Art 174 of the Limitation Act come into play. But this rule does not seem to debar a judgment-debtor who did not make any application under sub-rule (2) from appearing as an opponent to contest a fraudulent execution and to ask the Court to enquire into the fact of payment or adjustment This would be in consonance with the provisions and spirit of s 47, otherwise the provisions of this rule and s. 47 would be inconsistent and irreconcilable When a judgment-debtor resists the fraudulent execution by a decree-holder by a plea of adjustment or satisfaction, it is submitted his case ought to fall under s. 47. It may also be noted here the rule 11, cl (*e*) expressly requires that a judgment-creditor when applying for execution shall state whether any payment or adjustment has been made between the parties subsequent to the decree. And a person who applies for execution over again in spite of payment or adjustment of the decree out of Court alleging that there has been no adjustment makes a false statement under rule 11, cl. (*e*). There is no reason whatever why the fact of payment or adjustment should not be enquired into under s. 47. To hold otherwise would be simply lending support to the carrying out of fraud. The view expressed seems to have the support of *Gadhadhar* v *Shyam Charan*, 12 C. W. N. 485, where the judgment-debtors complained that the decree-holder had by fraud kept them in ignorance, till within a month of their application, of the fact that satisfaction of the decree had not been certified, and it has held that the matter could be investigated under s. 47.

This view was also taken in *Ramayyar* v. *Ramayyar*, 21 M 356, where it has been held that if a decree-holder falsely representing to the judgment-debtor that an adjustment out of Court has been duly certified by him fraudulently proceeds with the execution, the judgment-debtor may rely on the uncertified adjustment, and may prove it in the execution proceedings. The Court proceeded on the ground of a fraud having been practised upon the Court and judgment-debtor. This case had not the

support of the later decisions in *Ganapathy* v. *Chenga*, 30 M. 312; *Veerappa* v. *Ponnyya*, 17 M. L. J. 527; *Budruddin* v. *Galans*, 36 M. 357, and has been adversely commented on in *Trimbak* v. *Hari Laxman*, 34 B. 579, HEATON, J., discussed the question and expressed himself thus: "It is however supposed that the Court is debarred from recognising in any way any payment unless it is certified by the decree-holder or proved by the judgment-debtor in accordance with the special procedure provided by s. 285 (the present rule). To so suppose is to run counter to the provisions of s. 244 (s. 47) which provide that the Court executing the decree shall determine any question between the parties relating to the discharge or satisfaction of the decree, and if what is supposed to be the effect of the law be in truth its effect, it leads to a very singular result; for it means that a decree-holder may fraudulently apply to execute a decree twice over; and the Court is prohibited from enquiring whether there is or there is not fraud; and this inspite of the fact that the decree-holder seeks to debar the Court from enquiring into the fraud, by the device of refusing to do what the law says he must do If that be the effect of the law, then all that I have to say is that the law intends the Court to be used, in this kind of matter, not as an instrument of justice but as an aid to fraud. It is to me abundantly clear that the legislature never intended such a result as an encouragement of fraud. Do the words of the law compel it? I think not, though s. 258 is doubtless worded in such a way as to invite misunderstanding To state the result briefly the final clause of s. 258 raises a presumption but does not limit the jurisdiction of the Court. This result appears to me to be inevitable if s 258 be read not by itself as an isolated enactment containing a complete statement of the law on the matter it deals with, but as a part of a whole and with reference to its place in the scheme of the code and its relation to other parts of the scheme. It is a matter which nearly affects the reputation of our Courts, and very closely affects the administration of justice, for to read the law as it often is read is it seems to me, to reverse the principles of justice and to convert the instruments of justice into instruments of fraud" In *Deno Bandhu* v. *Hari Maiti*, 21 C 437 it was observed that this rule did not restrict the operation of s. 47

The recent decision in *Hansa Godhaji* v *Bhawa Jogaji*, 40 B. 303: 18 Bom. L R 22, adopts the view that where fraud has been committed the executing Court should enquire into the question of adjustment or payment out of Court although it has not been certified In this case plaintiff obtained a decree for Rs 2,508. The next day the parties effected a compromise for Rs 2,000 in full satisfaction, the money was paid and a formal receipt passed but the payment was not certified to the Court The plaintiff notwithstanding applied for execution of the decree The lower Courts held that although the application for execution was fraudulent, they could not under this rule recognise the uncertified payment and execution should proceed. The High Court held that the question of payment or adjustment should be gone into. The judgment of HEATON, J., in 34 B 575 (*ante*) was followed and STOTT C. J observed: "that the Court should not in the exercise of its duty under s 47 allow a clear case of fraud to be covered and condoned by the provision of Or XXI, r. 2." The above decisions have, however, been overruled by a Full Bench of the same Court in *Mehbunnissa* v. *Mehmedunnissa*, 49 B. 548: A. I. R. 1925 B. 300 and *Ganesh* v. *Yeshwant*, 25 Bom. L. R. 247: A. I. R.

1923 B. 253, where it has been held that a Court executing a decree can in no case recognize a payment or adjustment not certified as required by this rule. The Calcutta High Court has also held in several cases that in no case can an executing Court inquire into uncertified payment or adjustment even if fraud is imputed to the decree-holder; *Binoo Gordain* v. *Jaimurat*, 16 C W N 923; *Jogendra v. Ashutosh*, 24 C. L. J. 462. The same view has been taken by the Patna High Court in *Imamuddin* v *Bindubasini*, 5 Pat. L. J. 70: 55 I. C 890, and by the Lahore High Court in *Parma Ram* v *Lehna Singh*, (1919) 135 P. R. 349: 53 I. C. 443.

"Uncertified payments shall not be recognised by the Court executing the decree"—Section 47.—Under this rule any payment or adjustment made out of Court and not certified cannot be taken into account in execution proceedings, *Trilochun* v *Rakkaswar*, 15 C. L. J. 423; *Janki Prasad* v. *Thakur Das*, 13 I C 21, *Prosanna* v. *Lal Mia*, 55 I. C. 669, *Radhakanta Lal* v *Mussammat Parbati Koeri*, 63 I. C. 535; 6 Pat. L J. 337; *Taj Sing* v. *Jagan Lal*, 14 A. L J. 370, *Jogendra* v. *Ashutosh*, 24 C. L. J. 462. It has been further held that the Rule is applicable where, in answer to an application for execution, an uncertified adjustment is set up and the executing Court is bound not to recognise and to enquire under s 47 notwithstanding fraud on the part of the decree-holder; *Badrudden* v *Gulam*, 36 M 357. (*Veerappa* v. *Armugam*, 17 M. L. J. 527; *Ganapathi* v *Chenga*, 29 M 312, *Periatambi* v. *Vellaya*, 21 M. 409, *followed*, *Ramiayyar* v *Ramayyar*, 21 M 346, *commented on and disapproved*); *see* also *Biroo Gorain* v *Jainwati*, 16 C. W. N. 929: 16 C. L J. 174; *Shamlal* v *Hazarimal*, 15 C L J 451. The provisions of this rule are express and no payment or adjustment which is not certified shall be recognised. It is no answer under s 47 to an application for execution of a decree. In this case the judgment-debtor pleaded that by fraud he was prevented from learning that the adjustment had not been certified by the decree-holder in accordance with his promise; *Bajrang* v. *Lachmi*, 15 C. L. J. 38; *Sojhro* v *Changomal*, 63 I. C. 238; *P. Chetty firm* v. *G. Lon Pon*; A. I. R. 1923 R. 103. 1 Bur. L. J. 226. *See*, however, *Gadadhar* v. *Shyam Churn*, 12 C W. N 485, which lays down that where the judgment-debtor complained that the decree-holder had by fraud kept them in ignorance till within a month of their application, of the fact that the satisfaction of the decree had not been certified, the matter could be investigated under s 47 But see *Taj Singh* v. *Jaganlal*, 38 A. 281: 35 I. C. 234. Such uncertified payment or adjustment cannot be recognised by Court even to guard against the end of giving an opportunity to dishonest decree-holder to commit fraud by denying adjustments which are not certified; 40 I. C. 889 *In re M. D S. Elanitai Co. Ltd.*, omission on the part of the decree-holder to certify does not amount to fraud and executing Court can on no account entertain directly or indirectly an objection regarding uncertified adjustment of decree; *Imamuddin Khan* v. *Bindu Bashini Prasad*, 55 I. C. 899: 5 Pat. L. J. 70; *Ellis E. P. Charry* v. *Kittar P. Gowrya*, 46 B. 226 · 23 Bom. L. R. 981.

The weight of authority is decidedly against the contention that such uncertified payments may be investigated and recognised when the decree-holder is guilty of fraud in suppressing or omitting to certify such payment but there are some cases in which executing Courts have allowed the judgment-debtor to raise such plea in execution on the principle that

decree-holder cannot be permitted to obtain an unjust order from Court by false statements. *See* the case of *Hansa* v. *Bhawa*, 40 B. 333: 18 Bom. L R. 22; 33 I. C. 232; *Ghasi Ram* v. *Dalel Singh*, 45 I. C. 222, where an execution sale was held to be a nullity as the decree was satisfied and decree-holder, in failing to certify payment, had committed fraud on Court.

Uncertified payments cannot be proved under s 47 when the time for application under Art 173-A, Limitation Act, has passed away, *Kamini* v. *Agore*, 14 C. W N. 357 11 C L J 91, (*Ram Doyal* v *Ramhari*, 20 C. 32; *Bairagulu* v. *Bapana* 15 M 302 *relied on*), *Nistarini* v *Kasim*, 12 C. L. J. 65; *Manmohan* v. *Dwarkanath*, 12 C L J 312, *Golam Majafar* v. *Goloke*, 25 I. C. 884 and even if decree-holder certifies, the judgment-debtor can show that no such payment was made, or that such payment did not extend period of limitation; *Hender Mirza* v *Kailash*, 17 I C 177.

An uncertified payment or adjustment is not effective to save limitation, *Bisseswar Mukerjee* v *Ambicacharan Bhattacharjee*, 45 C 630: 42 I. C. 472

The decisions on this point are not harmonious It has been held in some cases that an uncertified payment may be enquired into under s. 47, if there is fraud on the part of the decree-holder *See* notes under "DOES THIS RULE RESTRICT THE OPERATION OF s 47"

Uncertified Payments.—A sum paid under a void agreement cannot be acknowledged or recognised in execution of a decree under this section, unless it has been certified within the proper time —*Durga Prasad* v. *Lalit Mohon*, 25 C 86. *See* also *Chedambara Pillai* v *Ratna Ammal*, 3 M. 113.

In the course of execution proceedings, the parties entered into an agreement which was registered and filed in Court and the decree-holder filed a petition stating that as the judgment-debtor had made over to him a bond he could realize his debt by bringing a suit upon it On this the execution case was struck off Afterwards the decree-holder applied for execution of the decree, alleging that the judgment-debtor had failed to make over the bond to him *Held* that the decree was not superseded by the agreement, and was, therefore, capable of execution —*Fateh Muhammad* v. *Gopal Das*, 7 A. 424

A *kistibondi* or instalment bond was executed by way of adjustment of decree, and thus was not certified. *Held* that a Court executing the decree was not competent to take cognizance of the *kistibondi* under s 47 and the decree must be executed notwithstanding the adjustment.—*Ram Doyal* v *Ram Hari*, 20 C 32 But see *Gadadhar* v *Shyam Churn*, 12 C W N. 485.

If the adjustment or payment pleaded by judgment-debtor be admitted by decree-holder, then the executing Court cannot proceed to execute the decree, though such payment or adjustment be not certified, as the jurisdiction to execute the decree ceases as soon as the Court is informed by the decree-holder that the decree has been adjusted. The intention of this Rule is to avoid enquiry into uncertified and disputed adjustment or payment, but there is no time limit for the decree-holder to certify, and

if a decree-holder admits satisfaction, the Court should not proceed in execution any further So it was held that a Court should not confirm sale, if the decree-holder admits satisfaction of decree, as confirmation of sale is a proceeding in execution.—*Nilkanta* v. *Yeshwant*, 65 I. C. 331.

The Court is not bound to take account of an adjustment out of Court by agreement to receive a smaller sum in satisfaction of the decree unless such adjustment is certified under this section —*Veerappa* v. *Arumugam*, 17 M. L J 527

A decree-holder was opposed by the judgment-debtor on the ground that the decree had been sold by the Deputy Collector in execution of a decree of his Court, and that he (judgment-debtor) had become the purchaser thereof. *Held* that these proceedings amounted to an adjustment out of Court, which could not be recognized by the Court, unless certified by the judgment-creditor himself —*Bharat Chunder* v. *Nazir Ali*, 10 W. R 354.

A decree being attached as directed by s. 273, C. P. Code, 1882 (Or XXI, r 53), its adjustment subsequent to such attachment cannot be recognized by the Court —*Gopal Nanashit* v *Jaharimal*, 16 B. 522

Agreement between Judgment-debtor and Proposed Assignee of Decree Before Assignment can be Pleaded in Bar of Execution Without Certification.—See *Brajabashi* v *Manik*, 31 C W N. 921: A. I. R 1927 C. 694

Uncertified Payments and Limitation.—The omission of the words "*as a payment or adjustment of the decree*" from the last para of the old section has made it clear that the Court cannot recognize a payment or adjustment which has not been certified, *for any purpose whatsoever.* It follows that an uncertified payment or adjustment cannot operate to prolong the period of limitation for applying for execution under the Limitation Act

As the section stood before it provided that an uncertified payment could not be recognized *as a payment or adjustment* of the decree so it was formerly *held* that if a decree-holder sought execution of a decree and was resisted by the judgment-debtor by the plea of limitation, in deciding the question whether it has become time barred or not it was competent to the Court to take evidence about an uncertified payment made out of Court and to take it into consideration as every payment gives a fresh starting point for limitation (as *Tukaram* v. *Babaji*, 21 B 122; *Roshan* v *Matadin*, 26 A. 36. 23 A W N 179, *Hurri* v *Nasib*, 21 C. 542).

Under the present rule uncertified payments cannot be recognized for the purpose of limitation or for *any purpose whatsoever, e g.*, extending the limitation; see *Kutabullah* v *Durga*, 16 C. W. N. 396. 13 I C. 424, *Bhajan* v. *Cheda*, 12 A. L. J. 85 · 24 I C 215; *Seth Narsoomal* v. *Tiraltmal*, 30 I. C. 51; *Amir Singh* v *Chattar*, 13 A. L. J. 666. 29 I. C. 274; *Bireswar* v. *Ambika Charan*, 45 C. 630: 42 I. C. 472; or for deciding whether the application for execution is within time; *Ram Sarup* v. *Jaggannath*; 15 I. C. 523: 15 O. C. 234, or for shewing that the decree has been satisfied; *Romes Ch. Shaha* v. *Kala Ganji*, 50 I. C. 331.

The omission of the words has rendered the following decisions nugatory:—*Kishan* v. *Aman*, 17 A. 42; *Bhubonesuari* v *Dina Nath*, 2 B. L. R 320; 11 W. R. 232, *Bishto* v. *Uma*, 15 W. R. 459; *Fakir* v. *Madan*, 4 B L. R. 130, F. B., 13 W. R. 40; *Juggut Mohinee* v. *Madhub*, 15 W. R. 66; *Purnanand* v. *Vallab*, 11 Bom. H C 506; *Tukaram* v. *Babaji*, 21 B. 122; *Hurri* v. *Nasib*, 21 C 542, *Rajeswara* v *Hari Babandhu*, 19 M. 162; *Roshan* v *Matadin*, 26 A 36 (12 A 569 *overruled*); *Zahar Khan* v. *Bakhtwar*, 7 A. 327.

"Show cause."—It does not mean merely to allege causes, nor even to make out that there is room for argument, but both to allege causes and to prove it to the satisfaction of the Court In such an investigation the evidence may be given either orally or by affidavit.—*Rung Lall* v. *Hem Narain*, 11 C. 166, referred to in *Shaik Davud* v *Paramasami*, 31 M. L. J. 207.

Suit by Judgment-debtor Based on Uncertified Payments Is Barred.—Where a decree is alleged to be satisfied by an agreement out of Court, but satisfaction is not certified a subsequent suit on the agreement is not maintainable for a declaration that the amount payable under the decree has been paid and satisfied and for an injunction restraining the decree-holder from executing the decree. S 47 is a bar to such suit, *Deno'bundhu* v. *Hari Malti*, 81 C. 480 8 C W N 395 *See* also *Azizan* v. *Matuk Lal*, 21 C. 437; *Bairagulu* v *Bapanna*, 15 M 302; *Palaneappa* v. *Somasundaram*, 28 I. C. 468. But see *Iswar Chandra* v *Haris Chandra*, 25 C. 718: 2 C. W. N. 247; *Mukund* v *Hari Das*, 17 B 23. *See* also 50 I. C. 956 In Punjab it has been held that a suit for a declaration that a decree has been satisfied and is incapable of execution lies; *Diwan* v. *Amur*, 16 P R. 1910· 5 I C. 814 (21 C 437 *not folld*) *See* also *Mt Jamna* v. *Beliram*, 190 P W R 1913; *Jamun* v *Kishen*, 42 P. R. 1914.

No separate suit will lie to set aside a sale held in execution of a decree on the ground that the decree had been adjusted out of Court, when, in fact, no such adjustment of the decree had been certified in the manner provided by this section —*Jaikaram Bharti* v *Raghunath*, 20 A 254

Where an application for recording adjustment out of Court has been rejected, the decision cannot be attacked by a regular suit —*Hafiz Abdulla* v. *Kanhya*, 14 I C 751 92 P W R. 1912

Suit Lies by Decree-holder on Uncertified Adjustment.—In execution of a decree a compromise was effected and the judgment-debtor executed a bond in favour of the decree-holder in satisfaction of the judgment-debt. The compromise was not certified to the Court *Held* that the bond was not void, but was binding on the obligor: and a suit upon the bond was therefore, maintainable.—*Ramghulam* v *Janki Rai*, 7 A 124 (5 B L. R. 223: 20 W. R. 150: 3 C L R. 414 4 B. 295 3 A 533 and 538, *followed*; 6 B. 146, and 8 B 300, *dissented from*) *See* also *Hukum Chand* v. *Tahorrunnessa*, 16 C. 504; *Sellamayyan* v *Muthan*, 12 M. 61; *Hara Gobind Das* v *Issuri Dasi*, 15 C 187; *Swamirao Narain* v. *Kashi Nath Krishna*, 15 B. 419; and *Tukaram* v. *Anant Bhat*, 25 B. 252. *See*, however, *Thirumalai* v. *Sundara*, 11 M. 469; *Abdul Rahiman* v. *Khoja Khaki*, 11 B. 6, and *Heranema* v. *Pestonji*, 22 B. 693, F. B. Followed in *Dhanram Ragho* v. *Ganpat Sadashib*, 27 B. 96.

if a decree-holder admits satisfaction, the Court should not proceed in execution any further So it was held that a Court should not confirm sale, if the decree-holder admits satisfaction of decree, as confirmation of sale is a proceeding in execution —*Nilkanta* v *Yeshwant*, 65 I C. 331.

The Court is not bound to take account of an adjustment out of Court by agreement to receive a smaller sum in satisfaction of the decree unless such adjustment is certified under this section —*Veerappa* v *Arumugam*, 17 M L J. 527.

A decree-holder was opposed by the judgment-debtor on the ground that the decree had been sold by the Deputy Collector in execution of a decree of his Court, and that he (judgment-debtor) had become the purchaser thereof *Held* that these proceedings amounted *to* an adjustment out of Court, which could not be recognized by the Court, unless certified by *the* judgment-creditor himself —*Bharat Chunder* v. *Nasir Ali*, 10 W R 354.

A decree being attached as directed by s 273, C. P. Code, 1882 (Or XXI, r 53), its adjustment subsequent to such attachment cannot be recognized by the Court —*Gopal Nanashit* v *Jaharimal*, 16 B. 522.

Agreement between Judgment-debtor and Proposed Assignee of Decree Before Assignment can be Pleaded in Bar of Execution Without Certification.—See *Brajabashi* v *Manik*, 31 C W N 921: A I R. 1927 C. 694

Uncertified Payments and Limitation.—The omission of the words "*as a payment or adjustment of the decree*" from the last para of the old section has made it clear that the Court cannot recognize a payment or adjustment which has not been certified, *for any purpose whatsoever. It* follows that an uncertified payment or adjustment cannot operate to prolong the period of limitation for applying for execution under the Limitation Act

As the section stood before it provided that an uncertified payment could not be recognized *as a payment or adjustment* of the decree so it was formerly *held* that if a decree-holder sought execution of a decree and was resisted by the judgment-debtor by the plea of limitation, in deciding the question whether it has become time barred or not it was competent *to* the Court to take evidence about an uncertified payment made out of Court and to *take* it into consideration as every payment gives a fresh starting point for limitation (as *Tukaram* v *Babaji*, 21 B. 122; *Roshan* v. *Matadin*, 26 A 36 23 A W N 179, *Hurri* v. *Nasib*, 21 C. 542)

Under the present rule uncertified payments cannot be recognized for the purpose of limitation or for *any purpose whatsoever*, *e.g.*, extending the limitation; see *Kutabullah* v *Durga*, 16 C. W. N. 396, 13 I. C. 424, *Bhajan* v. *Cheda*, 12 A. L J 85 24 I C. 215; *Seth Narsoomal* v. *Tirathmal*, 30 I. C. 51, *Amir Singh* v *Chattar*, 13 A. L. J. 666: 29 I C. 274; *Bireswar* v. *Ambika Charan*, 45 C. 630; 42 I. C. 472; or for deciding whether the application for execution is within time; *Ram Sarup* v. *Jagannath*; 15 I. C. 523: 15 O. C 234, or for shewing that the decree has been satisfied; *Romes Ch. Shaha* v. *Kala Ganji*, 50 I C. 331

adjustment may be recognised by a Civil Court except in execution.—*Kalyan Singh* v. *Kamta Prasad*, 13 A. 339. *See* also *Ghansham* v. *Kashiram*, 16 B. 539; *Azizan* v. *Matuk Lal*, 21 C. 437; and *Balkrishna* v. *Bapu Yesaji*, 19 B. 204.

Where a decree has been satisfied out of Court, and the payment has not been certified, it is nevertheless open to the *quondam* judgment-debtor, when suing, to have a sale made by the *quondam* decree-holder, after satisfaction of the decree set aside, to prove the payment of the decretal money otherwise than by a certificate under this rule.—*Pat Dasi* v *Sharup Chand*, 14 C 376 *See* also *Ramayyar* v *Ramayyar*, 20 M. 356; and *Tegh Singh* v *Amin Chand*, 5 A 269 But see *Mathura Mohun* v. *Akhoy Kumar*, 15 C. 557

Criminal Proceedings.—This rule does not debar a Criminal Court from recognizing uncertified payment, where the decree-holder is charged with fraudulently executing a satisfied decree —*Q.-E.* v. *Pillala*, 9 M. 101: *Q.-E* v. *Bapuji*, 10 B 288, *Q* v *Moturaman*, 4 M 325, and *Madhub* v. *Nobodeep*, 16 C. 126

Mere application for execution is not an offence under s. 210, I. P. C. The decree must have been caused to be executed —*Shama Churn* v. *Kashi*, 23 C 971

Appeal.—An order under this rule, allowing or refusing an application to record an adjustment of a decree falls within the terms of s 47 being made on a question arising between the parties to the suit such an order falls within the definition of " decree " and is appealable under s 96.—*Guruvayya* v *Vudayappa*, 18 M 26, *Lingayya* v *Narasimha*, 14 M. 99; *Jamna Prasad* v *Mathura Prasad*, 16 A 129, *Rangji* v *Bhaiji Harjivan*, 11 B 57; *Raja Kamlessuri Persad* v *Sukhan Singh*, 7 C W N 172, *Biroo* v *Jawati*, 16 C. W. N 923, *Jadunandan* v. *Sheonandan*. 1 P 644. 68 I. C 645 A I R 1922 P 200

Limitation.—The judgment-debtor must apply within ninety days from the payment or adjustment, for the issue of a notice to the decree-holder to show cause why payment or adjustment should not be recorded as certified *See* Art 174, Limitation Act, 1908

Time Within Which Decree-holder shall Certify.—No time is fixed within which decree-holder is bound to certify a payment out of Court.—*Tukaram* v *Babaji*, 21 B 122 He can certify part payments at any time —*Lakhi Narain* v *Falamani*, 20 C L J 131 But a payment cannot be certified after the decree has become time barred —*Bhajan* v *Cheda*, 24 I C 215

The decree-holder may certify payment either prior or subsequent to the application for execution by a separate application or he may do so on his application for execution — *Eusuff Azeman Sanchai* v *Sauchia Lal*, 43 C. 207: 23 C. L J 390 20 C. W N 272 34 I C 606 *Madan* v. *Haralal*, 26 C W N. 531, *Baby* v. *Ayanmai*, 26 C W N 529: A. I R. 1922 C. 30; *Masilamani* v *Sethusami*, 41 M 25, *Pandurang* v *Jagya*, 45 B 91; *Maung Law San* v. *Maung Po Thein*, 2 R 393 A I R. 1925 R. 26 The Allahabad High Court took a contrary view and held that the certification must be a distinct and prior proceeding, that is, it should be made prior to the application for execution; *Baijnath* v. *Pannalal*, 45

A. 635: A. I. R. 1924 A 706, *Chatter Singh* v. *Amir Singh*, 38 A 204 32 I. C. 590, *Bhajan* v *Chhedalal*, 12 A. L. J. 825. In the F. B case reported in 52 I. C 804 (*Kazi Shafi Muhammad* v *Choitram*), it has been held that there was no period of time within which such payments had to be certified by the decree-holder and that he may certify by mentioning the fact in his petition for execution *See* also *Sheik Elahi Bakhsh* v. *Nawab Lal*, 50 I C 364, A I R 1919 P. 260. But the decree-holder must certify before the decree is barred by limitation and an uncertified payment cannot be taken notice of to save limitation; *Bahu Bulla* v. *Jogesh Chandra*, 23 C W N 320 50 I. C 242. *See* also 45 C. 630 42 I. C. 472, 29 I C 472 38 A 204 32 I C. 590; and *Pandurang Balkrishna* v *Jagya Bhau*, 45 B 91 59 I. C 399, *Madan* v. *Haree*, 26 C W. N 534 35 C L J 566 64 I C 72, *Bahy Md Sahu* v. *Aijanmai*, 35 C. L J 71 26 C W N 529 The alleged payments must be made within three years from the date of the decree and the application to certify must be made within three years from the date of payment; *Jatindra* v. *Gagan*, 46 C 22 45 I C 903, *Madan* v *Haralal*, 26 C W. N. 534; *Amar Singh* v *Ram Dei*, 47 A 873 A I R 1925 A. 802; *Maung Law San* v *Maung Po Thein*, 2 R 393 A I R 1925 R 26

Part payment, made within time but certified after time saves limitation.—*Rajan Aiyar* v *Ananthavathnam*, 29 M L. J. 669 (20 C L J 138 *referred to*).

Jurisdiction of Executing Court.—When one of several debtors had paid the decretal amount to decree-holder and got the payment certified under Or. XXI, r 2, and another judgment-debtor in ignorance of the satisfaction of the decree paid money into Court and it was withdrawn by decree-holder and having discovered that the decree had been previously satisfied, the judgment-debtor made an application to the executing Court for refund of the money *Held* that executing Court had jurisdiction to entertain such application —*Gopal* v *Rambhanjan*, 65 I. C. 307.

Reversal of Decree and Refund of Uncertified Payment.—If a decree is reversed on appeal the judgment-debtor is entitled to get back what he had paid to the plaintiff under the decree whether certified by the Court or not.—*Vasudeb* v *Vishnu*, 11 B 724.

Limitation and Step-in-aid of Execution.—An application by some of the judgment-debtors, signed by the decree-holders, to have certain payments made out of Court certified under this rule and that time be allowed to pay the balance of the decree, is a "step-in-aid of execution," such as will keep the decree alive within the meaning of Art. 179 of the Limitation Act, 1877.—*Wasi Imam* v *Ponit Singh*, 20 C 696; *Surjan Singh* v. *Hira Singh*, 12 A 399; *Muhammad Husan* v *Ram Sarup*, 9 A. 9; *Tarini Das* v *Bishtoo Lal*, 12 C 608, *Akbar Jamadar* v *Kali Krishna*, 4 C W. N. (S N.) clii (152); *Kasumri* v *Beni Prasad*, 26 A. 19.

The payment of part of the judgment-debt by the judgment-debtor with the acknowledgment of liability by his pleader, is sufficient, under s. 19 of the Limitation Act (XV of 1877), to give a fresh period of limitation.—*Trimbak* v *Kashi Nath*, 22 B 722 *See* also *Muhamad Said* v *Payag Sahu*, 16 A. 228, where the acknowledgment was made in the presence of the collector and it was held to be a valid acknowledgement for all purposes and sufficient under ss 19 and 20 of the Indian Limitation

Act to save limitation in respect of the execution of the decree. An application by decree-holder to certify payment made out of Court is a step-in-aid of execution; *Hari Charan* v. *Hari Charan*, 6 I. C. 43 (10 C. L. J. 467 *followed*).

Omission of Section 257-A from the C. P. Code.—Section 257-A, which had a place in the Code of 1882, has now been omitted. It ran as follows:—

"257-A. *Every agreement to give time for the satisfaction of a judgment-debt shall be void, unless it is made for consideration, and with the sanction of the Court which passed the decree, and such Court deems the consideration to be under the circumstances reasonable. Every agreement for the satisfaction of a judgment-debt, which provides for the payment directly, or indirectly of any sum in excess of the sum due or to accrue due under the decree, shall be void, unless it is made with the like sanction. Any sum paid in contravention of the provisions of this section shall be applied to the satisfaction of the judgment-debt; and the surplus (if any) shall be recoverable by the judgment-debtor.*"

The section was first enacted by Act XII of 1879, with a view to protect the interests of judgment-debtors against the exercise of undue pressure by decree-holders. It gave rise to conflicting decisions and as interpreted by the majority of the High Courts was found in practice to be of little service to the judgment-debtors Section 16 of the Indian Contract Act as amended, appeared to the Special Committee to afford to adequate protection where it was required

The reason for the omission will be clearly understood on reading the Full Bench Case of *Atma Singh* v *Banke Rai*, reported in 61 P L R. (1907), 71 P W R 1907, where all the cases decided by the High Courts under the old section have been referred to, discussed and explained. The Full Bench said —

"A contract under undue influence as under fraud, coercion or misrepresentation is only voidable, and it is left to the Courts to decide the question upon evidence aided by certain presumptions in particular cases. But here simply because the debt has been the subject of a decree, a contract between a debtor and his creditor relating to the liquidation of the debt by which any time is given for its payment, or any sum however small, is agreed to be paid in excess of the decree, is by inflexible fiat of the Legislature pronounced as nullity unless made with the sanction of the Court that passed the decree The effects of such a rule in the substantive law of Contract is far-reaching indeed"

"The first part of s 257-A is however, clearly and admittedly an invasion of ordinary Contract Law Such an agreement without consideration would clearly be void under s 25 of the Contract Act But if for any reason, poverty, misfortune, illness, or so on, the judgment-debtor can induce the decree-holder to give him time, and the Court which passed the decree endorses the indulgence, the contract which under substantive law would be void, becomes valid under this special enactment"

"Under the ordinary law, Contract Act, s 25, an agreement for the satisfaction of the decree, which provides for the payment of a sum in excess of the decree, but does not extinguish the decree, is clearly void in the immense majority of cases, as it is absolutely without consideration

The decree remains in force and executable and the judgment-debtor gains nothing whatever Such an agreement is void without the intervention of s. 257-A "

The effect of the omission of s 257-A. from the present Code, is, that now no agreement to give time to the judgment-debtor without any consideration and without the sanction of the Court, or any agreement which provides for the payment of any sum in excess of the sum due or to be due under the decree, would be void except in so far as such agreements may be affected by the provisions of the Indian Contract Act

For contracts induced by undue influences, see notes to s. 9.

COURTS EXECUTING DECREES.

Lands situate in more than one jurisdiction.

3. Where immoveable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure. [New.]

COMMENTARY.

The introduction of this rule settles a point on which decisions were not harmonious It provides for cases where estates are situate within the jurisdiction of two or more Courts and definitely lays down that any of such Courts may attach and sell the entire estate. The principle was acted upon in various cases and they are noted below

Sale of Property Situate in More than One Jurisdiction.—A suit was instituted, on a mortgage of a single revenue-paying estate, part of which lies in Bakherganj and part in Fareedpore, in the Sub-Judge's Court at Bakherganj under s 17, and a decree was obtained for sale of the mortgaged property, *held* that the Court was competent to order a sale of the whole of mortgaged property, though only a portion of it was situated in the district of Bakherganj —*Shuroop Chunder v. Ameerunnissa*, 8 C. 703, *Shama Charan v. Kasi Nath*, 23 C 971 *See* also *Ram Lall v. Bama Sundari*, 12 C. 307 (11 B L R 56, 19 W R 134 *followed*), *Shib Narain v. Gobin Das*, 23 W R 154; and *Ganga Narain v. Annada Moyee*, 12 C L. R. 404. *See*, however, *Unnocool Chunder v Hurry Nath*, 2 C. L R 334.

In execution of a mortgage decree in a suit brought under the provisions of s 17 in the Court of the Sub-Judge of Rajshaye, properties situated in the districts of Rajshahye and Nyadumka were sold by the Rajshahye Court.—*Maseyk v. Steel & Co.*, 14 C. 661. Referred to in *Gopi Mohun v. Doybaki Nundun*, 19 C 13. The latter case has been followed in *Tin Couuri Debya v. Shib Chandra*, 21 C. 639, and also in *Jagernath Sahai v. Dip Rani Koer*, 22 C 871 *See*, however, *Prem Chand v. Mokhoda Debi*, 17 C. 699 (F B)

Change of Territorial Jurisdiction.—When during the pendency of execution proceedings, there was a change of territorial jurisdiction of the executing Court, *pending proceedings* are by *operation of law transferred*

to the Court having jurisdiction and if in spite of such change, property is sold by a Court which initially had jurisdiction, but subsequently had ceased to have jurisdiction owing to such change; *held*, sale invalid.—*Kasi* v. *Murugappa*, 33 M. L. J 750 13 I. C. 70.

Transfer to Court of Small Causes.

4. Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes, and the Court which passed it wishes to be executed in Calcutta, Madras, Bombay or Rangoon, such Court may send to the Court of Small Causes in Calcutta, Madras, Bombay or Rangoon, as the case may be, the Copies and certificates mentioned in rule 6; and such Court of Small Causes shall thereupon execute the decree *as if it had been passed by itself.* [*S.* 223, *para.* 5.]

COMMENTARY.

This rule corresponds to para. 5 of s. 223 of the C P Code, 1882, with some verbal changes only

A S. C. Court executing the decree of another Court has the same powers as it possesses in regard to its own decrees, *Gunapatty* v *Thakurdye*, 34 C. 823.

Mode of transfer.

5. Where the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But, where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed. [S. 223, para. 6.]

COMMENTARY.

Transfer Within District.—District transfer of decrees within the same district is not illegal, *Kelu* v *Vikrusha*, 15 M 345

Direct Transfer Outside District.—A decree for money passed by a Munsif in one district was sent for execution to a Munsif in another district directly *Held* that the *latter* Court had no jurisdiction to execute it without an express order of the District Judge —*Debi Dial* v *Moharaj Singh*, 22 C. 764.

The Judge of Gaya sent a decree direct to the Sub-Judge of Palamau another district for execution who dismissed the application *Held*,

that he should have returned the papers to Gaya for retransmission t proper Court instead of dismissal, *Prakash* v *Baldeo*, 22 I C 682

As to the power of the Court to which a decree is transferre execution to determine the question of limitation, see notes under s

Procedure where Court desires that its own decree shall be executed by another Court.

6. The Court sending a decree for execution shall se

(*a*) a copy of the decree;

(*b*) a certificate setting forth that s faction of the decree has not been obta by the execution within the jusrisdictio the Court by which it was passed, or, w the decree has been executed in part, the e to which satisfaction has been obtained and part of the decree remains unsatisfied; and

(*c*) a copy of any order for the execution of the de or, if no such order has been made, a certifi to that effect. [S. 2

COMMENTARY.

The documents required to be transmitted for the purpose of ob ing execution are a copy of the decree and a certificate of any sum rem ing due under it, together with a copy of any order for execution may be passed —*Venkata Subba* v *Sivaramappa*, 4 M. 331.

The words "a copy of any order for the execution of the dec mean a copy of any subsisting order —*Hathibhai* v *Patel*, 13 B 3

The omission to transmit to the Court executing the decree the c ficate required by this rule is a mere irregularity, which would not v the sale —*Abbubaker* v *Mohidin*, 20 M 10.

Court receiving copies of decree etc to file same without proof.

7. The Court to which a decree is so sent shall cause copies and certificates to be filed, wit any further proof of the decree or order execution, or of the copies thereof, unless Court, for any special reasons to be reco under the hand of the Judge, requires such proof. [S. 2

COMMENTARY.

Alteration and Effect—Enquiry into Jurisdiction.—The word " *the jurisdiction of the Court which passed it* " which occurred after " co thereof " have been omitted, on the ground that an executing C ought not to go into any question as to the jurisdiction of the Court w passed it The result is that the judgment-debtor cannot now raise such objection as to jurisdiction in the executing Court.—*Bhagwanti*

v. *Vishwanath*, 28 B. 371; *Haji Mura* v. *Permanand*, 15 B. 216; *Imdad* v. *Jagun*, 17 A. 478 (7 B. 481 not followed).

The executing Court has no power to question the jurisdiction of the Court which passed the decree under execution, *Hari Govind* v. *Narsing*, 38 B. 194: 16 Bom L. R 23 I C. 123 *See* also *Kasturseti* v. *Ram Kanhoji*, 10 B. 65.

As to Court's power to question the validity of decree, *see* notes to r. 10.

It has been held that before issuing execution, the jurisdiction of foreign Court, *e.g.*, Cochin, to pass the decree sought to be executed can be questioned; *Veeraraghava* v. *Muga Seit*, 27 M. L. J. 535; *Jivappa* v. *Jeerji*, 18 Bom L. R. 486.

Execution of decree or order by Court to which it is sent.

8. Where such copies are so filed, the decree or order may, if the Court to which it is sent is the District Court, be executed by such Court or be transferred for execution to any subordinate Court of competent jurisdiction. [S. 226.]

COMMENTARY.

This rule corresponds to s 226, C. P. Code, with some modifications. The words "*be transferred for execution to any subordinate Court of competent jurisdiction,*" have been substituted for the words "by any subordinate Court which it directs to execute the same"

As to the powers of the Court to which a decree is sent for execution, under this section, see *Manorath Das* v *Ambika Kant*, 13 C W. N 533, and notes to s 42 The Court to which a decree is sent for execution may not be competent to execute it before a copy of the decree is received, but once an order is made sending a decree to another Court for execution, that by itself is sufficient to entitle the decree-holder to apply for rateable distribution under s 73, C. P Code, to the Court to whom the decree has been ordered to be sent; *Arimuthu Chetty* v *Vegapiri Pandaram*, 8 I. C 852; and it is not necessary for the decree-holder to apply afresh to the Court to which decree is transferred, for execution, if he had already applied for execution and transfer to the Court which passed the decree; *Dutt* v. *Taraprasanna*, A I R. 1923 P 280· 2 P 909 74 I C 753

Jurisdiction of Executing Court to Execute Decree Beyond its Pecuniary Limits.—The Code does not make any distinct provision as to whether a decree which is sent for execution to another Court, and which is for an amount beyond its pecuniary jurisdiction can be executed by the latter Court The Calcutta and Bombay High Courts have held, in view of s 6, that a Court having no jurisdiction to try a suit, can have no jurisdiction to execute a decree passed therein, see *Gokul Kristo* v. *Akhil*, 16 C 457; *Durga Charan* v. *Umatara*, 16 C 465; *Sidheswar* v *Harihar*, 12 B. 155. The Madras High Court has taken a contrary view and held that the jurisdiction of a Munsif in regard to execution of a decree transferred to him for execution is not subject to any pecuniary limit, *Vasorath* v.

Syed Ghulam, 5 I. C. 155; 7 M. L. T. 182 (*Narasayya* v. *Venkatakrishnayaya*, 7 M. 397, *Shanmuga* v. *Ramanathan*, 17 M. 309, *followed*; 16 C. 457, 16 C. 465, 12 B. 155, *not followed*). *See* also *Kelu* v. *Vikilua*, 15 M. 345. A similar view seems to have been taken in Punjab; *Ganga Ram* v. *Gursaram*, 31 P. R. 1887 (F. B.)

Executing Court can Not Extend Time of Payment.—Where a High Court decree is sent to a Munsif for execution, he has no power to extend the time of payment allowed in the decree. The Court which passed the decree can only grant such extension; *Mohideen* v. *Manam*, 21 M. L. J. 1018.

Execution by High Court of decree transferred by other Court.

9. Where the Court to which the decree is sent for execution is a High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction. [S. 227.]

COMMENTARY.

The functions of the High Court in respect of the execution of decrees of other Courts are limited to effecting execution, and to matters arising out of the proceedings in execution.—*Jadu Ray* v. *Farrell*, 6 B. L. R. Ap. 66.

APPLICATION FOR EXECUTION.

Application for execution.

10. Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then, to such Court or to the proper officer thereof. [S. 230, para. 1.]

COMMENTARY.

Decree-holder.—A "decree-holder," is the person in whose name the decree was made, or some person whom the Court has by order recognised as the decree-holder from the original plaintiff or his representatives.—*Paupayya* v. *Narasannah*, 2 M. 216. A decree-holder, includes any person to whom the decree has been transferred.—*Dwar Bux* v. *Fatil. Jah*, 3 C. W. N. 22. *See* also *Vishnu Sakharam* v. *Krishnarao*, 11 B. 153 and *Chalhoth* v. *Saidindavide*, 26 M. 258. *See*, however, 27 C. 488 and 25 A. 443.

But a person who is a stranger and not a party to the suit, cannot apply for execution of the decree merely because he has got certain rights under the decree; he may bring a separate suit; *Dil Afza Begum* v. *Deputy Commissioner, Bahraich*, 37 I. C. 133.

As to the right of the decree-holders' representatives to execute the decree without a certificate of heirship, *see* notes under Or VII, r. 4.

" Court which passed the decree."—*See* s. 37, and notes

If the Decree has been sent to Another Court.—Where the decree of a District Court has been sent to the Court of a Munsif for execution, and has not been returned to the District Court, the proper Court within the meaning of the Limitation Act, 1908, Art. 182 (5), in which to apply for execution of the decree, is the Court of the Munsif; *Maharajah of Bobbili* v. *Narasaraju*, 43 I A 238 39 M 640 36 I C 682

Executing Court cannot vary or question Validity of Decree.—The executive Court cannot call the legality or validity of a decree under execution in question.—*Kashi Pershad* v. *Jamuna Pershad*, 31 C. 922: 8 C. W. N. 264 (23 A 191 5 C. W. N 137. P. C *followed*) *Kalipada* v. *Harimohan*, 24 C L J 375, *Rama Prosad* v. *Anukul*, 20 C. L. J. 512; *Nagendrabala* v *Secy of State*, 14 C L J. 83, *Benode* v *Brojendra*, 29 C. 810; *Hassan* v *Gouzi*, 31 C 170, *Rash Behari* v *Thakur*, 4 C. L. J. 475; *Debendra* v *Prasanna*, 5 C L J 328, *Sundarappa* v *Sreeramlu*, 30 M. 402; *Aruna Chalam* v *Murugappa*, 12 M 503 But see *Lakshmana Swami* v. *Ramgamna*, 26 M 31, where it has been held that a Court executing a decree is at liberty to consider the validity of the decree, when it is passed by a Court without jurisdiction and is on the face of it null and void or when a compromise decree embodies an agreement which is unlawful and opposed to public policy; *followed* in *Krishnabai* v *Hari Gobind*, 31 B 15, referred to in 30 M 255.

A judgment-debtor is precluded from impeaching the decree in execution proceedings which was passed without opposition and has not been set aside, *Gomanathan* v *Komander*, 27 M 118, *Rangasamy* v *Tirupati*, 28 M 26 [21 B 205 (211) *referred to*]

A decree cannot be varied or added to in the execution department To re-open the decree would be to re-hear the suit on that matter.—*Udwant* v *Tokhan*, 28 C 353, P C *Thakur Madan* v *Mohan*, 16 C. L. J. 517; *Prasanna Kumari* v *Sris*, 22 C L J 561, where the principle was applied to consent decree No modification of a decree can be allowed in execution thereof on ground not recognized in the decree itself; *Ranmal Sangji* v *Kundan*, 26 B 707

The Court executing a decree is not competent to go behind it.—*Ramphal Rai* v *Ram Baran*, 5 A 53 *See* also *Lalji Lal* v *Barber*, 15 A. 334, and *Appa Rao* v *Krishna* 25 M 537 Where the terms of a decree are clear, the executing Court is bound to give effect to it and cannot read into its limitations gathered from a reference to the records of the suit —*Venkata Challam* v *Veerappa*, 29 M 314

A decree for sale cannot be impeached in execution proceedings, *Mandaleswara* v. *Mahant*, 32 M. 429.

Where Terms of Decree are Ambiguous.—*See* notes to Or. XX, r. 6 under " Construction of Decree."

Oral applications.

11. (1) Where a decree is for the payment of money the Court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court. [S. 256.]

Written application.

(2) Save as otherwise provided by sub-rule (1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely :—

(*a*) the number of the suit;

(*b*) the names of the parties;

(*c*) the date of the decree;

(*d*) whether any appeal has been preferred from the decree;

(*e*) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree;

(*f*) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;

(*g*) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed;

(*h*) the amount of the costs (if any) awarded;

(*i*) the name of the person against whom execution of the decree is sought; and

(*j*) the mode in which the assistance of the Court is required, whether—

(i) by the delivery of any property specifically decreed;

(ii) by the attachment and sale, or by the sale without attachment, of any property ;

(iii) by the arrest and detention in prison of any person;

(iv) by the appointment of a receiver;

(v) otherwise, as the nature of the relief granted may require. [S. 235.]

(3) The Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree. [New.]

COMMENTARY.

The old section has been re-cast, and some material changes have been introduced The important changes are given below and they should be noted

Alterations—Sub-rule (1).—The words "*for the payment of money*" have been substituted for "passed for a sum of money only;" (2) the words "and the amount decreed does not exceed the sum of one thousand rupees," and the sentence "issue of a warrant directed either against the person of the judgment-debtor if he is within the local limits of the jurisdiction of the Court or against his moveable property within the same limits", and (3) the words "arrest of the judgment-debtor prior to the preparation of a warrant if he is within the precincts of the Court" have been added

Sub-rule (2).—The words "*save as otherwise provided by sub-rule (1) every*" have been added in the beginning

Cl. (e).—In cl (e), the words "*payment or other,*" have been added and the word "*controversy*" has been substituted for the word "dispute."

"The Committee have not given effect to the suggestion that this should be limited to payments and adjustments which the creditor executing the decree is bound by law to recognize, as this would remove a valuable incentive to state truly what payments have been made (*see* 10 B. 288)."—See also *the Report of the Special Committee*

In the case of *Queen-Empress v. Bapuji Dayaram*, 10 B. 288, referred to in the Report of the Special Committee, it has been held that under s. 235, C. P Code, 1882 (Or XXI, r 11), the decree-holder or the party who applies for execution, is bound to state in his application any adjustment between the parties after decree, whether such adjustment has or has not been previously certified to the Court. Intentional omission to make such statement amounts to an offence under s 193 of the Penal Code (XLV of 1860).

Cl. (f).—In cl. (f), the words "*dates of such applications*" have been added.

Omission to specify all the previous applications with their dates and their results is not a material irregularity, such as would render the whole of the execution proceeding illegal —*Saudamini* v *Jessore Registered Loan Co. Ltd*, 96 I C 554 A I R 1926 C. 1146

Cl. (g).—In cl (*g*), the words " *together with particulars of any cross-decree whether passed before or after the date of the decree sought to be executed*" have been added By the changes this clause, has been rendered more general The change seems to have introduced in adoption of the principle laid down in *Damodar* v *Vyanku*, 31 B. 244 (249), where it has been held that a debt or compensation cannot be attached until ascertained

Cl. (j).—Sub-clause (*ii*) of clause (*j*) has been substituted for the words " *by the attachment of his property* "

Sub-clause (*iii*) *of clause* (*j*) has been substituted for the words " *by the arrest and imprisonment of the person named in the application.*" The omission of the words " *named in the application* " seems material, inasmuch as the decree-holder, under the provisions of the old Code, was bound to name the person to be arrested in his application for execution, and thus giving sufficient opportunity to the person named to evade the process But under the present Code the decree-holder is not bound to disclose the name of the person to be arrested in his petition for execution He can give the name of the person to be arrested, at any subsequent stage of the proceedings, when he may find the opportunity for arresting the judgment-debtor This is for the benefit of the decree-holder.

Sub-clause (*iv*) *of* clause (*j*) is new Decrees may be executed by appointment of Receivers in cases where such appointment is just and convenient as for instance in Administration Suits —*Maung Powin* v. *Mat Tin*, 36 I C 385. 10 Bom L T 206 Receiver may be appointed in execution of money or other decrees. *See* other cases under Or. XL, r. 1, C. P Code.

In sub-clause (*v*) of clause (*j*) the words " *relief granted* " have been substituted *for the* words " relief sought," which occurred in the old Code

Sub-rule (3) —This is new Under the old Code, *it* was optional with the decree-holder to file a copy of the decree with his application for execution. But under the present Code, it would depend entirely upon the discretion of the Court

For the mode of execution of mortgage-decree and limitation, see notes under Order XXIV

Sub-rule (1).—The Court has a discretion, *see* r 21 and r. 37.

Form.—*See* Appendix E. No 6

Date of Decree for Purposes of Execution.—This must be taken to be the date of the judgment for the purpose of Art 179, Limitation Act. Time runs therefore not from the date where the decree was actually signed but from the date of judgment; *Rakhal* v. *Jagendra*, 10 C. L. J. 467; *Afzal* v. *Umda*, 1 C. W. N. 93; *Golam* v. *Goljan*, 25 C. 109; *Yamaji* v. *Antaji*, 23 B. 442. *See* Or. XX, r. 7.

Verification.—An application for execution verified by general attorney of decree-holder is a proper verification, notwithstanding that his principal may be residing within the jurisdiction of the Court; *Bakar* v. *Udit Narain*, 26 A. 154 (23 A. 490 *distinguished*). One of several decree-holders may verify.—*Bhagwat* v. *Dwarka*, 74 I. C. 174. Verification by a person other than the decree-holder, but who is well acquainted with the facts of the case is valid. It is not necessary that the verification should be made in open Court or after obtaining permission of the Court.—*Kharana Majazilla Zemindari Syndicate Ltd* v. *Omed Sheikh*, 28 C. W. N. 687: A. I. R. 1924 C. 811

As to the mode of verification, see notes to Or. VI, r 15.

Arrest.—In authorizing immediate execution of a Small Cause Court decree by the issue of a warrant either against the person or the moveable property of a judgment-debtor, the Legislature never intended that the debtor should be protected from arrest until he had a reasonable time for returning home.—*De Penning* v. *Debendro Nath*, 9 W. R 549.

As to privilege from arrest, see notes under sec 115

Sub-rule (3)—Copy of Decree.—Formerly applications for execution need not have been accompanied with the copy of decree (*see Gunga* v. *Makhum*, 9 W R. 362; *Khettur* v *Ishur*, 11 W R. 271; *Modhoo* v. *Nobin*, 16 W R. 25 *Dhunput* v *Lalanund*, 2 Bom L R Ap. 18: 11 W. R 28; *Rajkumar* v *Raj-Lakhi*, 12 C 441, *Rajaram* v *Banaji*, 23 B. 311 Now under the new sub-clause (3) the discretion to dispense with the copy of the decree rests with the Court It is perfectly clear that the Code does not require that a copy of the decree is to be attached to the application.—*Raj Gir* v *Iswardhari*, 11 C L J 241 As the Code does not require copy to be attached decree-holder cannot get cost of copy, *Raghubar* v *Jadunadan*, 14 C W N 736

Before a decree-holder can obtain execution of a decree affirmed by the Privy Council, he must produce, on the application for execution, a certified copy of the order passed by the Council.—*Juggernath* v *Jadoo*, 5 C. 329 4 C L R 387 *See* also *Joy Narain* v *Goluck Chunder*, 20 W. R. 444

Where the original order of Her Majesty in Council (given to the successful party) had not been filed in the High Court, so as to enable the proper officer to supply a certified copy *held* that a copy, though not certified by him, might accompany a petition for execution.—*Hurrish* v *Kali Sundari*, 9 C. 482 12 C L. R. 511.

Lost or Destroyed Decree.—A Court has inherent powers to restore its record when it has been lost or destroyed and application for execution may be made before reconstruction of the decree The contents of the lost record may be passed by secondary evidence under s 65 (c) of the Evidence Act *Raj Gir* v *Iswardhari*, 11 C. L J 243 *See* also 8 C. L. J. 521.

Applications for Execution not containing the Particulars Mentioned in Sub-rule (2).—An application for execution not containing the necessary particulars required by this rule, is a mere scrap of paper and does not amount to an execution application.—*Ramdhun Ray* v. *Abdool Gunee*,

9 W. R. 390, *Oodey Chand* v *Nobo Coomar*, 10 W. R. 428; and *Gouree Sunkur* v. *Aman Ali*, 21 W. R. 309; *Bhubendra Narain* v. *Janeswar*, 7 P. L. T. 350. A I R 1926 Pat 533. But every omission in an application for execution is not necessarily a material irregularity, such as would vitiate the execution proceeding Whether an omission is or is not material, will depend on the particular circumstances of the case; *Saudamini* v. *Jessore Registered Loan Co Ltd*, 96 I C. 554 · A. I. R. 1926 C. 1146

If it does not specify the mode in which the assistance of the Court is sought the application is defective, *Karam Chand* v. *Ghela Bai*, 19 B. 34; *Pratap* v *Peary*, 8 C 174; and should be dismissed without deciding whether the decree is capable of execution, *Satish* v. *Purna*, 11 I. C. 696

Where an application for execution omits to give the names of all the parties, even if it shall appear from the other parts of the proceedings who those parties are, the parties named must be understood to be the parties defendants against whom the execution is sought.—*Abdool Kureem* v. *Jaun Ali*, 18 W R 58

Where an application for execution is not complete in itself, so as to show in what manner execution is to be taken out, still it is capable of being acted upon, for it refers to the former application in which the mortgaged properties were set out, and prays that the decree may be executed by sale of those properties —*Wajihan* alias *Alijan* v *Bishwanath*, 18 C. 462. *See* also *Asgar Ali* v *Troilokya Nath*, 17 C. 631. Application to amend petition for execution though not in the form required by law, but which when read with the original application supplies all the information, should be treated as a first application and allowed to proceed.—*Haridas* v. *Raj Kumar*, 53 I C 111 (C)

Where decree gives reliefs of different character separate and successive applications in respect of each relief may be made —*Radhakishen* v *Radha Pershad*, 18 C 515, *Sadho* v *Hawal*, 10 A. 98; *see* also *Fulchand* v. *Bai Ichha*, 12 B 98

A decree-holder who has attached before judgment, and who is desirous of sharing in the distribution of sale-proceeds under s. 73 must make an application for execution under this rule —*Pallonji* v. *Jordan*, 12 B. 400.

As to the right of the decree-holder's representatives to execute the decree without a certificate of heirship, *see notes under Or. VII, r. 4.*

A decree declared null and void against one of the parties to it, is susceptible of execution against others —*Pasupati Nath* v. *Nando Lal*, 30 C. 718 (10 B. 338 and 25 M 426 *referred to*).

Continuance of Execution Proceedings After Death of Judgment-debtor—Execution proceedings already commenced continues after the death of the judgment-debtor by substitution of the name of the legal representative and no fresh application under this rule is necessary — *Puroshottam* v. *Rajbai*, 34 B. 142.

Execution Against Benamidar.—A decree cannot be executed against any one not a party to it, nor a representative of judgment-debtor, on the ground that he is a *benamidar*.—*Jadunath* v *Premmoni*, 14 C. W. N. 774.

The decree-holder is bound to state any adjustment between the parties after decree, whether such adjustment has or has not been previously certified to the Court. Intentional omission to make such statement amounts to an offence under s. 193, I. P. Code.—*Queen-Empress* v. *Bapuji*, 10 B. 288 (2 M. 216 *followed*). *See*, however, *Shama Charan* v. *Kasi Naik*, 23 C. 971.

Upon an application for execution of a decree for removal of a building the mode in which the assistance of the Court was required was stated to be by giving the decree-holder possession of his wall by pulling down the wall. *Held* that the decree-holder's application could not be granted in that form, and that he should have asked the assistance of the Court in the way provided by s. 260, C. P. Code, 1882 (Or. XXI, r. 32).—*Protap* v. *Peary*, 8 C. 174: 9 C. L. R. 453.

Execution in Part.—*See* notes to rule 15 under "Execution of Part of Decree."

Conditional Decree—Mode of Execution.—The Code does not seem to provide for the execution of conditional judgment. It deals with the case of absolute decrees. When a conditional decree is made, the plaintiff, on the default of the defendant, should apply to the Court, which passed the decree, on notice to the defendant for an order absolute. Then, if and when such an order is obtained after determination of any objection of the defendant, application may be made in the usual way for execution of the order.—*Sudevi* v. *Sobaram*, 10 C. W N 306.

A conditional decree directed that if the defendant deposited the amount within three months he would be liable to pay interest at 12 per cent. (the claim was at 30 per cent.) and would be exempted from further liability. It was affirmed by the High Court and Privy Council *Held* that the time for payment must be calculated from the date of the decree of the first Court and not from date of the Privy Council decree—*Ghanshyam* v *Ram Narain*, 31 A 379

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The person appearing on the face of the decree as the decree-holder is entitled to execution, unless it be shown by some other person that he has taken the decree-holder's place —*Jasoda Deye* v. *Kirtibash*, 18 C. 639.

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W. R. 255, *followed*) But see *Denonath* v *Lalit Coomar*, 9 C 633; 12 C. L. R 145; and *Gour* v *Hem*, 16 C 355

An application for execution, made through mistake, against the minor's mother personally, and not as his guardian.—*Hari* v *Narayan*, 12 B. 427.

An application for execution not accompanied by a copy of a decree—*Rama Chandra* v *Laxman*, 31 B 162 8 Bom L. R 892 (28 M 557 *followed*).

An application for execution by the party entitled to make it, although by mistake the deceased judgment-debtor is named as the person against whom execution is sought—*Samia Pillai* v *Chokalinga*, 17 M 76

From the mere fact that an application for execution is refused, it does not follow that the application is " not in accordance with law," which words do not mean that the application must of necessity be a successful one.—*Adhar Chandra* v *Lal Mohan*, 1 C W N. 676.

Non-compliance with certain formalities regarding execution is none the less an application in accordance with law, *Srinivasa* v *Tirumalai*, 23 I. C. 99 15 M L T 337

Applications Not " in accordance with law."—By a guardian of a minor who was major at the time of the application—*Saramma* v. *Seshayya*, 28 M 396

By the general attorney of a decree-holder at a time when he himself is resident within the jurisdiction of the Court executing the decree—*Murari* v *Umrao*, 23 A 499 *See* also *Kasumri* v. *Beni*, 26 A 19. But see *Bakar* v *Udit* 26 A 154, and 4 C 605

An application against the judgment-debtor's surety while judgment-debtor's application for declaration of insolvency was pending—*Langtu Pande* v. *Baij Nath*, 28 A 387

Irregular or Defective Applications.—Application for execution was presented within time, but all the particulars required by this rule not having been given, the application was returned for amendment within a week The amended application was not put in within the fixed time; but after the expiry of three years, fresh application was presented in due form with the defective application that was returned for amedment. *Held* that the execution was barred as the defective application was not made in accordance with law.—*Gopal Sha* v. *Janki Koer*, 23 C. 217, *explained* in 14 C. W. N. 481. *See* also *Asgar Ali* v. *Troilokya Nath*, 17 C 631, F. B. (14 C. 124 *overruled*), where the application was defective in not complying with the provisions of r. 13. An application not properly verified was held to be a defective application—*Raghunath* v *Venkatesa*, 26 M. 101. But see *Gopal Chunder* v. *Gosain Das*, 25 C. 594, F. B ; 2 C W. N. 556, F. B ; *Rama* v. *Varada*, 16 M. 142; *Ramanadan* v. *Peratambi*, 6 M. 250; *Mahomed* v. *Abdoolah*, 12 C. L. R. 279, *Fuzloor Ruhman* v. *Altaf Hossein*, 10 C. 541; *Jibhai Mahirpati* v. *Parbhu Papu*, 1 B 59, *Hurry Churn* v. *Subaydar*, 12 C. 161, and *Kalka Dulee* v. *Bisheshar Patal.*, 23 A. 162 In these latter cases it has been held that an informal application for execution filed within time, but not amended till after that

time, is an application in accordance with law, and keeps the decree alive. An unverified application substantially in accordance with law is sufficient to save limitation.—*Ramayyan* v. *Kadir Bachu*, 31 M. 68. The addition of sub-rule (2) in rule 17 has settled the point that where a defective application is amended it shall be deemed to have been presented on the date when it was first presented A defective application thus amended will save limitation. See *Ganendra* v *Rishendra*, 22 C W. N. 540: 27 C. L. J. 398: 44 I C 553 and 40 M. 919: 38 I. C. 186; *Kanjimal* v. *Kedar Nath*, 49 I. C. 982 The law casts upon the Court a duty to ascertain if the application for execution is in order; if it is not, then either to reject it or to allowed it to be amended —*Ganesh* v *Palit Chand*, 55 I. C. 16; *Bhagwat* v. *Dwarka*, 74 I. C. 174. 2 Pat 809 A I R. 1923 Pat. 229. *See* notes to r. 17.

An application for execution to obtain relief not given by the decree is not an application in accordance with law, and does not keep the decree alive.—*Pandari Nath* v. *Lila Chand*, 13 B 237

An application for execution, without specifying the proper mode in which the assistance of the Court is required, but asking the assistance of the Court in the improper mode, is not an application in accordance with law, so as to keep the decree in force.—*Muhammad Umar* v *Kamilee Bibi*, 4 A. 34

An insufficiently stamped application for execution of a decree may suffice to keep the decree alive.—*Ramasami Ayyar* v *Seshayyangar*, 6 M. 181.

An application for execution by attachment of judgment-debtor's property was dismissed for non-payment of process-fees *Held* that the application was in accordance with law, and kept the decree alive.—*Kerala Varma* v. *Shangaram*, 16 M. 452

This rule is no bar to the maintenance of concurrent execution-Courts. The Court may allow amendment of the application for execution already filed by addition of other properties to the list *Ram Sumran* v *Babu Ram*, 71 I. C. 741: 2 Pat 328 4 Pat L T 99

Omission to give date of disposal of a prior application is not fatal, but omission to mention existence of cross decrees may be fatal —*Prosanna* v. *Jatindra*, 71 I C. 1054.

Application for attachment of moveable property not in judgment-debor's possession.

12. Where an application is made for the attachment of any moveable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same. [S. 236.]

COMMENTARY.

This rule refers to an application for attachment of moveable property belonging to the judgment-debtor, but not in his possession Rules 43, 45 prescribe the attachment of moveable property in his possession.

W. R. 255, *followed*). But see *Denonath* v. *Lalit Coomar*, 9 C. 633. 12 C. L. R. 145, and *Gour* v *Hem*, 16 C 355.

An application for execution, made through mistake, against the minor's mother personally, and not as his guardian.—*Hari* v. *Narayan*, 12 B. 427.

An application for execution not accompanied by a copy of a decree — *Rama Chandra* v *Laxman*, 31 B 162. 8 Bom. L. R. 892 (28 M 557 *followed*).

An application for execution by the party entitled to make it, although by mistake the deceased judgment-debtor is named as the person against whom execution is sought.—*Samia Pillai* v *Chokalinga*, 17 M. 76

From the mere fact that an application for execution is refused, it does not follow that the application is " not in accordance with law," which words do not mean that the application must of necessity be a successful one.—*Adhar Chandra* v *Lal Mohan*, 1 C. W. N 676.

Non-compliance with certain formalities regarding execution is none the less an application in accordance with law; *Srinivasa* v *Tirumalai*, 23 I. C. 99: 15 M L T 337

Applications Not " in accordance with law."—By a guardian of a minor who was major at the time of the application —*Saramma* v *Seshayya*, 28 M. 396

By the general attorney of a decree-holder at a time when he himself is resident within the jurisdiction of the Court executing the decree — *Murari* v *Umrao*, 23 A 499 *See* also *Kasumri* v *Beni*, 26 A 19. But see *Bahar* v *Udit*, 26 A 154, and 4 C. 605 .

An application against the judgment-debtor's surety while judgment-debtor's application for declaration of insolvency was pending —*Langtu Pande* v *Baij Nath*, 28 A 387

Irregular or Defective Applications.—Application for execution was presented within time, but all the particulars required by this rule not having been given, the application was returned for amendment within a week The amended application was not put in within the fixed time; but after the expiry of three years, fresh application was presented in due form with the defective application that was returned for amedment. *Held* that the execution was barred as the defective application was not made in accordance with law —*Gopal Sha* v *Janki Koer*, 23 C. 217, *explained* in 14 C. W. N 481 *See* also *Asgar Ali* v. *Troilokya Nath*, 17 C 631, F. B. (14 C 124 *overruled*), where the application was defective in not complying with the provisions of r. 13. An application not properly verified was held to be a defective application.—*Raghunath* v. *Venkatesa*, 26 M. 101. But see *Gopal Chunder* v. *Gosain Das*, 25 C. 501, F. B. 2 C W. N. 556, F. B ; *Rama* v *Varada*, 16 M. 142; *Ramanadan* v. *Periatambi*, 6 M. 250; *Mahomed* v. *Abdoolah*, 12 C. L R. 279; *Fuzloor Ruhman* v. *Altaf Hossein*, 10 C. 541; *Jibhai Mahirpati* v *Parbhu Papu*, 1 B 59, *Hurry Churn* v. *Subaydar*, 12 C. 161, and *Kalka Dulee* v. *Bisheshar Patak*, 23 A. 162 In these latter cases it has been held that an informal application for execution filed within time, but not amended till after that

time, is an application in accordance with law, and keeps the decree alive. An unverified application substantially in accordance with law is sufficient to save limitation.—*Ramayyan* v. *Kadir Bachu*, 31 M. 68. The addition of sub-rule (2) in rule 17 has settled the point that where a defective application is amended it shall be deemed to have been presented on the date when it was first presented. A defective application thus amended will save limitation. See *Ganendra* v. *Rishendra*, 22 C. W. N. 540: 27 C. L. J. 398: 44 I. C. 553 and 40 M. 919. 38 I. C. 186; *Kanjimal* v. *Kedar Nath*, 49 I. C. 982. The law casts upon the Court a duty to ascertain if the application for execution is in order, if it is not, then either to reject it or to allowed it to be amended.—*Ganesh* v. *Palit Chand*, 55 I. C. 16; *Bhagwat* v. *Dwarka*, 74 I. C. 174. 2 Pat. 809. A. I. R. 1923 Pat. 229. *See* notes to r. 17.

An application for execution to obtain relief not given by the decree is not an application in accordance with law, and does not keep the decree alive.—*Pandari Nath* v. *Lila Chand*, 13 B. 237.

An application for execution, without specifying the proper mode in which the assistance of the Court is required, but asking the assistance of the Court in the improper mode, is not an application in accordance with law, so as to keep the decree in force.—*Muhammad Umar* v. *Kamilee Bibi*, 4 A. 34.

An insufficiently stamped application for execution of a decree may suffice to keep the decree alive.—*Ramasami Ayyar* v. *Seshayyangar*, 6 M. 181.

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This rule is no bar to the maintenance of concurrent execution-Courts. The Court may allow amendment of the application for execution already filed by addition of other properties to the list. *Ram Sumran* v. *Babu Ram*, 71 I. C. 741. 2 Pat. 328. 4 Pat. L. T. 99.

Omission to give date of disposal of a prior application is not fatal, but omission to mention existence of cross decrees may be fatal.—*Prosanna* v. *Jatindra*, 71 I. C. 1054.

Application for attachment of moveable property not in judgment-debor's possession.

12. Where an application is made for the attachment of any moveable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same. [S. 236.]

COMMENTARY.

This rule refers to an application for attachment of moveable property belonging to the judgment-debtor, but not in his possession. Rules 43, 45 prescribe the attachment of moveable property in his possession.

" Failure to annex inventory."—The inventory must be delivered into Court along with the application, *Sreenath* v. *Yusoof*, 7 C. 556, p. 559 *See* also *Dhonkal* v. *Phakkar*, 15 A. 84 (86). The failure to annex an inventory with the application for execution makes it not in accordance with law under Art 182, Limitation Act, *Abdul Rafi* v. *Maula Baksh*, 37 A. 527. *See* also 13 A. L. J 706.

Application for attachment of immoveable property to contain certain particulars.

13. Where an application is made for the attachment of any immoveable property belonging to a judgment-debtor, it shall contain at the foot—

(*a*) a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers; and

(*b*) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same. [S. 237, para. 1.]

COMMENTARY.

Alteration.—The words, " *the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers,*" have been added in clause (*a*) of this rule.

The amendment expressly lays down that in areas where settlement has been effected the numbers and boundaries in settlement record shall be given.

Description of Property and Specification of Interest.—The intention of this rule is that the description should be sufficient to identify the property; and in the case of an estate-paying revenue to Government, that there should be a specification of the revenue.—*Lack Ram* v. *Mahesh*, 13 W. R. 488

A judgment-creditor is bound, to specify the debtor's share or interest in the property sought to be attached to the best of his belief, or so far as he has been able to ascertain the same.—*Ardesir Nasarvanji* v. *Muse Nath*, 1 B. 601.

The specification required of the judgment-debtor's share or interest in immoveable property sought to be attached, should state distinctly whether it was the judgment-debtor's undivided share, or the family property in which the judgment-debtor had an undivided share which was sought to be attached, and should also specify what that family property was.—*Muhammad Husain* v. *Dib Chand*, 14 A. 190.

The effect of Or. XXI, rr. 13, 14 plainly is to impose a duty on the person applying for execution to disclose to the Court his own lien in his

application for sale, and on the Court the duty of specifying the same in the proclamation, and in default the purchaser will purchase the property free of his mortgage lien.—*Ram Chandra* v. *Jairam*, 22 B. 686. *See* also *Jaganatha* v. *Gangi Reddi*, 15 M. 303; and *Kasturi* v. *Venkatachalapathi*, 15 M. 412.

Power to require certified extract from Collector's register in certain cases.

14. Where an application is made for the attachment of any land which is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing, any transferable interest in, the land or its revenue, or as liable to pay revenue for the land, and the shares of the registered proprietors. [S. 238.]

COMMENTARY.

Alteration.—Under the old section it was compulsory that the application should be accompanied by a certified extract. This restriction has been removed, and it has been left to the Court to determine whether such an extract should be asked to produce.

Certified Extract.—In attaching an estate paying revenue to Government, the attaching creditor must give also the special information required by this rule.—*Ajoodhia* v. *Sheo Pershun*, 11 W. R. 175. *See* also *Lack Ram* v. *Mahesh*, 12 W. R. 488.

It is unnecessary to specify in the sale notification the names of the mouzas included in the property sought to be sold. All that is necessary is to specify the estate or shares of estates, and the number they bear in the Collector's office.—*Amirunnissa* v. *Secy. of State*, 10 C. 63: 3 C. L. R. 131.

The circumstance that a sale notification contains only the name of one, and not the recorded proprietors of a revenue-paying estate, does not amount to an irregularity.—*Secy. of State* v. *Rash Behary*, 9 C. 591: 12 C. L. R. 27.

In addition to the information required by Or. XXI, rr. 13, 14, the area of a revenue-free tenure and the amount of an annual revenue should be stated in the application for attachment. *See* Calcutta High Court C. O. No. 10, dated 27th March 1879.

Application for execution by joint decree-holder.

15. (1) Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application. [S. 231.]

COMMENTARY.

Alteration.—This rule corresponds with s 231, C. P. Code, with some changes. The words "*unless the decree imposes any condition to the contrary,*" have been added in sub-rule (1). The addition seems to have been made in accordance with the principle laid down in 6 A. 69, noted below The words "*or his or their representatives*" have been omitted, as this will be covered by the general clause (s. 146)

Scope.—The Code does not expressly lay down the rules as to the course to be pursued by the Court, if several persons who have rights in a decree all seek to execute it Rule 15 provides for cases where a decree has been passed *jointly* in favour of more persons than one; *Arumuga* v *Yogamba*, 17 I. C 323 13 M L T 227

Joint Decree.—This means a decree passed in favour of two or more persons although their share or interest in the decretal amount or property may be different

A joint-decree remains a joint-decree notwithstanding the acts of the decree-holder in realizing his money from one or more of the judgment-debtors separately —*Wahed Ali* v *Mulluck Anayet*, 12 Bom. L. R 500. 20 W. R 31; *Sreenath* v *Sahib*, 12 Bom L. R. 504-n, 12 W. R. 304, *Krishto* v *Ram Lochan*, 2 W R Mis 49, *Gopal* v. *Ramanoogra*, 8 W R 201; and *Raghoonath* v *Alladeen*, 5 W R 9, *Juggurnath* v. *Ahemddoollah*, 8 W. R. 132, *Oudh Behari* v *Brojo Mohan*, 4 Bom. L R. Ap. 41: 13 W. R. 128 and *Nunkoo* v *Dhunesh* 17 W R. 497.

In the case of a joint-decree any arrangement made by the decree-holders amongst themselves or to their relative shares in the decree would not alter its character, *Indurjeet* v *Mazam*, 6 W. R. Mis 76; *Brojo Kumar* v. *Ram Buksh*, 1 W. R Mis 1.

Application for Execution of the Whole Decree by one of Several Joint Decree-holders.—Under ordinary circumstances *all* the decree-holders must join in the execution Where some of the joint decree-holders apply for execution, the application may be refused or granted at the discretion of the Court, which is bound to protect the interests of the absent decree-holder, but whether the Court does so or not, all recoveries in execution so made must be for the benefit of all the decree-holders —*Shib Chunder* v *Ram Chunder*, 16 W. R. 29. *See* also *Tara Sundari* v. *Behari Lal*, 1 Bom. L R. 28, and *A. J. Meik* v *The Midnapur Zamindary Co. Ltd.*, 53 I. C. 803. So also a transferee of the interest of some of the joint decree-holders ought to apply for the execution of the decree for the benefit of [illegible] *Reddi* v *Subba Reddiar*, 49 I. C. 141: (1916) [illegible] on the part of an applicant for an execution [illegible] the names of the other joint decree-holders [illegible] have in the decree, is not such a defect as

would be sufficient for holding that the proceedings are incomplete and therefore invalid. It is not obligatory upon the Court to issue a notice before making an order under this rule to issue a notice on the other joint decree-holders of each case.—*Nawab Nuzhat-ud-dowla* v. *Beni Madhab*, 30 C. W. N. 562: 96 I. C. 692: A. I. R. 1926 C. 811; *Durga Das* v. *Dewraj*, 33 C. 306: 10 C. W. N. 297: 3 C. L. J. 112. It has a discretion, and the other decree-holders ought to be heard before execution; *Umrith Nauth* v. *Chandra Kishore*, 21 W. R. 31 and *Ahmed Chowdhry* v. *Shahazada Khatoon*, 7 C. L. R. 537.

When one of several joint decree-holders apply for execution on behalf of himself and the other decree-holders, and alone obtains leave to bid for the property and purchases it, the co-decree-holders, are in equity entitled to recover their share of the property, *Kesri* v. *Ganga*, 33 A. 563 F. B.: 8 A. L. J. 616.

Any one of several joint decree-holders may, unless the decree imposes a condition to the contrary apply for execution of the whole decree; *Gajadhar* v. *Bindhbashini*, 29 I. C. 131. In case of death of one of several joint decree-holders, the other decree-holders may apply for execution for their own benefit and for the benefit of the representatives of the deceased joint decree-holders.—If any person claims to be brought on the record as the heir of the deceased, the Court should inquire into the matter and dispose of it according to law; *Bollamma* v. *Audi Narayana*, 43 I. C. 1008; *Rawat Gojan* v. *Banwari Lal*, 34 A. 72.

Execution Against One of the Joint Judgment-debtors.—A decree-holder is entitled at his pleasure to execute the whole decree against any one of the joint judgment-debtors. A releas
a joint decree does not discharge the other
has been a partial payment towards the de
holder is not entitled to ignore it and claim satisfaction of the whole against judgment-debtor. He may proceed for the balance; *Bhawani* v. *Darson*, 14 C. L. J. 354: 11 I. C. 450.

Execution must be For the Whole Decree.—Though one of several decree-holders may, with the permission of the Court, take out execution of a joint decree, the execution must be for the whole and not for any fractional share and the Court may admit the application after making proper orders for, protecting the interest of other decree-holders.—*Thakoordas* v. *Luchmeput*, 7 W. R. 10, *Juggeebun* v. *Goluck Monee*, 22 W. R. 351; *Indro* v. *Mohuma*, 15 W. R. 159, *Auseemoonessa* v. *Ameeroonissa*, 22 W. R. 204; *Fyez* v. *Sadut*, 23 W. R. 282, *Ibid* v. *Munnoo*, Agra 183.

Where two out of several decree-holders petitioned the Court to execute their share of the decree, which was for possession and mesne profits, and the other decree-holders though they virtually joined in the application by signifying their consent and the original applicants declined to proceed with the execution of the decree for mesne profits. *Held* that there was no application on the part of all the decree-holders to execute the decree for mesne profits nor any application by some of them for execution of the whole decree.—*Seetapul Roy* v. *Ali Hossein*, 24 W. R. 11.

Application by One of Several Decree-holders for Execution in respect of his Share of the Decree.—A *joint decree cannot be executed* by one of

the several joint decree-holders in respect only of his share of the decree—*Banarasi Das* v *Maharani Kuar*, 5 A. 27 (1 A. 231; 4 A 72, and 8 Bom L. R. 114, *followed*); *Muthusami Ayyar* v. *Natesa Ayyar*, 18 M. 464; *Collector of Shajahanpur* v. *Surjan*, 4 A. 72; *Dali Chand* v. *Bai Shivkor*, 15 B. 242; *Meik* v. *The Midnapur Zemindary Co. Ltd.*, 4 Pat L. J. 575. 53 I. C. 803. But if the decree specifically determines the extent of the share of each decree-holder, one among the joint decree-holders may take out execution in respect of his share only —*Harish* v. *Kali Sunderi*, 9 C. 482, P. C.: 12 C L R 511, P C, followed in *Fazak* v. *Habib*, 7 I. C. 474: 61 P. R 1910 A decree may some times become devisible and executable in part to the extent of such severance when by operation of law or by act of parties, the judgment-debtor has acquired the interest of one of the joint decree-holder, *Pena Sami* v *Krishna Ayyar*, 25 M. 431 F. B.: 12 M L. J 166 Separate execution may be taken for costs; *Sukha Sindhu* v *Jogeswar*, 5 I C 460

If all the decree-holders file a petition that they have no objection to executing the decree by one of them, then the decree may be executed at the instance of one only —*Krishnakishore* v *Sukhasindhu*, 10 C. W. N. 1000, (1002.)

This rule of law which forbids application for execution of part of a decree does not bar application for all that remains due upon a decree where the rest has been previously satisfied —*Tej Narain* v. *Ram Tunoo*, 12 W. R. 370.

When a decree is of a complex nature and grants different kinds of reliefs to be obtained by process of different kinds, there is no valid objection to separate applications for partial execution of the decree.—*Ram Buksh* v. *Madat Ali*, 7 N W 9 *See* also *Johnson* v. *Mad. Ry. Co.*, 28 M. 479. 15 M L J 363.

If an application for partial execution is not objected to by the judgment-debtor and allowed, it will keep the decree alive; *Nanda* v. *Raghunandan*, 7 A. 282; *Dali Chand* v *Bai Shivkor*, 15 B. 242; *Nepal* v. *Amrita*, 26 C. 888.

" Unless decree imposes any condition to the contrary."—The provisions of this rule are not applicable to the case of joint decree-holders whose decree is conditional on their joint performance of a particular act.—*Farzand* v *Abdullah*, 6 A. 69.

Effect of Payment by Judgment-debtor out of Court to One of Several Decree-holders.—If a payment of a *portion* of the decretal amount is made by judgment-debtor *bona fide* to one of several joint decree-holders and duly certified to the Court by the latter for the benefit of all the decree-holders, the other joint creditors cannot execute the decree for more than their share; *Taruck* v. *Direndro*, 9 C. 831: 11 C. L. R. 566. If such payment to one of several joint decree-holders is not certified it cannot be regarded as made in satisfaction of the decree except for the purpose of determining what orders should be passed under this Rule; *Sultan* v. *Saralayammal*, 15 M. 313: 11 M. L. J. 50. One of several joint decree-holders is not competent to grant full discharge of the decree out of Court, or to certify to the Court complete satisfaction of the decree, without the concurrence of the other decree-holders, though he may certify satis-

faction in respect of his own share therein.—*Lachman* v. *Chaturbhy*, 28 A. 252; *Moti Ram* v. *Hannu*, 26 A. 334; *Tamman Singh* v. *Lachhmin*, 26 A. 318; *Umrao* v. *Muktar Beg*, 45 A. 401: A. I. R. 1923 A. 494: 74 I. C. 687; *Pichakkuttiya* v. *Doraiswami*, 47 M. L. J. 498: 82 I. C. 588: A. I. R. 1925 M. 230. Although a payment to one of two joint decree-holders of the whole decree amount does not, even when certified, absolve the judgment-debtor from liability to the other decree-holder, such decree-holder is not bound to proceed against the judgment-debtor, but he may sue the other decree-holder to recover his share.—*Somasundaram* v. *Krishnasamy*, 29 M. 183.

A payment to two out of three partners who are joint decree-holders does not bind the third unless the former are agents; *Mahomed Silar* v. *Nabikhan*, 1916 M. W. N. 471.

" Any one or more of such persons."—This includes persons claiming under such persons. A transferee of a decree, within the meaning of r. 16 below, is such a person; *Dwar Buksh* v *Fatik*, 26 C. 250.

Effect of Payment to a Joint-creditor.—The sum due upon a mortgage was paid to one of the two mortgagees and he gave an acquittance without the knowledge of the other mortgagee, who now sued upon the mortgage *Held* that the mortgage had been discharged and the plaintiff was not entitled to sue —*Barber Maran* v. *Ramana*, 20 M. 461. 7 M. L. J. 269. The payment to one of two joint mortgagees does not necessarily operate as a discharge of the debt to the other mortgagees. *Ausainara* v. *Rahamannessa*, 13 C. L J. *See* also *Sitaram* v. *Sridhar*, 27 B. 292 [25 M. 26 (39) *referred to*].

Appeal.—An order under this rule allowing or disallowing one of several joint decree-holders to execute a joint decree is a decree under s. 47 and is appealable when the contest is between decree-holder and judgment-debtor; *Lakshmi* v. *Ponnassa*, 17 M 394, *see* also *Gooroo Dass* v. *Ram Rungince*, 17 W R. 136, *Obhoya* v *Mahadeo*, 17 W. R. 415 But where the contest relating to the execution of the decree is between the decree-holders themselves (and not between decree-holders on the one side and judgment-debtor on the other), no appeal lies against an order; *Ratanlal* v. *Bai Gulab*, 23 B. 623. Where four only, out of eleven joint decree-holders, applied for execution, and no objection was raised by the judgment-debtor in the executing Court, which therefore passed no orders under this rule, *held* that he cannot contend in appeal that the executing Courts order allowing execution is barred; *Yarmath Khan* v. *Amir-ul-umma*, 24 L. W. 711 · 97 I C 375: A. I. R. 1926 M. 1198.

Effect of Application by One of Several Joint Decree-holders on Limitation.—When one of several joint decree-holders applies for execution, time runs from the date of presentation and not from the date on which the application is disposed of; *Raj Behari* v *Kalihar*, 10 C. L. J. 479. *See* also 30 C. 761: I C. W N 260.

Every application made by one or more out of several decree-holders is an application made in the interests of all, and every proceeding taken by one is a proceeding taken for the benefit of all to enforce the judgment or to keep it in force.—*Roy Preonath* v. *Prannath*, 8 W. R.

100, *Dhanessuree* v. *Goodhur*, 11 W. R. 421; *Bhoobunessuree* v. *Chunder Monee*, 21 W R 243, *Hurrukh* v. *Zurooree*, 22 W. R. 468 *Oudh Behari* v. *Brojo Mohan*, 4 Bom L. R. Ap. 41; 13 W. R. 128; *Johuroonissa* v. *Ameeroonnissa* 6 W R. Mis. 59; *Indurjeet* v. *Muzum*, 6 W. R. Mis 76, *Azimunissa* v. *Sashi Bhusan*, 2 Bom. L R. Ap. 47: 11 W. R. 343 But if the decree gives separate sums to each of the decree-holders separately, proceedings taken by one cannot keep the decree alive for the benefit of the others —*Choon Sahoo* v. *Tripoora*, 13 W. R 244.

Where a joint decree is obtained by several persons, and afterwards some of them die, the execution may be taken by the survivors of the original decree-holders for the benefit of all the parties interested in the decree in order to keep the decree alive.—*Teja Singh* v. *Raj Narain*, 1 Bom. L R A C 62 10 W R 95 *See* also *Jogendra Chandra* v. *Sham Das*, 9 C. L J 271.

An application to execute an aliquot part of a decree, though irregular and ineffectual for the purpose, must, if made *bona fide* under a misapprehension of the law, be regarded as a proceeding which keeps the decree alive.—*Koylash Nath* v *Nitya Shama* 15 W. R. 449; *Shib Chunder* v. *Ram Chunder*, 16 W. R 29; *Pran Kishore* v. *Kishore Chunder*, 16 W. R. 267; *Doyamoyee* v *Nilmonee*, 25 W R. 70.

An application for the partial execution of a joint decree by one of the decree-holders is an application according to law and has the effect of keeping the decree in force —*Nanda Rai* v *Raghunandan*, 7 A. 282 *See* also *Ponampilath Parapravan* v *Ponampilath Parapravan*, 3 M. 73, *Dali Chand* v *Bai Shivkar*, 15 B 242 *See*, however, *Ram Autar* v *Ajudhia Singh*, 1 A. 231, *Collector of Shahjahanpur* v. *Surjan Singh*, 4 A. 72

Minor.—Where one of several joint decree-holders was a minor and the remedy of major joint decree-holder was barred: *Held* that the remedy of the minor decree-holder was not time-barred under s. 7 of the Limitation Act, 1877, and that he was entitled under this Rule to execute the whole decree, as although the remedy of the major decree-holder was barred, his right was not extinguished —*Anando Kishore Das* v. *Anando Kishore Bose*, 14 C 50 (4 C 350, *distinguished*) *See* also *Govindram* v. *Tatia*, 20 B 383; followed in *Zamir Hasan* v. *Sundar*, 22 A. 199.

Where one of several joint decree-holders is a minor, s. 7 of the Limitation Act saves an application for execution by the minor decree-holder from being barred by limitation —*Surja Kumar* v. *Arun Chunder*, 28 C. 465· 5 C. W N 767 (20 B 383 and 22 A. *followed*; 13 M. 236 and 17 M. 189 *dissented from*) But see *Periasami* v. *Krishna Ayyan*, 25 M. 431, F B, where it has been held that sec. 7 of the Limitation Act. 1877, only applies where all the joint decree-holders are under disability at the time when the period of limitation begins to run (28 C. 465 *dissented from*, 13 M. 236 and 16 M. 436 *approved*).

Application for Execution Against Some Only of Joint-debtors—Effect of.—Where there has been a joint-decree against more persons than one, an application for execution against some one or his representatives will keep the decree alive against all persons jointly liable under the decree—

Subramanya v. *Alagappa*, 30 M. 268: 2 M. L. T. 180; *Barada* v. *Nabin*, 11 C L. J. 83: 14 C. W. N. 465; *see* also 2 C. L. J.4-*n*; *Ramanuj* v. *Hingu*, 8 A. 517; *Krishnaji* v. *Muraravran*, 12 B. 48 But *see* *Harendra* v. *Sham Lal*, 27 C. 210

Where a decree was passed against several defendants, each of whom is declared to have a separate liability in respect of a definite amount, execution against one or more of such judgment-debtors keeps the decree in force against all simultaneously.—*Mohesh Chunder* v. *Mohun Lal*, 8 W. R. 80. *See* also *Mohesh Chunder* v. *Tara Moone*, 9 W. R. 240; and *Stephenson* v. *Unnoda*, 6 W. R. Mis. 18. But see *Wise* v. *Rajnarain*, 1 Bom. L. R. 258, F. B.: 10 W. R. *Khema Debea* v. *Kamola Kant*, 10 Bom. L. R. 259-*n*; 10 W. R. 10; and *Hurkoo Singh* v. *Ram Kishen*, 6 W. R. Mis. 44.

Application for execution by transferee of decree

16. Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution.

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others. [S. 232.]

COMMENTARY.

Alteration and Effect.—The important changes in para 1 are the addition of the words "*or if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is*" ; and the omission of the words "*if that Court thinks fit*" which occurred in the old section As to their effects *see* below

"Decree."—The word "decree" in para. 1 and proviso 1 of this rule includes a mortgage decree, *Sarju* v *Thakur*, 42 A 544 · 58 I. C. 743; *Kudhai* v. *Sheo Dayal*, 10 A 570 The second proviso is limited to money decrees only.

"If transferred by assignment in writing or by operation of law."—The only persons competent to apply for execution under this rule are;—

(1) The transferee of a decree under assignment in writing. A transferee under an oral assignment is not competent to apply; *Parvata* v. *Digambar*, 15 B. 307.

(2) The transferee of a decree by operation of law. Such a transferee includes the legal representative of a deceased decree-holder, the Official Assignee in the case of an insolvent decree-holder, or the purchaser of a decree at a Court sale in execution of a decree against the decree-holder; *Gour Sundar* v *Hem*, 16 C. 355. A transfer by operation of law means a transfer on death, or by devolution, or by succession

(3) A transferee (under an assignment in writing or by operation of law) from any of the transferees mentioned in (1) and (2) above; *Amar* v. *Gour Prosunno*, 27 C. 488; *Ganga* v. *Yakub*, 27 C. 670.

Execution by Transferee a Matter of Right.—The omission of the words "*if that Court thinks fit*" from the rule has an important effect Formerly it was held that the Court had an absolute discretion to allow or refuse execution at the instance of the transferee (see *Shama* v. *Nobin*, 15 W. R. 283; *Krishna Mohini* v. *Kedar Nath*, 15 C. 446; *Balkissen* v *Bedmati*, 20 C. 388; *Parvata* v *Digambar*, 15 B. 307: 31 B. 462; 9 B 179). The omission now makes it clear that the transferee can proceed with execution as a matter of right It does not depend upon the discretion of the Court, *Asad Ali* v *Haidar Ali*, 38 C. 13 at p. 21. A transferee of a decree must prove his right before he can be allowed to execute; *Mohomed Rowther* v *Pichari*, 4 L W. 534.

"The transferee may apply for execution of the decree."—"Transferee" does not mean only a transferee of the whole decree It includes a transferee of a portion of the decree, and also where the decree is a joint one, the transferee of the interest of any one of the joint decree-holders; *Kishore* v. *Gisborne & Co* , 17 C. 341; *Endoori* v. *Venkatachairulu*, 33 M 80; *Muthiah* v. *Govind*, 44 M. 919, 69 I C. 337; *Muthunarayane* v. *Balkrishna*, 19 M 306 This rule applies to the assignment of even a fractional interest in a decree; *Ram Sahai* v. *Madan Lal*, 48 A. 432: 24 A. L J. 430: A. I. R. 1926 A. 346

But a decree for payment of money and costs is one and indivisible, and the transfer of the right to realize costs only does not give any right of execution to the transferee, *Ram Chandra* v. *Abdul*, 35 A 204: 19 I. C. 304; *Ahmad Shah* v *Faujdar*, 2 Lah. L J. 1: 55 I. C. 983

"Transferee" within the meaning of this rule does not mean a person to whom a party to a suit agrees to transfer any decree that may be passed in the suit, *Basroovittil* v. *Rama Chandra*, 17 M. L J. 331.

A purchaser of a portion of immoveable property from the holder of a decree for possession of that property, is not a transferee of the decree within the meaning of this rule, and is not therefore entitled to execute the decree; *Hansraj* v. *Nukhraji*, 27 A. W. N. 280; *Vithal* v. *Mahadeb*, 26 Bom. L. R. 333: A. I R. [illegible] B. 426: 80 I. C. 249; *Pommal* v. *Marukrithammal*, A. I R [illegible] I. C. 856

An application for [illegible] by an assignee, pending suit, of the rights of the [illegible] a decree is subsequently passed, is not one [illegible] The necessity for

an assignment prior to an application for execution is one which the law, as embodied in this rule, requires as a condition precedent; *Genaram* v. *Hanmantram*, 28 Bom. L. R. 761 : A. I. R. 1926 B. 406.

Sale of Property does Not Give Right of Execution.—If a decree-holder holding a decree for possession of immoveable property sells a portion of such property, the sale does not, without express provision to that effect give the purchaser any right to execute the decree himself.—*Hansraj Pal* v. *Mukharji Kunwar*, 30 A. 28: A. L. J. 759 (7 A. 107 *referred to*).

The sale of a mortgaged property by the mortgagor does not entitle the purchaser to execute a redemption decree obtained by the mortgagor before the sale unless the sale deed expressly includes the decree.—*Ahmed Shah* v. *Faujdar Khan*, 55 I. C. 883. But when, in execution of mortgage decree the mortgaged properties were sold together with "all arrears of rent," the purchaser was held to be entitled to execute all decrees for rent obtained against the tenants of the mortgaged properties by the mortgagor; *Ananda Mohun* v. *Promotha Naht*, 57 I. C. 874: 25 C. W. N. 863.

Pledge of Decree.—This rule seems to recognise the validity of a pledge of decree as security no less than the validity of its sale; *Subbaraya* v. *Kuppuswamy*, 1 I. C. 535 · 5 M L. T 278.

Transfer When Takes Effect and When Complete.—When a decree is transferred by an instrument in writing, such transfer takes effect from the date of instrument, and not from the date of its recognition by Court: *Sadagopa* v. *Raghunatha*, 33 M. 62. The transfer is complete when the assignment is in writing It does not depend on the sanction of the Court; *Subba Naicker* v. *Saminatha*, 5 M L T 260: 1 I. C. 353.

Part Transfer of Decree.—A share of a decree can be transferred. Though Or. XXI, rr. 15 and 16 may not in terms apply, there is nothing in the Code prohibiting an application by such transferee. The principle underlying r. 16 will apply and Court has jurisdiction to place the part transferee on record, though the deed of transfer expressly provided that the transferor should execute the decree —*P. M. A. R M Muthiah Chettiar* v. *Lodd Gobinda*, 44 M 919, F B But see *Majaher Hossain* v. *Mt. Amtul Bibi*, 66 I. C. 679, where it has been held that unless the whole interest be exhausted there is no transfer within the meaning of this rule.

General Rights and Liabilities of Transferee of a Decree.—This rules should be read with s. 49, which lays down the respective rights and liabilities of transferees and judgment-debtors *See* notes ante.

A transferee cannot apply for mere recognition of his right to execute the decree without asking for execution; *Alagappa* v *Ramasawmi*, 14 M. L. T. 513.

The assignment of a decree is one approved by law as contained in this rule and the transferee of a decree gains by the transfer the rights of the transferor.—*Vishnu Sakharam* v *Krishnarao*, 11 B 153.

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An application for execution of the decree by an assignee, pending suit, of the rights of the plaintiff in whose favour a decree is subsequently passed, is not one made in accordance with law. The necessity for

an assignment prior to an application for execution is one which the law, as embodied in this rule, requires as a condition precedent; *Genaram* v. *Hanmantram*, 28 Bom. L. R. 761: A. I. R. 1926 B. 406.

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The assignment of a decree is one approved by law as contained in this rule and the transferee of a decree gains by the transfer the rights of the transferor.—*Vishnu Sakharam* v. *Krishnarao*, 11 B 153

The transferee of a decree for costs is entitled to realize the amount in execution of the decree and not by a separate suit.—*Ram Buksh* v. v. *Panna Lal*, 7 A. 457.

A purchaser of a portion of mortgaged property, who subsequently purchased the mortgage-decree, was held entitled to execute the decree against the judgment-debtors personally as well as against the portion of their property in their hands.—*Nafar Chundra* v. *Bhikanto Nath*, 4 C. L. R. 156.

Assignment must be in Writing.—An assignee of a decree under an oral assignment has no *locus standi* at all to apply for execution of a decree, *Parvata* v. *Digumber*, 15 B. 307; *Ramanathan* v. *Sokkanatha*, 2 M. W. N. 559, *Ramanathan* v. *Raghavendra*, 16 I. C. 807.

As writing is essential in a transfer of a decree, a mere agreement to transfer, does not entitle the intended transferee to apply for execution.—*Jotindra Nath* v. *Peyerdeya Debi*, 43 C. 990: 24 C. L. J. 67: 20 C. W. N. 866. 34 I. C. 69 P. C.

As a transfer of a decree must be in writing a transferee under an oral assignment has no right to execute the decree. A person to whom a decree is agreed to be transfered is not a transferee. A transfer of property during the tendency of suit, does not entitle the transferee to execute the decree unless he has taken steps to get himself substituted in the suit in place of his vendor, nor can an assignee of a property with all its future and back rent, execute a decree for rent subsequently obtained by the landlord when the decree itself has not been transferred.—*Mathurapur Zemindari Co. Ltd.* v. *Bhasa Ram*, 28 C. W. N. 626. 39 C. L. J. 373.

A transfer of a decree by an unrecognised transferee is seldom objected to in practice and is recognized by the Courts as passing a good title.—*Mian Shaheb Levai* v. *Gopalier*, 33 I. C. 558, but if the transferee is not recognised by Court, the decree-holder on record can execute the decree in spite of the transfer. S. *Ari Chetti* v. *Theer Chama Lal Chetty*, 34 I. C. 791.

Who can Apply on Assignment of Decree.—Where a decree has been transferred to a particular person under an instrument in writing, no other person claiming that he was the real owner under the transfer, and that the transferee named therein was a mere *benamidar* for him, can apply for execution of the decree under the terms of Or. XXI, r. 16, *Gurdial* v. *Gurbaksh*, 8 L. 35. A. I. R. 1927 L. 110 (A. I. R. 1925 M. 701 *folld.*).

Rights of Transferee by Operation of Law.—As to right of the representative of a decree-holder to execute the decree without a certificate of heirship, *see* notes under Or. VII, r. 4, under the heading "Right to Execute Decree Without Certificate."

The succession of a son to the estate of his deceased father is succession or transfer by operation of law.—*Umasondury* v. *Brojonath*, 16 C. 847. *See also Raghunatha* v. *Venkatesa*, 20 M. 101.

The right to execute a decree obtained by a Hindu widow, would not pass to her heirs or assigns, but would revert to her reversionary heirs.—*Hridoy Kant* v. *Behari Lal*, 11 C. W. N 239.

The representatives of the original decree-holders are transferees of the decree by operation of law.—*Purmanandas* v. *Vallab Das*, 11 B. 506; but a person, by being a decree-holder of the decree-holder, does not become a transferee of the decree-holder by operation of law; *Fazlur Rahman* v *Musst Kokila*, 5 Pat. 511: 96 I. C. 446: A. I. R. 1926 Pat. 320.

The holder of a certificate of administration under s 7 of Reg. VIII of 1827 is transferee by operation of law of a decree obtained by the deceased.—*Khandevav* v. *Ganesh*, 11 B 368.

Where the estate of an insolvent is assigned to his surety, the surety is an assignee by operation of law —*A. T. Mitter* v *Abinash Chunder*, 4 C. W. N 785.

A person attaching a decree under Or. XXI, r 53 is a representative of the decree-holder within the meaning of that term as used in s. 47, and in every case is entitled to enforce execution of the decree which he has attached.—*Peary Mohun* v *Romesh Chunder*, 15 C. 371; and *Rangasami Chetti* v. *Periasami Mudali*, 17 M 58 *See* also *Adhar Chander* v. *Lal Mohan*, 24 C 778

A mortgage suit, even after an order absolute, is a pending suit up to the time of sale. An application for substitution, by legal representatives of the decree-holder, after order absolute for sale, but before actual sale is governed by Or XXII, r. 10, and not by Or. XXI, r 16 —*Bhagwan* v. *Nilkanta*, 9 C W N. 171

Certain persons sought to enforce a decree on the ground that they were transferees thereof by operation of law The transfer was disputed and the matter was *sub-judice* in another suit *Held* that the Court has discretion both under ss 232 and 234, C P. Code, 1882, either to stay execution or dismiss the petition.—*Vakubaabhararanes* v *Rangaiyan Chetty*, 28 M. 357.

Application by Transferee for Execution must be to "the Court which passed the decree."—As to definition of "Court which passed the decree," *see* notes to s 37

It includes the Court, which by reason of a transfer of jurisdiction, has jurisdiction in respect of the subject-matter of the suit —*Udit Narain* v. *Mathura*, 35 C 974 12 C. W N. 859 But where after a decree was transferred to another Court for execution and the interests of the judgment creditor vested in another person by operation of law he can apply for execution to the Court to which the decree was transferred and obtain afterwards a certificate from the Court which passed the decree; *Manorath* v *Ambika*, 13 C W N 538 · 9 C L J 443

An application by the transferee of a decree for execution after substitution of his name can be entertained only by the Court which passed the decree and the Court to which the decree has been transferred for execution has no jurisdiction to entertain it.—*Amarchandra* v. *Guru*

Prosunna, 27 C. 488 *See* also *Manorath Das* v. *Ambika Kant*, 13 C. W. N. 533 (14 W R 65· 5 Bom L. R 497; 9 B 46, and 2 A. 283, *referred to*).

The Court to which a decree is transferred for execution has no power to entertain the transferee's application for rateable distribution under s. 73 Such application can be entertained by the Court which passed the decree —*Tamesher Prasad* v *Thakur Prasad*, 25 A. 443 (27 C 488 and 16 A 483 *referred to*) But *see* 26 M 258.

Where an order of the Privy Council was transmitted by the High Court to the District Court as the Court which pased the first decree, the latter has jurisdction to entertain an application made by an assignee and to allow him to execute the decree, *Krishna* v. *Raja of Vizianagram*, 38 M. 832.

Notice of Application shall be Given to Judgment-debtor and Transferor.—The notice required by the first proviso to this rule is not notice of the assignment but notice of the application for execution of the decree: *Musst. Bhagwanta* v. *Dewan Zamir*, 3 Pat. 596: 78 I. C. 766: A. I R 1924 Pat. 576. The provision as to notice is imperative and no execution by assignee can proceed unless notice has been served both upon judgment-debtor and transferor Notice upon judgment-debtor alone is not enough; *Sreenath* v *Achutananda*, 11 C L. J. 354· 6 I C 262 If execution is issued without notice, the proceedings in execution are void; *Gulzari* v *Daya Ram*, 9 A 46, *Musst. Gulab* v. *Syed*, 6 Pat L J 858; *Notan Das* v *Lachhman*, L. 230· 63 I. C 884. The object of the notice is to enable the transferor and the judgment-debtor to raise such objections regarding the assignment as may be available to them, *Sheo Prasad* v *P E Lall*, 4 Pat 120 86 I. C. 564: A. I. R. 1925 Pat 449 *See* also 36 B. 85 and *Protap Sing* v *Gurditta Mal*, 39 I. C 952. A notice under s 158, B T Act, will not dispense with the necessity of a notice under this rule —*Maharaja Sir Rameswar Sing* v. *Harihar Jha*, 57 I. C 250. But if no objection be taken in prior execution proceedings, the judgment-debtor cannot plead want of notice under this rule when a subsequent execution is proceeding.—*Brailal Marwari* v *E M. Atkinson*, 5 Pat L J. 639 57 I C. 707. Notice of application for execution and not of transfer is to be given, so where during the pendency of an execution proceeding, the assignee applies for continuance of the execution he does not apply for fresh execution and no notice is necessary —*Musst Golab Koer* v *Syed Mahomed Zaffar Hossain*, 62 I. C. 30 The provisions of this Rule are mandatory and non-compliance with them renders the proceedings void —*Notan Das* v *Thaka Lachman Sing*, 63 I. C 884

The notice required by this rule need not be in writing, *Musst Bhagwanta* v *Dewan Zamir*, 3 Pat 596: 78 I C. 766: A I R 1924 Pat 576

A notice under this rule can be issued only by the Court which passed the decree An application for transmission of the decree for execution can be treated as an application for execution.—*Nando Lal* v. *Chutterput*, 29 C 235.

Where on an application by the transferee of a decree to have his name substituted as a decree-holder, no objection is taken by the judgment-debtor as to the validity of the transfer, the judgment-debtor will be precluded from questioning the validity of the transfer, on an application by the transferee for execution of the decree; *Taj Singh* v. *Jagan Lal*, 38 A. 289; *Dwarkadas* v. *Muhammad*, 47 A 86: 80 I. C. 722: A. I. R. 1925 A. 119.

Where judgment-debtor is dead, no such notice can be sent until his representatives are brought on record.—*Mahalinga* v. *Kuppana Chariar*, 30 M. 241: 17 M L J 485. Notice of the transfer may be served on the legal representatives of the deceased judgment-debtor.—*Khushrobhai* v. *Harmazsha*, 11 B 727

A decree is not a "debt" within the meaning of that word as used in s. 131, Transfer of Property Act (IV of 1881), so as to make a transfer thereof void without express notice. When a decree is assigned, a notice under this rule is sufficient.—*Dagu* v. *Vanji* 24 B 502. *See* also *Afzal* v. *Ram Coomar*, 12 C 610

"Objections" to be Heard Before Attachment.—Upon an application by an assignee, attachment was issued before hearing judgment-debtor's objection; *held* the attachment was illegal and should be set aside.—*Kassum* v *Dayabhai*, 13 Bom L. R. 973

The fact that when notice under Or XXI, r 16 was given to the judgment-debtor of the application for execution, he failed to file any objection as to its executability before the decree was tranfserred for execution, does not prevent him from raising an objection to the right of the transferee of decree to execute the decree before the Court to which the decree has been transferred for execution, *Ram Sewak* v. *Satruhan*, 8 P. L. J. 163: A I R 1927 Pat. 170 (12 C L J 312 *distinguished*)

Benamidar.—If a decree is transferred to one as *benamidar* for the actual purchaser, the latter is entitled to execute it and his right course is to apply under this rule.—*Manikkam* v. *Talayya*, 21 M 388; *Chellam Chetti* v. *Seeni Chetti*, 43 I. C. 801. If the transferee is a *benamidar* for one of the judgment-debtors, he cannot execute, *Ramanaya* v. *Krishnamurthi*, 19 M. L. T 124, *Mohamed Rowther* v *Pichai*, 4 L W. 534; *Mahammed Rowther* v *Pichai Rowther*, 35 I C. 624, *Gian Chand* v. *Sunder Das*, A. I R 1926 L 666

But the absence of consideration for the assignment of a decree is immaterial and will not deprive the assignee of his right to execute the decree provided the assignment is not a sham transaction, *Thimma Reddy* v. *Subba Reddy*, 40 I. C 141

It is permissible for the Court to enquire, if a transferee is a *benamidar* for the judgment-debtor. If the transferee is found to be a *Benamidar* for a judgment-debtor, the Court is bound to refuse execution in his favour; *Gauraitta Mal* v *Partab Singh*, 54 I. C 94; *Gurdial* v. *Gurbaksh*, A. I. R. 1927 L. 110

But a purchase by a pleader of judgment-debtor, in the name of his wife, does not satisfy the decree and release the judgment-debtor from liability, although the pleader holds the decree assigned to him in trust

for his clients and if called upon by his clients, to do so, is bound to assign the decree to them, on equitable terms, *Nagendra Bala Dassi* v. *Debendra Nath*, 22 C. W. N. 491. 27 C. L. J. 388. A *benamidar* may otherwise be permitted to execute the decree; *Lala Dwarka Das* v. *Burma Railways Co.*, 62 I. C. 299.

"Decree for the payment of money."—The second proviso applies only to decrees for money personally due by two or more persons, and it does not apply to mortgage decrees.—*Lala Bhagun* v. *Hollaway*, 11 C. 393; *see* also *Laidhari* v. *Manager, Court of Wards*. 14 C. L. J. 639. 16 C. W. N. 132. 12 I. C. 70; *Jagabandhu* v. *Haladhar*, 27 C. L. J. 110, *Chidambara* v. *Subbarayar*, 49 M. 508. 93 I. C. 53: A. I. R. 1926 M. 623. The prase "a decree for payment of money" means a personal decree for the payment of money by two or more defendants jointly. The proviso does not extend to a decree against the estate of a deceased person, where the personal liability of the representatives is to be determined by the Court.—*Pana Chand* v. *Sundrabai*, 31 B. 308. 9 Bom. L. R. 409.

As to whether a rent decree is a decree for money or not, *see* s. 65, B. T. Act and 25 C. 322.

Award.—A transferee of an award filed in Court under the provisions of the Arbitration Act, 1899, is entitled to apply for execution under this rule, *Gladstone Wyllie & Co.* v. *Joosub*, 27 C. W. N. 666: 77 I. C. 868: A. I. R. 1924 C. 117.

Proviso (2). Effect of Transfer of Money—decree Against Two or More Persons to One of them.—The proviso does not make an assignment of a decree in favour of one of several judgment-debors invalid in law. It only provides that the transferee is not entitled to enforce his rights by execution.—*Arumuga* v. *Yogamba*, 17 I. C. 323; 13 M. L. T. 227; *see* also *Annabatulla* v. *Annabatulla*, 28 I. C. 906. The proviso does not mean that a judgment-debtor purchasing a decree will have no relief against his fellow judgment-debtors. It provides that he shall not execute the decree against the others. The proper procedure would be to bring a suit for contribution, for if execution was allowed, a purchasing judgment-debtor might execute the whole decree against one of his fellows who might then purchase it and execute the whole againt anther and so on; *Ramlal* v. *Khiroda* 18 C. W. N. 113, *Anant* v. *Vinayak* 32 B. 195 p. 197; *see* also *Kalyan* v. *Damber* 6 A. L. J. 564. There is a distinction between purchase of the *whole* decree and purchase of a *partial* interest. When one of several joint judgment-debtors, acquires the position of decree holder in respect of the *whole* judgment-debt, by operation of law or by transfer, the effect is to extinguish *protanto* the liability of other judgment-debtors, and the decree cannot be executed against them. But when one of them so acquires only a *partial* interest in the decree, the effect is not to extinguish the entire judgment-debt, but so much only of it as such judgment-debtor has acquired.—*Benarasi Dasi* v. *Maharani Kuar*, 5 A. 27. (7 W. R. 136; 25 W. R. 343; 9 N. R. 230; 6 N. W. P. 1, *referred to*). *See* also *Kudhai* v. *Sheo Dayal*, 10 A. 570 (followed in *Fazal* v. *Habib*, 61 P. R. 1910: 7 I. C. 474), and *Pogose* v. *Fukurooddeen*, 25 W. R. 343.

Rule 16 prohibits the execution of a decree by one judgment-debtor against another, but where by an agreement between the decree-holder and some of the judgment-debtors it was settled that the decree-holder should execute the decree against the other judgment-debtors and pay the amount to them in consideration of the fact that they have paid the amount in advance to him, the agreement does not fall under the prohibition of r. 16; *Ramanathan Chetti* v. *Muthu Vabliappa*, 52 M. L. J. 59: 99 I. C 902: A. I R. 1927 M. 322.

A decree directing separate amounts with separate sets or proportionate costs to be recovered against defendants, is not a decree passed jointly against several persons and this rule is not applicable.—*Anant Vinayak* v *Nagappa*, 32 B 195 (9 W. R. 230, *referred to*).

The purchase of the benefit of a decree by one of the joint-debtors, although it has the legal effect of satisfying the judgment-debt which the decree creates, cannot affect the decree itself —*Abul Munsoor* v. *Abdool Hamid*, 2 C. 98.

Attachment of Decree by a Co-Judgment-Debtor.—When a person attaches a decree against himself and several others in execution of a decree obtained by him against his decree-holder, the ownership does not vest in him, and he is competent to take out execution against his co-judgment-debtors; *Kalyan* v *Damber*, 6 A. L J. 564: 2 I. C. 626

Assignment of Rent Decree—*See* s 148 (*h*), B. T. Act, which provides that notwithstanding any thing contained in this rule, an application for the execution of a decree for arrears obtained by a landlord shall not be made unless the landlord's interest in the land has become and is vested in him *See* also *Dinanath* v. *Golap Mohini*, 1 C W. N. 183: *Monmotho* v. *Rakhal*, 10 C. L J. 397, *Sambhunath* v *Sheo Prasad*, 40 C. 462 F B. 17 C W. N. 296; 16 C. L. J 227 (*Dwarka* v. *Peari*, 1 C. W. N. 694 *overruled*); *Kailash* v. *Jadunath*, 14 C 380; *Karunamayi* v. *Surendra*, 26 C 176, *Chatrapat* v *Gopi Chand*, 26 C 750. 4 C W. N. 446; *Nagendra* v *Bhuban*, 6 C W. N 91, *Hem Chander* v *Monmohini*, 3 C. W. N. 604, *Gurucharan* v *Kartick*, 18 C. W N 747 41 C. 926 P C (*Maharaj Bahadur* v *Forbes*, 35 C 737 *reversed*); *Dinonauth* v v. *Golap*, 1 C W N 183.

As to what is a rent decree and what is not, *see* 27 C 827 F. B : 4 C. W N 357· 4 C. W. N. 605.

Substitution of Name of Assignee in Execution Proceedings Not Necessary.—There is no provision in the Code which renders necessary the actual substitution of the name of an assignee or legal representatives for the validity of the execution proceedings, all this rule provides is that assignee should apply for execution of the decree and that his name should be brought on the record, *Monmotho* v. *Rakhal*, 10 C L J 396. *See* also *Jogendra* v *Sham*, 36 C 513, *Syud Nadir* v *Pearoo*, 19 W. R. 255; *Shamapodo* v *Nobin*, 15 W R 283, *Javermal* v *Umaji*, 9 B 179.

Record Decree-holder Entitled to Proceed.—The person appearing on the face of the decree as the decree-holder is entitled to execution, unless it is shown that another person has taken his place as assignee. *Jasoda* v. *Kirtibash*, 18 C. 639, *Khetter* v. *Ishur*, 11 W. R 271, *Manmotho* v. *Rakhal*, 10 C L J. 396.

Fresh Attachment not Necessary.—If at the date of assignment of a decree the judgment-debtor's property is already under attachment in execution of the decree, fresh attachment by assignee is not necessary, *Hafiz Suleman* v *Abdullah*, 16 A 133 (12 Bom. L. R. 133 *referred to*)

Fresh Application Not Necessary.—It is not necessary for an assignee of decree to present a fresh application if the execution initiated by the transferor is pending at time of transfer; *Monmotho* v. *Rakhal*, 10 C. L J. 396, p. 400.

Decree-holder Dying Pending Execution—Legal Representatives must Apply for Execution Afresh.—There is no rule of law which enables the legal representatives of a deceased decree-holder to apply for mere substitution of names He must apply, whenever he does apply for fresh execution, in the usual form of ten columns, when his predecessor's application is pending; *Baij Nath* v *Ram Bharos*, A. I. R. 1927 A. 165.

Right of Assignee to Sue for Refund of Price or for Declaration of Right.—A suit lies at the instance of the assignee of a decree for a declaration as to the validity of his assignment. S. 47 is no bar—*Rammanapate* v *Chinta*, 26 M 264 (14 M 478 *referred to*).

An assignee of a decree who was refused execution is entitled to sue his assignor to recover the amount paid by him for his assignment, *Ramasami* v *Basapappa*, 16 M. 225. The assignee is also entitled to sue for the cancellation of the order refusing execution and for a declaration of his right to execution. Such a suit is not barred by s 47—*Raman* v. *Muppil*, 14 M 478 Where an application by the transferee was dismissed on the ground that his purchase was *benami* for some of the judgment-debtors, he was entitled to bring a separate suit for a declaration of his right to execute the decree—*Halodhar* v. *Harogobind*, 12 C 105 See also *Sheoraj* v. *Aminuddin* 20 A 539; and *Ram Baksh* v *Panna Lal*, 7 A. 457. But no suit will lie to establish a right to execute a decree when an order dismissing an application under this rule has been allowed to become final—*Amanatulla Khan* v. *Sardah Parsad*, 28 A 618; 3 A. L. J. 421 (1906), A W. N. 133. (20 A. 539 *distinguished*) *See* also *Kunhammad* v *Amad*, 16 M. L. J. 27.

A transferred a decree to B, who recovered part of the amount due under it, and was prevented from recovering the balance by an attachment in execution of a decree against A *Held* that A was liable to pay compensation to B—*Puthiandi* v *Avalil Moidin*, 20 M. 137.

A suit brought for a declaration that a decree purchased in the name of the defendant who had wrongfully taken out execution of the same in his own name had been really purchased by the plaintiff for his own benefit is not barred by s 47—*Gourmohan* v *Denonath*, 2 C. W. N 76. *See* also *Sethurayar* v *Shanmugam Pillai*, 21 M. 353.

Appeal.—A transferee of a decree is a representative of the decree-holder; hence an order refusing to recognize the transferee of a decree or dismissing his application for execution on the objection of the judgment-debtor is a decree and appealable as such; *Subbuthayammal* v. *Chidambaram*, 25 M. 383; *Ganga Das* v. *Yakub*, 27 C. 670; *Harditta* v. *Nizhaia*, 4 Lah. L. J. 259; A. I. R. 1922 L. 396; *Badri Narain* v. *Jai Kishan*, 16 A. 483; *Tameshar* v. *Thakur*, 25 A. 3.

17. (1) On receiving an application for the execution of a decree as provided by rule 11, sub-rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.

Procedure on receiving application for execution of decree.

(2) Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.

(3) Every amendment made under this rule shall be signed or initialled by the Judge.

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application :

Provided that, in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree. [S. 245.]

COMMENTARY.

This rule corresponds to section 245, C P Code 1882, with some changes.

Sub-rule (1).—The words "*may allow the defect to be remedied*" have been substituted for the words "may allow it (application) to be remedied." The last sentence of the old section, *viz*, "*If the application be not so amended, it shall be rejected,*" has been omitted Sub-rule (1) states the procedure that a Court should adopt on receiving an application for execution and emperors the Court to reject the application if not properly drawn up or to allow the defect to be remedied. Where an application is not signed, it should not be rejected but should be allowed to be amended, *Chowdhuri v Srimati*, 1 Pat 149 69 I C. 200. A I R. 1922 Pat 400, *Ganesh Das v Fatteh Chand*, 2 Lah. L. J 104 · 55 I C 16 The amendment may be allowed even after the application has been registered, provided the execution of the decree has not been barred by limitation on the date of filing the application; *Rai Bahadur v. Ram Bahadur*, 2 Pat 328 71 I C 741 A I R 1923 Pat 61; *Chaurasi v Bhagan*, 2 Pat 787 · 74 I C 141 A I R 1923 Pat. 209 The Court has an option under Or. XXI, r 17 either to reject the application or to allow the defect to be remedied within a time to be fixed by it. If it rejects the application, t[illegible] *...air* v.

Ambu, 49 M. L. J. 699. A. I. R. 1926 M. 260. It was held in *Vemuri v. Raja Yarlagadda*, 45 M. L. J. 651: A. I. R. 1924 M. 367, that where an application for amendment is filed after the expiration of 12 years provided by s. 48, the Court may accept it or reject it.

Sub-rule (2).—This sub-rule is new. It has introduced a change of an important character and has been framed to remove some doubts which hitherto existed, as to whether a defective application for execution can save limitation and to set the rest at several conflicting rulings under the old Code. Sub-rule (2) has made it clear that even if an application for execution was defective when it was filed and subsequently amended, the amended application shall be deemed to be an application in accordance with law and to have been presented on the date when it was *first filed*.

Sub-rule (4).—The words "*subject to the provisions hereinafter contained*," have been added.

For the meaning of the words "decree for payment of money," see notes under rule 20 of this order.

Procedure After Admission of Application for Execution.—If an application for execution corresponds with the terms of a decree, it should be admitted.—*Bisheshur Roy* v. *Bisheshur Bose*, 8 W. R. 227.

If the application is admitted, the Court is bound to issue executio[n] according to the nature of the application if made in writing after th[e] passing of the decree.—*Davis* v. *Middleton*, 8 W. R. 282.

This rule does not contemplate any enquiry before the Court whethe[r] the property belongs to the judgment-debtor or not.—*Subjan Bibi* v. *Sanatulla*, 3 Bom. L. R. A. C. 413: 12 W. R. 329.

An application for execution is said to be "granted" when it [is] made formally and regularly. The word "granted" is equivalent [to] "admitted" as used in this rule.—*Dewan Ali* v. *Soroshibala Dabee*, [...] C. 297: 10 C. L. R. 111 and *Rahim Ali* v. *Phulchand*, 18 A. 482.

A decree-holder cannot as a matter of right discontinue the execu[...]tion proceedings at any stage at his option; *Kenaram* v. *Kailash*, 18 [C.] L. J. 53: 19 I. C. 904.

Time for Remedy of Defect.—Court can extend the time allowed *see* s. 148.

Duty of Court.—Court may either allow amendment or reject defective application, but it is not bound to calculate interest due und[er] the decree.—*Chintamoni* v. *Monmohini*, 69 I. C. 200: 1 Pat. 149.

Sub-rule (2) and Limitation.—The rulings under the old law wer[e] not uniform (*see* notes to r. 11 under the heading "Irregular or Defective Application") as to whether a subsequent amendment would rela[te] back and the application be deemed to be presented on the date when [it] was first presented. It was held in the following cases decided und[er] the old Code that where an order was made for amending an applicati[on] for execution and the amendment was made, the application should b[e] deemed to have been presented not on the date when it was first presen[ted]

ed, but on the date when it was amended; *Mathura* v. *Musst. Anuraga* 14 C W. N. 481; *Gopal Sah* v. *Janki Koer*, 23 C. 217; *Raghunatha* v. *Venkatesa*, 26 M. 101. These decisions are no longer law because the addition of sub-rule (2) makes it clear that when an application is amended, it shall be deemed to be an application "in accordance with law" and presented on the date when it was first presented.

A decree-holder applied for execution of a decree, and the Judge ordered the application to be amended within seven days. This order was disobeyed, but no order rejecting the application was passed. Subsequently the applicant prayed for leave to make the amendment, which prayer was granted. *Held* that the order granting leave to amend was not *ultra vires* of the Judge under this rule.—*Kaminy Mohun* v. *Gopal*, 8 C 479: 10 C. L. R. 519.

A decree-holder made several applications for execution giving wrong date of decree in each On the third application the judgment-debtor objected that the application was barred. The application was allowed to be amended, but the amendment took place after the expiry of the period of limitation. *Held* that the amendment would relate back to the preceding applications, and execution of decree was not barred.—*Jiweat Dubee* v *Kali Charan*, 20 A. 478; *Gnanendra* v. *Rishendra*, 22 C. W. N. 540: 27 C. L. J. 398.

Where an execution application has been registered, no amendment is possible thereafter, but an application to file fresh list of properties against which execution is also prayed for is not an amendment of the execution petition; *Chaurasi* v. *Bhagan*, 2 Pat. 787 · 74 I C. 144. But the Madras High Court has held that rule 17 does not take away the power of the Court to allow amendment of execution petition at any time before final disposal and that an amended application must be deemed to have been in accordance with law when it was presented, though the amendment was made after the period of limitation; *Vemuri Pitchayya* v *Raja Yaralgadda*, 45 M. L J. 651.

Value of Property Attached shall Correspond with Decretal Amount.—Under this rule the value of the property attached shall, as nearly as may be, correspond with the amount for which the decree has been passed; *Sadatmand* v *Phul Koer*, 20 A. 412, P C.: 2 C W. N. 550, P. C. *See* also *Madarsah* v. *Pillaniappa*, 23 M. 628; and *Sivasami* v. *Ratnasami*, 23 M 568

See notes to Order XXI, rule 66

If the order for attachment is wrong and excessive the attachment actually put is not null and void or without jurisdiction, *Sorabji* v. *Govind*, 16 B 91 (114).

Execution of Declaratory Decree.—Execution cannot be obtained on a merely declaratory decree.—*Muniyan* v *Periya*, 1 M. H. C 184; *Jeora* v. *Thakoree*, 2 N. W. P 303; *Tata Chariar* v *Singara Chariar* 1 M. 219. *See*, however, *Kishore Bun* v. *Dwarka*, 21 C. 781.

A decree, so far as it is a mere declaratory decree, cannot be enforced in execution.—*Janakiram* v. *Thiruvee Koda*, 2 M. L. T 94 (5 B. 80; 3 M. I. A. 359; 23 M. 298, and 18 C. 448, P. C., *referred to*).

Declaratory decree cannot be executed in Revenue Court: *Kuar v. Achhaibar*, 27 A. 97: 26 I. C. 397.

Execution of Rent Decree.—A landlord who has obtained a d for arrears of rent of an under-tenure is at liberty to execute the d in the ordinary manner against the person or other property, wh moveable or immoveable, of his judgment-debtor. He is not rest by the provisions of the Bengal Tenancy Act to executing such d in the first instance by sale of the under-tenure.—*Folick v. Foly*, 492 (14 C. 14 *explained*); *Tarini v. Narayan*, 17 C. 301; *Bhabari v. tap*, 8 C. W. N. 575; *Surendra v. Surnomoyi*, 23 C. 103: 3 C. W. 38 (*foll'd.* in 8 C. L. J. 754).

Execution of Maintenance Decree.—If in a maintenance decree party is charged with payment of the allowance, to make a fresh unnecessary in case of default in payment of the instalments, a re should be appointed under the decree itself with directions, in ca default in payment of the maintenance to take possession of the and sell the same, and out of the sale-proceeds to pay the allowanc maintenance.—*Hemangini v. Kumode*, 26 C. 441. *See* also the f ing cases: 2 B. 494, 9 B. 108; 9 A. 33, 19 C. 139; 10 M. 259; 16 A. 22 C. 813 and 906; 2 C. W. N. 33, 12 B. 65 and 416; and 12 M.

A decree for maintenance can be executed after the death o person against whom it was passed, against other members of the family, where the decree created a charge on the joint family proper *Subbanna Bhatta v. Subbamma*, 30 M. 324, 17 M. L. J. 180.

Execution of Satisfied Decree.—This rule has nothing to do the invalidity of a sale made to a stranger, who purchased without n of the fact that the amount realised by previous sale of other plots c property attached was more than sufficient to satisfy the decree in e tion.—*Surendra v. Bela Ram*, 45 I. C. 699.

Mortgage-decree.—*See the cases under Or. XXXIV.*

Appeal.—An order under this rule is not appealable as a d *Paltah Veeran v. Kunhi*, 9 I. C. 760: 9 M. L. T. 347. An order all the decree-holder to withdraw execution is not appealable; *Kenar Keilash*, 18 C. L. J. 53.

18. (1) Where applications are made to a Court for the cution of cross-decrees in separate suits for payment of two sums of money passed betw the same parties and capable of executio the same time by such Court, then—

Execution in case of cross-decrees.

(*a*) if the two sums are equal, satisfaction shall be ent upon both decrees; and

(b) if the two sums are unequal, execution may be t out only by the holder of the decree for the l sum and for so much only as remains after dedu the smaller sum, and satisfaction for the smaller

shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.

(2) This rule shall be deemed to apply where either party is an assignee of one of the decrees and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself.

(3) This rule shall not be deemed to apply unless.—

(a) the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits; and

(b) the sums due under decrees are definite. [S. 246.]

(4) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons. [New.]

Illustration.

(a) A holds a decree against B for Rs 1,000. B holds a decree against A for the payment of Rs. 1,000 in case A fails to deliver certain goods at a future day B cannot treat his decree as a cross-decree under this rule.

(b) A and B, co-plaintiffs, obtain a decree for Rs. 1,000 against C, and C, obtains a decree for Rs 1,000 against B. C, cannot treat his decree as a cross-decree under this rule

(c) A obtains a decree against B for 1,000 C, who is a trustee for B, obtains a decree on behalf of B against A for Rs 1,000 B cannot treat C's decree as a cross-decree under the rule.

(d) A, B, C, D and E are jointly and severally liable for Rs. 1,000 under a decree obtained by F. A obtains a decree for Rs. 100 against F singly and applies for execution to the Court in which the joint-decree is being executed F may treat his joint-decree as a cross-decree under this rule.

COMMENTARY.

This rule corresponds with 246 of the C P Code of 1882, with some modifications The meaning of the rule has been made more clear by use of appropriate words

Alterations and Effect—Sub-rule (1).—The words "*where applications are made to a Court for the execution of cross-decrees,*" and words "*in separate suits*" have been added after "Cross-decrees" in order to indicate that this rule is applicable to cross-decrees passed

separate suits and not cross-claims under one decree, for which provisi is made in rule 19 The addition seems to have been made in adoptio of the principle laid down in *Kalka Prasad* v. *Ram Din*, 5 A. 272.

Sub-rule (4).—This is new; it has been added in accordance wit the principles laid down in *Ram Sukh Dass* v. *Tota Ram*, 14 A. 339 an *Hurry Dayal Guha* v. *Din Dayal Guha*, 9 C. 479: 13 C. L. R. 93 Th illustration (*d*), which has been newly added, clearly explains the meanin of sub-rule (4).

Applicability.—The words "where *applications* are made to a Cou for the execution of *cross-decrees* in *separate suits*" clearly indicate tha this rule contemplates applications by both persons for execution of bot decrees passed in separate suits, *viz.*, A against B and B against A. A being the decree-holder against B in one suit, and B the decree-holde against A in another That is both the two decrees sought to be set of must be before the *same court* and *under execution at the same time* If one decree-holder only applies for execution and the other has no applied, set off can not be allowed and execution must proceed for th full amount; *Chajmal Lal* v. *Dharam*, 24 A. 481 [L. R. 18 I. A. 10 (110) *refd. to*], followed in *Ponnusamy* v *Doraisamy*, 32 M. 336

The words "*separate suits*" signify that for the purposes of set of a counter-claim is not an independent action. For all purposes except those of execution a claim and a counter-claim are two independent actions; *per* Lord Esher in *Stumor* v *Campbell & Co.*, (1892) 1 Q. B. 317.

Where parties are entitled under the same decree to recover from each other, though in different ways, this rule applies.—*Sankara Menon* v. *Gopala Pattar*, 23 B 121 (16 A 395 *approved*).

This rule is applicable to cross-decrees and not to cross-claims under one decree —*Kalka* v *Ram Din*, 5 A 272. As to cross claims, *see* rule 19

Requisites for Right of Set-off of Cross-decrees.—In order that this rule may apply the following elements must be present: (1) The cross decrees must be passed in *separate suits*, (2) The cross-decrees must be for payment of *two sums* of *money* passed between *same parties*; (3) The cross-decrees must be in the *same Court* for execution at the *same time*, *i.e.*, both decree-holders must apply for execution; (4) They must be *capable of execution*, (5) The sums due under decrees must be *definite*. (6) The decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other, and each party *fills the same character in both suits* The existence of one without the other does not justify application of the rule. They will be considered under separate heads —

(1) Cross-decrees in Separate Suits.—Rule 18 applies even though one decree is in a suit and the other is in a proceeding under s 144 Where A attached, in execution of a decree against B, a decree for mesne profits obtained by B under s. 144 of the C. P. Code against C, though the case may be not strictly fall under Or. XXI, r. 18, the Court has inherent power to allow C to set off as against A executing the decree for mesne-profits against him (as B's assignee) to a decree for a larger sum

which he holds as against B: *Adwaita* v. *Chittagong Loan Cos*, 28 C. W. N. 988: 84 I. C 747: A I. R 1925 C. 102.

(2) **"Two sums of money"—Mortgage-decrees.**—A decree in a mortgage suit directing the plaintiff to recover the amount by *sale of properties* but not directing payment by the defendant, is essentially a decree for money. The provisions as to set-off, in this rule will apply to such decrees.—*Krishnan* v *Venkatapathy*, 29 M. 318 (28 M. 476 *followed*). *See* also Rule 20 of this order which seems to have been framed in adoption of the principle of this ruling.

"Between the same parties."—In order to admit of a set-off being made when there are cross-decrees, the parties must be the same, and the sum due under each decree or decrees must be definite.—*Razoodin* v. *Fazloonissa*, 5 W R. Mis. 12.

Where a decree-holder holds a decree against several persons jointly, one of whom holds a decree against him singly, both decrees being executable in the same Court, it is competent to the holder of the joint decree to plead such decree in answer to an application for execution of the decree against him singly.—*Ram Sukh* v. *Tata Ram*, 14 A. 339. *See* also *Hurry Dayal* v. *Din Dayal*, 9 C. 479: 13 C. L. R. 93. *See*, however, *Murli Dhur* v. *Parsotam*, 2 A. 91.

(3) **In the Same Court and under Execution at the Same Time.**—*See* notes under "*applicability*," above. Before a cross-decree can be set-off, the one against the other, it is necessary that both the decrees should be in the same Court for execution: For instance, A obtaining a decree against N in the Court of S, in execution prays that another decree obtained by N against A in the Court of B should be set-off against A's decree This cannot be allowed as the two-decrees were not in course of execution in the same Court; *Afzalunnissa* v. *Nurul*, 11 A L. J. 763: 21 I. C. 32. *See* also *E. I. Ry. Co.* v. *Hall*, 3 N. W. P. 104; and *De Silva* v. *Ameer Shaha*, 16 W. R. 303. They must be under execution at the same time.—*Juddo Nath* v. *Ram Baksh*, 7 W. R. 535 *See* also *Chajmal* v. *Dharam*, 24 A. 481, *folld.* in *Ponnusami* v. *Durasamy*, 32 M. 336: 1 I. C. 247; *Rukmani* v. *Seethamul*, 22 I. C. 75.

But when the Court directed that a decree for rent should not be executed until the amount of mesne profits due under a decree against the Rent decree-holder has been ascertained, evidently the intention was that the decrees should be set-off against each other and set-off was allowed though the judgment-debtor did not apply for execution of his decree, *Hiralal* v. *Ramjiram*, 52 I. C. 746.

The provisions of this rule apply only to cross-decrees of the same Court between the same parties, or to cross-decrees between the same parties, though of different Courts, which had found their way for execution to the same Court.—*Ram Coomar* v. *Gobind*, 7 W. R. 480 (reversing on review 6 W. R 21). *See* also *Hadoo Sardar* v. *Jadoo Manee*, 17 W. R. 46. Where on application for execution of a decree in the Court of a Sub-Judge, it was sought to set-off a decree obtained in the Judge's Court which has not been sent to the Sub-Judge for execution: *Held* that this rule was inapplicable.—*Girish* v. *Fakir*, B. L. R. Sup. Vol 500; 6 W. R. Mis. 72.

separate suits and not cross-claims under one decree, for which provision is made in rule 19 The addition seems to have been made in adoption of the principle laid down in *Kalka Prasad* v. *Ram Din*, 5 A. 272.

Sub-rule (4).—This is new, it has been added in accordance with the principles laid down in *Ram Sukh Dass* v. *Tota Ram*, 14 A 339 and *Hurry Dayal Guha* v *Din Dayal Guha*, 9 C. 479: 13 C. L. R. 93 The illustration (*d*), which has been newly added, clearly explains the meaning of sub-rule (4)

Applicability.—The words " where *applications* are made to a Court for the execution of *cross-decrees* in *separate suits* " clearly indicate that this rule contemplates applications by both persons for execution of both decrees passed in separate suits, *viz*, A against B and B against A A being the decree-holder against B in one suit, and B the decree-holder against A in another That is both the two decrees sought to be set off must be before the *same court* and *under execution at the same time* If one decree-holder only applies for execution and the other has not applied, set off can not be allowed and execution must proceed for the full amount, *Chajmal Lal* v *Dharam*, 24 A 481 [L. R. 13 I. A 10 (110) *refd to*], followed in *Ponnusamy* v. *Doraisamy*, 32 M. 336

The words " *separate suits* " signify that for the purposes of set o a counter-claim is not an independent action. For all purposes excep those of execution a claim and a counter-claim are two independen actions, *per* Lord Esher in *Stumor* v *Campbell & Co.*, (1892) 1 Q I 317

Where parties are entitled under the same decree to recover fro each other, though in different ways, this rule applies.—*Sankara Menc* v *Gopala Pattar*, 23 B 121 (16 A 395 *approved*).

This rule is applicable to cross-decrees and not to cross-claims under one decree —*Kalka* v *Ram Din*, 5 A 272, As to cross claims, *see* rule 19

Requisites for Right of Set-off of Cross-decrees.—In order that this rule may apply the following elements must be present: (1) The cross-decrees must be passed in *separate suits*; (2) The cross-decrees must be for payment of *two sums* of *money* passed between *same parties*; (3) The cross-decrees must be in the *same Court* for execution at the *same time*, *i e*, both decree-holders must apply for execution; (4) They must be *definite*, *capable of execution*, (5) The sums due under decrees must be *definite*, (6) The decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other, and each party *fills the same character in both suits* The existence of one without the other does not justify application of the rule. They will be considered under separate heads —

(1) Cross-decrees in Separate Suits.—Rule 18 applies even though one decree is in a suit and the other is in a proceeding under s. 144 Where A attached, in execution of a decree against B, a decree for mesne profits obtained by B under s. 144 of the C. P. Code against C, though the case may be not strictly fall under Or. XXI, r 18, the Court has inherent power to allow C to set off as against A executing the decree for mesne-profits against him (as B's assignee) to a decree for a larger sum

which he holds as against B; *Adwaita* v. *Chittagong Loan Co.*, 28 C. W. N. 988 : 84 I. C. 747 : A. I. R. 1925 C. 102.

(2) "Two sums of money"—Mortgage-decrees.—A decree in a mortgage suit directing the plaintiff to recover the amount by *sale of properties* but not directing payment by the defendant, is essentially a decree for money. The provisions as to set-off, in this rule will apply to such decrees.—*Krishnan* v. *Venkatapathy*, 29 M. 318 (28 M. 476 *followed*). *See* also Rule 20 of this order which seems to have been framed in adoption of the principle of this ruling.

"Between the same parties."—In order to admit of a set-off being made when there are cross-decrees, the parties must be the same, and the sum due under each decree or decrees must be definite.—*Razoodin* v. *Fazloonissa*, 5 W. R. Mis. 12.

Where a decree-holder holds a decree against several persons jointly, one of whom holds a decree against him singly, both decrees being executable in the same Court, it is competent to the holder of the joint decree to plead such decree in answer to an application for execution of the decree against him singly.—*Ram Sukh* v. *Tata Ram*, 14 A. 339. *See* also *Hurry Dayal* v. *Din Dayal*, 9 C. 479 : 13 C. L. R. 93. *See*, however, *Murli Dhur* v. *Parsotam*, 2 A. 91.

(3) In the Same Court and under Execution at the Same Time.—*See* notes under "*applicability*," above. Before a cross-decree can be set-off, the one against the other, it is necessary that both the decrees should be in the same Court for execution. For instance, A obtaining a decree against N in the Court of S, in execution prays that another decree obtained by N against A in the Court of B should be set-off against A's decree. This cannot be allowed as the two-decrees were not in course of execution in the same Court, *Afzalunnissa* v. *Nurul*, 11 A. L. J. 763 : 21 I. C. 32. *See* also *E. I. Ry. Co.* v. *Hall*, 3 N. W. P. 104; and *De Silva* v. *Ameer Shaha*, 16 W. R. 303. They must be under execution at the same time.—*Juddo Nath* v. *Ram Baksh*, 7 W. R. 535. *See* also *Chajmal* v. *Dharam*, 24 A. 481, *folld.* in *Ponnusami* v. *Durasamy*, 32 M. 336 : 1 I. C. 247; *Rukmani* v. *Seethamul*, 22 I. C. 75.

But when the Court directed that a decree for rent should not be executed until the amount of mesne profits due under a decree against the Rent decree-holder has been ascertained, evidently the intention was that the decrees should be set-off against each other and set-off was allowed though the judgment-debtor did not apply for execution of his decree, *Hiralal* v. *Ramjiram*, 52 I. C. 746.

The provisions of this rule apply only to cross-decrees of the same Court between the same parties, or to cross-decrees between the same parties, though of different Courts, which had found their way for execution to the same Court.—*Ram Coomar* v. *Gobind*, 7 W. R. 480 (reversing on review 6 W. R. 21). *See* also *Hadoo Sardar* v. *Jadoo Manee*, 17 W. R. 46. Where on application for execution of a decree in the Court of a Sub-Judge, it was sought to set-off a decree obtained in the Judge's Court which has not been sent to the Sub-Judge for execution: *Held* that this rule was inapplicable.—*Girish* v. *Fakir*, B. L. R. Sup. Vol. 503; 6 W. R. Mis. 72.

(5) Decrees Capable of Execution.—A decree which is incapable of being enforced cannot be set-off against a decree which is alive.—*Huro Pershad* v. *Fool Kishore*, 16 W. R. 308.

A set-off is not admissible, except upon a cross-decree which the decree-holder is seeking to execute, and not upon a cross-decree incapable of execution by lapse of time. A cross-decree must be kept alive by action of the party entitled under it.—*Anund Mohun* v. *Huro Chunder*, 5 W. R. Mis. 16, *Prosunno Coomar* v. *Sham Lal*, 5 W. R. Mis. 8; *Hemraj* v. *Asoodun*, 5 W. R. Mis. 43. But where in one suit judgment is given in part for the plaintiff, and in part for the defendant, the decree for the smaller sum becomes absorbed in the one for the larger and no question of limitation can therefore arise in respect to the execution of the decree for the smaller sum which became incapable of execution as soon as the decree for the larger sum was passed.—*Nubo Lall* v. *Maharanee of Burdwan*, 9 W. R. 590.

When an appeal has been decided, then the original decree is merged in the appellate decree, and for the purpose of execution as for the purpose of amendment, the appellate decree even when it affirms the original decree is to be taken as embodying and superseding that decree; *Bepin* v. *Krishna*, 46 C. 168: 27 C. L. J. 392.

(6) Each Party Fills the Same Character in Both Suits.—For the meaning of these words, *see Illustration* (c) of this rule and *illustrations* (a) and (b) of Or. VIII, r. 6. *See* also *Abdul Hasan* v. *Zalerajan*, 5 A. 299, where it has been held that in a suit by the creditor of a deceased debtor to recover his debt, an amount due as manager cannot be set-off, against a personal liability. For instance A obtains a decree against B as executor to the estate of C, and B obtains a decree against A personally, the two decrees cannot be set-off, as A and B do not fill the same character in the two suits.

In the case of ordinary money decrees, even when the parties are not identical, but the decree is joint and several against the decree-holder of the other decree, set-off may be allowed, *Ram Chander* v. *Mahabir*, 39 I. C. 560 but the matter is different when the decree is a mortgage decree particularly when there is no personal liability, *ibid*. *See* also *Sheo Sanker* v. *Chunnilal*, 36 I. C. 948: 38 A. 669.

Decree for sale on mortgage against puisne encumbrancer—Personal decree in favour of puisne encumbrancer against mortgagee—Different capacities; *Sheo Shanker* v. *Chunnilal*, 14 A. L. J. 776: 38 A. 669.

When Two Sums are Unequal—execution should be issued for the difference. The smaller decree being absorbed in the larger, it cannot be executed separately; see *Sinnu* v. *Santhoji*, 26 M. 488. *See* also *Hara Sanker* v. *Tarak*, 3 B. L. R. A. C. 114.

Where property sold in execution of valid decree, under the order of a competent Court, was purchased *bona fide* and for fair value. *Held* that mere existence of a cross-decree for a higher amount in favour of the judgment-debtor without any question of fraud would not support a suit by the latter against the purchaser to set aside the sale.—*Rewa Mahton* v. *Ramkishen*, 14 C. 18, P. C. *Followed* in *Mothura* v. *Akhoy Kumar*

15 C. 557; and in *Yellappa* v. *Ram Chandra*, 21 B. 463. *See* also *Sinna Bandaram* v. *Santhoji*, 26 M. 428 (14 C. 18, P. C., *explained*).

Where there are essentially cross-decrees, the decree for the smaller becomes absorbed in the one for the larger, and the order of attachment under Or. XXI, r. 46, can have no operation or affect the legality of the set-off.—*Bhujhawan Lal* v *Sukraj Rai*, 2 A 866.

When the two sums are unequal, execution may be taken *only* by the holder of the decree for the larger sum *See* notes to r. 19

Though the holder of the decree for the smaller amount cannot apply for execution, his right and priorities should be decided as if the decree for the larger amount was attached at his instance as soon as application for execution is made; *Arumaga* v. *Yokamla*, 17 I C 323

Rights of Assignee of Decree to Set-off.—*A* and *B* had obtained a decree against *K* and *J* After partial satisfaction *A* and *B* assigned it to *D*. Prior to the date of assignment, *K* and *J* had instituted a suit against *A*, *B* and *D*, *and* ultimately obtained a decree against them *Held* that *K* and *J* were entitled to set-off their decree against the unexecuted portion of the decree which had been assigned to *D*—*Kristo Ramani* v. *Kedar Nath*, 16 C. 619.

Attaching decree-holders are assignees within the meaning of sub-rule (2) of this rule X, who has obtained a decree against Y, attaches in execution of his decree a decree held by Y against Z; X is an assignee of Y's decree within the meaning of sub-rule (2), *Adwaita* v *The Chittagong Loan Co Ltd.*, 28 C W N 988: 84 I. C. 747· A I R 1925 C. 102

A, by deed or *zur-i-peshgi*, let certain land to *B* to secure a sum advanced by him to her. *B* covenanted to pay certain dues annually to *A*. On failure of *B*, *A* obtained a decree against him for the amount In execution of a decree against *B*, *C* purchased his interest in the sum secured by the *zur-i-peshgi* deed, and sued *A* to recover the sum. *Held* that *A* was entitled in such suit to set-off the amount of the decree obtained by her against *B*—*Bhagwani Kunwar* v *Lala Baija Nath*, 2 B L. R. A. C. 84: 10 W R 380.

The purchaser of a decree held by *A* against whom *B* holds a cross decree takes it subject to a set-off on account of *B*'s decree—*Kaim Ali* v. *Lokhikant*, 1 B. L. R 23 (F B) 10 W R 32, *Nundc Coomar* v. *Koonjo Kishore*, 6 W. R. Mis 73· *Doorga Churn* v. *Debnath*, 18 W. R 142; *Oopendro Mohun* v *Poorno Chunder*, 19 W R. 85, and *Ram Chunder* v. *Mohendra Nath*, 21 W R 141

Cross-decree for Mesne-Profits.—Where there are cross-decrees for possession and mesne-profits in respect to the same land, the earlier decree comprehending only a part of the land embraced in the latter, each party may take execution and be entitled to receive mesne-profits separately.—*Anund Mohun* v. *Shibo Soonduree*, 16 W R. 256 *See* also *Ram Coomar* v. *Gobind Nath*, 12 W R 391

When both the decrees are for mesne-profits, the amounts of which have not been ascertained, the right of set-off does not arise until the amounts due under the decree are definitely ascertained and after ascer-

tainment of the amounts due, the provisions of this rule can be applied.—*Matadin* v *Chandi Din*, 10 A 188.

Appeal.—An appeal lies against an order under this rule as under s 47; *Krist Ramani* v *Kedar Nath*, 16 C. 619.

Execution in case of cross-claims under same decree.

19. Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then—

(*a*) if the two sums are equal, satisfaction for both shall be entered upon the decree; and

(*b*) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree. [S. 247.]

COMMENTARY.

This rule is applicable to cross-claims under *one decree only* and not cross-decrees in separate suits.

Scope—Applicability.—The object of this rule is to prevent each side executing a decree in respect of sums due whether for costs or otherwise under the same decree. (*Bhagwan* v. *Ratan*, 16 A. 395; *Venkatanarayana* v. *Puvvada*, 44 M L J 590. A I R. 1923 M. 638: 72 I. C. 865). There is nothing in the rule to prevent a plaintiff who holds a joint and several decree against two defendants (who under the same decree are individually entitled to different amounts for costs which in the aggregate exceed the amount due to the plaintiff), from taking out execution against one defendant alone for the balance due to him by both defendants until the other defendant applies for execution against the plaintiff. Thus *A* gets a joint decree against *B* and *C* for Rs 1,200, *B* gets Rs. 400 as costs against *A* and *C* gets Rs 1,000 as costs against *A*. *A* can execute against *B* for Rs 800; *Rangiah* v. *Narasayya*, 3 L. W. 267: 34 I. C 388

To make this rule applicable in the case of cross-claims under one decree, the parties entitled thereunder to recover from each other must hold the same character and possess identical rights of enforcing execution, and enforcement of the decree can only be refused, or satisfaction entered up, when this is the case.—*Kalka Pershad* v. *Ram Din*, 5 A 272

This rule is not limited in its application to cases in which the remedy of each party against the other is of precisely the same nature or where the parties fill the same character, 24 I. C. 276 Thus, where one party was entitled to recover certain costs by means of the sale of hypothecated property, and the other party under the same decree was entitled to recover a smaller sum as costs from his opponent personally. *Held* that this rule was applicable.—*Bhagwan Singh* v *Ratan*, 16 A.

395 (5 A. 272 *dissented from*). *Approved* in *Shankara Menon* v. *Gopala Pattar*, 23 M. 121; referred to in *Mirza Sadik* v. *Hashin*, 24 I. C. 376.

" Two parties "—mean the two parties or sets of parties who are parties not only to the suit in which the decree was passed but also referred to in the opening sentence of the rule; *Rangiah* v. *Narasayya*, 8 L. W. 267: 34 I. C. 388.

" Execution may be taken only by the party entitled to the larger sum."—It follows from this provision that the party who under a decree is entitled only to the smaller sum has no right to apply for execution The rule contemplates that the decree should be regarded as a single indivisible order enforceable *only* for the difference between the two sums awarded When two unequal sums are awarded, the smaller sum must be taken to have been entered as satisfied under the provision " satisfaction for the small sum shall be entered on the decree." Thus if *A* is awarded Rs. 50 against *B*, and *B* is awarded Rs. 100 against *A*, as costs, and *A* applies to execute the decree against *B*, he cannot do so even if *B*'s claim against him is barred by limitation; *Madappa* v. *Jaki Ghosal*, 40 B. 60: 17 Bom. L. R. 689; *see* notes to r. 18. If in violation of this Rule, a decree-holder takes out execution without setting off the dues of the judgment-debtor, the Court can under its inherent power compel a refund of the sum taken in excess.—*Annada Mahan* v. *Atul Chandra*, 24 C W N 465: 58 I. C 753

Set-off in Cross-claims under Same Decree.—Where two parties have to recover sums from each other under the same decree, the party entitled to the lesser sum cannot be allowed to take out execution against the party entitled to the larger sum, and the Court is bound to direct a set-off, or to enter satisfaction of the smaller sum upon the decree.—*Jugo Mohun*, v. *Soorendro Nath*, 13 W. R. 106. *See* also *Ramlal* v. *Ashutosh*, 44 I. C. 445.

Under this rule all that the decree-holder is entitled to enforce execution of is the difference between the amount found recoverable by him and the amount which the judgment-debtor is entitled to recover against him —*Giribala Debia* v. *Rani Minakumari*, 5 C. W N. 407. See *Amjud Ali* v. *Fazal Hossein*, 10 W. R. 187; *Issur Chunder* v. *Munmakun*, 12 W. R. 308.

A decree in a pre-emption suit directed that the plaintiff should obtain possession and recover costs from the defendant on payment of the purchase-money within a fixed time *Held*, applying the equitable doctrine of set-off, that the plaintiff was entitled, when depositing the purchase-money under the decree, to deduct therefrom the sum which the decree awarded to him as costs.—*Isri* v. *Gopal Saran*, 6 A. 351. *See* also 2 L. 294.

Cross-decrees and cross claims in mortgage suits.

20. The provisions contained in rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge. [New.]

COMMENTARY.

Object—Mortgage-decrees.—This rule is new. It is inserted in order to make it clear that the provisions as to cross-decrees and cross-claims

apply to the case of mortgage decrees. The rule also makes it clear that the expressions "decree for the payment of money" and other similar expressions in the Code do not include a decree for sale in enforcement of a mortgage or charge.—*Report of the Select Committee.*

This rule seems to have been framed in accordance with the principle laid down in *Krishnah* v *Venkatapathi*, 29 M. 318, where it has been held that a decree directing the plaintiff to recover the decreed amount by sale of properties but not directing payment by the defendant is essentially a decree for money and the provisions as to set-off in s. 246, C P. Code, 1882 (Or. XXI, r 18), will apply to such decrees (28 M. 476 *followed;* 24 M. 412 *overruled*)

It has been held that a simple decree for recovery of money can be set-off against a decree for recovery of money by enforcement of a mortgage or charge, *Nagar* v *Ram Chand*, 33 A. 240; 7 A. L. J. 1129.

The costs awarded to a judgment-debtor can be set-off against the money recoverable under a mortgage decree; *Mirza Sadik* v. *Hashim*, 24 I. C. 376.

21. The Court may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor. [S. 230, para. 2.

Simultaneous execution.

COMMENTARY.

Simultaneous Execution Against Person and Property.—This rule should be read with r 30, which says that decree may be executed both by attachment of person and property.

Though the Court has discretion to refuse execution against the person and the property simultaneously, it has no power to refuse execution against the person of the judgment-debtor on the ground that the decree-holder must in the first instance proceed against the property of the judgment-debtor; *Hargobind* v *Hakim Singh*, 6 L. 548.

Appeal.—An order under this rule, refusing execution of a decree simultaneously against the person and property of judgment-debtor, is appealable as a decree —*China Pemaji* v. *Ghelabhai*, 7 B. 301.

22. (1) Where an application for execution is made—

Notice to show cause against execution in certain cases

(*a*) more than one year after the date of the decree, or

(*b*) against the legal representative of a party to the decree,

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him :

¹Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him. [S. 248.]

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice. [New.]

COMMENTARY.

Principle—Scire Facias.—" Writs of execution must be sued out within a year and a day after the judgment is entered otherwise the Court concludes *prima facie* that the judgment is satisfied and extinct; yet however, it will grant a writ of *scire facias*, for the defendant to show cause why the judgment should not be revived and execution had against him."—(Stephen's Commentaries on Blackstone, p 421, Vol. 3, 15th Ed.). The provisions of this rule have been borrowed from the English procedure for a write of *scire facias; Jogendra* v. *Sham Das*, 36 C. 543; *Livinia* v. *Madhabmani*, 11 C. L. J. 489, 498. A *scire facias* is a judicial writ issued for the purpose of substantiating and carrying into effect an antecedent judgment.

Alterations—Effect.—This rule corresponds to section 248, C P. Code 1882, with several alterations and additions. The old section has been re-arranged and the language re-cast in order to make the meaning more clear and intelligible.

Sub-rule (2) is new. It has given full discretion to the Court to issue process in execution before issuing a notice under this rule, if for any reason the Court is satisfied that the isssue of such notice would cause unreasonable delay or would defeat the ends of justice. But before doing so, it shall record reason. The addition is no doubt an improvement and it has done away with the stringent rule which hitherto existed that omission to issue a notice rendered the execution proceedings null and void; *see* 20 C 370; 21 B. 424; 21 C. 19; 6 C. 103; 8 A. 424. *See* notes, *post*, under " Effect of Omission to Issue Notice to the Judgment-debtor "

The explanation attached to the old section has been omitted as unnecessary in view of s 37 in which the expression " *Court which passed a decree* " has been clearly defined.

"The Committee have omitted the reference to a decree passed in appeal, for that is ordinarily the decree to be executed (*Kristo Kinkur Roy* v. *Raja Burroda Kant Roy*, 14 M. I. A. 465 and *Muhammad Sulaiman Khan* v *Muhammaydar Khan*, 11 A. 267)."—*Report of the Special Committee.*

Object of Notice—is to prevent undue surprise, to a judgment-debtor, when more than one year has elapsed between the date of the decree and the application for execution, or when the decree is sought to be enforced against the legal representative of the party against whom the decree was originally made —*Jogendra Chandra* v *Sham Das*, 9 C. L. J. 271. 36 C. 543

The object is not merely to give an opportunity to show cause why the decree should not be executed because for instance it is time-barred or has been adjusted, but also to give him an opportunity to satisfy before issue of execution, *Erava* v *Sidramappa*, 21 B. 424; *Arjun* v. *Gunendra*, 20 C. L. J. 344; *Livinia* v. *Madhabmoni*, 11 C. L. J. 480, 407; *Lakshmi* v. *Srish*, 18 C. L J 162; *Tara Prasanna* v *Jnanendra*, A I. R. 1926 C 86; *Gurudas* v *Thakamani*, 25 C W N 972.

Proper Notice.—An insolvent's estate vested in the Official Assignee and a notice was served upon him to show cause why he should not be substituted for the judgment-debtor *Held* that this was not a proper notice under this rule and a notice to show cause why the decree should not be executed against him ought to have been issued; *Raghunath* v. *Sundar*, 42 C. 72, P. C.

An application for transmission of a decree is not an application for execution, and no notice under this rule can be issued upon it; *Chatterpat* v. *Saita*, 20 C. W N. 889 · 23 C. L. J 645. F. B. The Registrar of the High Court cannot order execution to issue, as an order for execution to issue is a judicial act which cannot be delegated to the Registrar under s. 637 of the old Code; *Ibid*

Proof of Notice.—A notice under this rule stands upon a different footing from a summons or other notice which a party is bound to serve, and it must be presumed that a Court, until the contrary is proved, has duly issued such notice when required by law to do so.—*Bimola Soonduree* v. *Kalee Kishen*, 22 W R 5

Court's Duty to Issue Notice.—It is the Court's duty to issue notice upon judgment-debtor when the decree is more than one year old even though the decree-holder may not formally ask and it is not obligatory upon him to do so; *Stevens* v *Kamta*, 10 C L. J. 19 · 2 I. C. 941 (20 C 580 *refd. to*).

Effect of Omission to Issue Notice to the Judgment-debor.—The question arises whether a sale without notice to the judgment-debtor is null and void by itself or voidable? It was held in *Gopal* v. *Gunamoni*, 20 C. 370, that the issue of notice is a condition precedent to the issue of execution in order that the Court should obtain *jurisdiction* to sell the property by way of execution, and omission to issue such notice renders the sale null and void. The decision was approved by the Privy Council in *Raghunath* v. *Sunder Das*, 41 I. A. 251 : 42 C. 72 : 24 I. C. 304; *Shyam Mandal* v. *Satinath*, 44 C. 954 : 38 I. C. 493; *Ram Kinkar* v. *Sthitiram*,

27 C. L. J. 528; *Fani Bhusan* v. *Surendra*, 35 C. L. J. 9: 64 I. C. 25; *Rajagopala* v. *Ramanuja Chariar*, 47 M. 288: 80 I. C. 92: A. I. R. 1924 M. 431 F B., *Sarada* v. *Krishna Dome*, 91 I. C. 711: A. I. R. 1926 C. 539. The sale is a nullity whether it is purchased by the decree-holder (*Rameswari* v. *Doorgadas*, 6 C. 103, *Gurudas* v. *Bhowanipore Zemindary Co. Ld.*, 25 C. W N. 972); or by a third party (*Imamunnissa* v. *Liakat Husain*, 3 A. 424; *Sahdeo* v. *Ghasiram*, 21 C. 19; *Parashram* v. *Balmukund*, 32 B. 572. In a case which went to the Privy Council, a decree was sought to be executed against the estate of a deceased judgment-debtor and a person described in the application as the legal representative was served with notice under this rule, who objected that he was not the legal representative. The executing Court ruled that he was the legal representative. The execution went on and the property of the judgment-debtor was sold. It turned out afterwards that the person served with the notice was not the real representative It was held by the Privy Council that the Court having determined for the purpose of execution proceedings that the person served was the legal representative, had *jurisdiction* to sell although the decision as to who was the legal representative was erroneous The omission to serve notice on the right person was a serious irregularity and the sale was *voidable* under Or XXI, r. 90 or by an independent suit brought within a year as provided by Art 12, cl (*a*) of the Limitation Act. But the sale was a reality and was valid so long as proper action under the law was not taken and it was not set aside.—*Malkarjan* v. *Narhari*, 25 B 337 P C 5 C W. N 10. The point was raised in *Livinia* v. *Madhabmoni*, 11 C. L. J 489 14 C. W. N. 560, where all the cases were discussed and the principle enunciated above in the Privy Council case was affirmed, and it was held that omission to serve notice is a grave irregularity sufficient by itself to justify the reversal of the sale if a proper proceeding is taken in that behalf. It was said there that that case (25 B. 337) is an authority for the proposition that a sale held without issue of notice under this rule is *not a nullity* and cannot be ignored by the party whose property has been sold as if the sale had never taken place: but such omission is a *serious irregularity*. This principle was applied in *Lakshmi* v. *Sris Chandra*, 13 C. L. J. 162; *Kumud Bewa* v *Prasanna*, 40 C 45, *Sham Sundar* v *Jhumak*: 20 C. L. J. 337 11 I C 893 *See* also *Arjun* v *Gunendra*, 20 C. L. J. 341.

In accordance with the principle laid down in the cases cited above, it has been held in *Kumud Bewa* v *Prasanna*, 40 C 45 (21 C. 19 *not followed*), that omission to serve notice is *not by itself* sufficient to render a sale subsequently held, void In order to justify the setting aside of such a sale it must be proved that the omission resulted in substantial injury; *see* also *Lakshmi* v. *Srish*, 13 C L. J 162, 164. *Quaere*: Whether omission to issue notice is a serious irregularity under the new Code having regard to para. 2, *Mahomed Meera* v *Kadir*, 22 I C. 302. 1914 M. W. N. 63.

The recent Privy Council case of *Raghunath* v *Sundar*, 42 C 72: 18 C. W. N. 1058, seems to have changed the situation There, it has been laid down (approving *Gopal Chunder* v *Gunamani*, 20 C 370) that a notice under this rule is necessary to confer on the executing Court jurisdiction to sell property and the Privy Council decision in *Malkarjan* v. *Narahari*, 25 B 337, was distinguished as one where notice was actually

served on a person whom the Court decided to be the legal representative If there is no *jurisdiction* to sell without service of notice, it must follow that the subsequent sale without notice is not merely an irregularity but a *nullity* The Calcutta High Court followed *Raghunath* v. *Sundar* in *Moharaj Bahadur* v *Surendra*, 19 C. W. N. 152, and held that non-service of notice vitiates the sale In *Syam Mandal* v. *Satinath*, 44 C. 954. 24 C L J. 523 also, it has been held that omission to give notice is not a mere irregularity which makes the proceeding voidable, but is a defect which goes to the root of the proceeding and renders it *void for want of jurisdiction* *See* also *Ram Kinkar* v. *Sthiti Ram*, 27 C L. J. 528; *Das Narayan* v *Mir Muhammad*, 6 Pat. L. J. 319; *see also* *Rajagopala Iyer* v *Ramanuja Chariar*, 46 M. L. J. 104 F.B., where 42 C. 72 has been followed, 45 M. 875 and 45 M. L. J. 413 overruled, and 25 B. 337, and 14 C. 18 distinguished.

A mere issue of notice is not sufficient, service of such notice is essential, otherwise order for execution is without jurisdiction and sale void; *Gurudas Biswas* v *Bhowanipore Zemindary Co. Ltd.*, 25 C. W. N. 972.

But the rule is sufficiently complied with if notice is given to the adult co-tenants in a case where they and the minor co-tenants live in the same house and the minors have no *guardian ad-litem* on record; *Fani Bhusan* v *Surendranath*, 35 C. L. J. 9: 64 I. C. 25.

This rule does not apply when judgment-debtor dies after attachment and order for sale, and the sale is not bad if held without the representatives of deceased judgment-debtors being brought on record; *Doraiswamy* v *Chidambaram*, 75 I. C. 46 45 M. L J. 413.

The issue of an attachment before the service of a notice under this rule without recording reasons, does not render the proceedings invalid *Girwar Sahai* v *Mangal*, 73 I. C. 241.

The notice under this rule is not necessary in every execution though made one year after the last execution proceedings, if once a notice has been served after one year from the date of the decree; *Mahadeo Singh* v *Dhotu Sing*, 2 Pat. 916, 74 I. C 838.

In case of instalment decrees, notice under this rule is necessary if execution is sought for 1 year after the decree, though the date of default is within one year of the execution of the petition. The *terminus a quo* is the date of decree and not the date of default; *Koralal* v. *Punjab National Bank Ltd*, 5 L L. J 67.

Where one of several judgment-debtors has ceased to have an interest in the property, a failure to serve him with notice does not vitiate the execution proceedings in view of a definite provision to that effect in Art. 182 of the Limitation Act; *Tara Prasanna* v. *Jnanendra*, A I. R 1926 C. 86.

Remedy when Property has been Sold, Without Notice to Judgment-debtor.—A sale without notice to the judgment-debtor may be set aside under Or. XXI, r. 90, or by a separate suit; *Malkarjan* v. *Narahari*, 25 B. 337 P C *See*, however, the following cases where it has been held that omission to serve notice is not a material irregularity in publishing

or conducting the sale within the meaning of Or. XXI, r. 90, and that rule does not apply. The proper procedure is to apply to set aside under s. 47 as the question arises in execution proceeding and the matter could not be raised in a separate suit; *Lakshmi* v. *Sris*, 13 C. L. J 162. *See* also *Kumud* v. *Prasanna*, 40 C. 45; *Livmia* v *Madhabmoni*, 11 C. L. J. 489; *Parashram* v. *Balmukund*, 32 B. 572, *Rajagopala* v. *Ramanuja Chariar*, 46 M. L. J. 104 F. B.

Rule Applies to Moveable Property or to Strangers.—It makes no difference in the application of this rule, if the property sold without notice is moveable property or if the auction purchaser is a stranger and not the decree-holder; *Sahadeo* v. *Ghasiram*, 21 C. 19; *Syam Mandal* v. *Satinath*, 44 C. 954: 24 C. L. J. 523.

Where the Judgment-debtor had No Knowledge of Notice or does Not Object.—Where notice was not personally served on the judgment-debtor and he came to know of the execution proceedings only when his property was attached, he is entitled to prefer objection against execution at that stage; *Mochai* v. *Meseruddin*, 13 C L J. 26 (the principle enunciated in *Mungul* v. *Girija*, 8 C. 51 P. C *explained*)

Although a judgment-debtor does not contest a notice under this rule, he can put in objections when his property is attached; *Chatterput* v. *Daya Chand*, 23 C L. J. 641

Irregular Service of Notice.—Irregularity in the service of notice as distinguished from non-service is a material irregularity within the meaning of Or. XXI, r 90; *Das* v *Mir*, 6 Pat. L. J 819 61 I C 822.

Appeal.—An order refusing or allowing an application to set aside a sale without notice is an order under s. 47 and appealable A second appeal lies; *Kumud Bewa* v *Prasanna*, 40 C. 45; *see* also *Parashram* v. *Balmukund*, 32 B 572 An objection as to non-service of notice can be taken in appeal although not taken in the first Court, *Lakshmi* v. *Sris*, 13 C W N 162

Effect of Issue of Notice of Execution on Limitation.—The issuing of a notice under this rule gives a fresh starting point for limitation under Art. 182 of the Limitation Act, 1908, whether such notice is issued on a valid or invalid application for execution.

Where notice under this rule is issued, the time provided by Art. 182 of the Limitation Act, runs from the date of the order directing issue of notice; actual service of the notice is not necessary —*Damodar* v. *Sonaji*, 27 B. 622 and *Govind* v *Dada*, 28 B 416 *See* also *Hari* v. *Yamunabai*, 23 B. 35 and *Jumai* v. *Abdul Karim*, 30 A 532 But in *Kedaressur* v. *Mohim*, 6 C W. N 656, it has been held that the expression " the date of issuing a notice " means the date when it is actually issued and not the date directing issue of notice *See* also *Rattan Chand* v. *Deb Nath*, 10 C. W N 303 4 C L J 530, *Cheranath* v. *Nenoth*, 30 M. 80: 16 M. L J. 548 In *Kooni* v *Girdharee*, 22 W. R 484, and in *Sheo Sahoy* v *Birj Beharee*, 23 W R 195, it has been held that time should be reckoned from the date of actual service of notice upon the judgment-debtor.

But the filing of an affidavit to prove service of notice under this rule has been held to be an application to take a step in aid of execution, *Pran Krishna* v. *Pratab*, 21 C W. N. 423: 38 I. C. 536.

An order for execution of a decree, made after notice to the judgment-debtor under this rule, has the effect of such a revivor of decree as prevents the execution of the decree from being barred by Art. 180 of the Limitation Act, 1877—*Ashootosh* v. *Doorga*, 6 C. 504: 8 C. L R. 23; *Jogendra* v *Sham*, 9 C L J. 271, 36 C. 543 followed in *Kamini* v. *Aghore*, 11 C. L. J. 91, *Futteh* v *Chundrabati*, 20 C. 551; *Suja Husham* v. *Monohur Das*, 24 C 224 (reversing on review, 22 C. 921), and *Umrao* v. *Lachmi*, 26 A. 361 *See* also *Desoo Venkatesa* v. *Perumal*, 38 M. 187. *See*, however, *Monohur Das* v *Futteh Chand*, 30 C 979: 7 C. W. N. 793.

Revival of Decree by Notice to One Judgment-debtor.—Revival of decree of original side of the High Court on notice to one only of two judgment-debtors does not keep the decree alive against the other judgment-debtor; *McLaren* v *Veeriah*, 38 M 1102

Reasons for Dispensing with Notice to be Recorded.—The omission to record the reasons for dispensing with the notice as required by sub-rule (2) is a mere irregularity; *Raja Gopala* v. *Ramanuja Chariar*, 47 M. 288. 80 I. C 92. A. I. R. 1924 M 431.

Procedure after issue of notice.

23. (1) Where the person to whom notice is issued under the last preceding rule, does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit. [S. 249.]

COMMENTARY.

Court shall Consider Objection.—When objection is filed under this rule, the Judge is bound to take it into consideration, and pass order notwithstanding the absence of the judgment-debtor and his pleader, for the decree might be *prima facie* unexecutable —*Rajballab* v. *Ram Saday*, 5 B. L. R Ap 65 14 W. R 155. An objection need not be verified; *Sant Gopal* v *Jugat*, 8 W R 200

When, after issue of notice, the legal representative of the judgment-debtor neglected to appear and raise objection to the execution, and certain property belonging to him was sold without opposition, and the sale was duly confined and the purchaser was put into possession he cannot afterwards come and ask to have the sale set aside as nullity.—*In the matter of the petition of Cochrane*, 14 B. L. R. 330: 23 W R 310.

Appeal.—An order by a Munsif refusing to execute a decree transferred for execution, or an objection raised by the judgment-debtor under this rule, is appealable.—*Perumal* v. *Venkataroma*, 11 M. 130 Where an order was virtually under this rule and by a clerical mistake r 25 was quoted, it was held appealable; *Ange Lal* v. *Jagdish*, 9 I. C. 431.

PROCESS FOR EXECUTION.

Process for execution.

24. (1) When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree. [S. 250.]

(2) Every such process shall bear date, the day on which it is issued, and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed.

(3) In every such process a day shall be specified on or before which it shall be executed. [S. 251.]

COMMENTARY.

Sub-rule (1) corresponds to sec 250 with the omission of the words "*subject to the provisions of section 245-A, and 245-B*" (s 57 and r 37 of this Order) as unnecessary. In sub-rule (2) *process* has been substituted for *warrant*, as the former word is more comprehensive The latter portion of s. 251 has been omitted and reproduced in rule 25.

"Shall issue process."—It is not open to the Court to refuse to execute a decree against which no appeal has been preferred, and the time for appealing against which has expired —*Ishan Chandra* v *Ashanoollah*; 10 C 817

"Shall bear date.—Execution of Time-expired Warrants.—This rule requires the Court to specify in a warrant for execution of a decree, the day on or before which the warrant must be executed It cannot be executed after expiration of the date A person resisting a time-expired warrant is not guilty of any offence.—*Abinash* v *Ananda*, 31 C 424; *Anand Lall* v. *Empress*, 10 C 18; *Shaik Mansur* v *Emperor*, 37 C. 122: 14 C. W. N. 282. But a warrant may be executed till the date it bears although the *nazir* who makes it over to the peon fixes an earlier date for execution and return, *Subed* v. *Emperor*, 40 C 849

If a warrant is extended, the date must appear on the warrant; *Shaik Mansur* v. *Emperor*, 37 C 122

Where a warrant bears no date upon which or before which it was to be executed it was bad and resistance to execution was no offence; *Mohini* v. *K Emperor*, 36 I C 871 1 Pat L J 550

"Shall be signed by the Judge or such other officer as the Court may appoint."—A warrant for arrest may be signed by the Judge himself or by the sheristadar who must be duly authorized —*The Deputy Legal Remembrancer* v *Mir Sarwar*, 6 C W N 845 *See* also *Q. E.* v. *Janki*

Prasad, 8 A. 293. But the word "signed" does not include initial—*Abdul Gofur* v *Queen-Empress*, 23 C. 896 and *Ram Dayal* v. *Mahatab singh*, 7 A. 506. If the warrant of attachment was not signed by the Judge and did not bear the seal of the Court, held the attachment was bad and resistance to such attachment was not an offence.—*Khadir Bukhash* v *Emperor*, 49 I C 171 3 Pat. L. J. 636.

An execution sale was set aside on the ground that the warrant had not been signed by the Judge, but by a *Munsarim* of the Court.—*Ram Dayal* v. *Mahtab Singh*, 7 A 506.

"Shall be sealed."—The provisions of this rule are mandatory, and omission to affix the Court's seal on the warrant renders the attachment illegal; *Khidir Bux* v. *K -Emperor*, 3 Pat L J. 636: 49 I. C. 171; *Badri Gopi* v. *Emperor*, 7 Pat L T. 30: 5 Pat 216· 93 I. C. 146: A. I R. 1926 Pat 237.

Delegation of Authority to Execute.—The office to whom a process is delivered for execution may delegate it to another officer for execution; *Abdul Karim* v *Bullen*, 6 A. 385; *Dharam Chand* v. *Q. E.*, 22 C. 599 (distd in 40 C 849); *Sheo Pragash* v *Bhoop Narain*, 22 C 759

A warrant under s. 45 of the Chaukidari Act cannot be delegated; *Shaik Mansur* v *Emperor*, 37 C. 122

See notes to r 25.

Arrest or Attachment Without Warrant.—The arrest of a judgment-debtor in execution of a decree without the officer making the apprehension having the warrant in his possession is illegal.—*Empress* v. *Amar Nath*, 5 A. 318. The judgment-debtor is entitled to see the warrant; *Shaik Mansur* v *Emperor*, 37 C 122 (126)

When a public servant attaches property under a warrant in execution of a decree, he must have the warrant with him, otherwise the taking of the property is not lawful —*Emperor* v *Ganeshi Lal*, 27 A. 258

Endorsement on process.

25. (1) The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in which it was executed, and, if the latest day specified in the process for the return thereof has been exceeded, the reason of the delay or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the court.

[S. 343, including latter part of S. 251.]

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability and shall record the result.

[S. 343.]

COMMENTARY.

"Officer entrusted with execution"—means the person who actually conducts execution *i.e.* seizes property. Such a person is known in English as "Bailiff" In Mofussil Courts such work is done by persons called "Peons."

The words "*officer entrusted with execution*" clearly indicate that such officer is the *peon* and not the *nazir; Subed Ali* v. *Emperor,* 40 C. 849.

Endorsement on Process—Delegation.—The Code does not prohibit a *nazir* from delegating a subordinate to execute a warrant for him, and his endorsement is *prima facie* evidence of the authority of the person to whom the warrant is delivered for execution.—*Abdul Karim* v. *Bullen,* 6 A. 385. *See* also *Dharam Chand* v *Q E.*, 21 C. 596; and *Sheo Progash* v. *Bhoop Narain,* 22 C 759. In *Subed Ali* v. *Emperor,* 40 C. 849, it has been held that the fact that processes are actually addressed to "bailiff's" shows that the peon executing derives his authority from the Court and not from *nazir* who endorses it. It is the nazir's duty to distribute the process among the peons and this does not amount in any way to delegation. *See* notes to r 24.

Proof of Execution of Process.—A return by the nazir to the effect that the peon swears that a process has been served is insufficient in law to prove the service without the deposition on oath of the peon taken before a competent authority—*Raj Kishore* v *Bydo Nath,* 12 W. R. 365. The nazir's return is no legal evidence of the service of process.—*In the matter of Nil Kant,* W R (1864), Mis 9, *Okhoy* v *Erskine,* 3 W. R. Mis 11; *Sree Nath* v *Watson,* 4 W R Mis 4; *Ram Soonder* v. *Kalee Kamul,* 6 W. R , Act X , 92, *Koondul* v *Noor Ali,* 10 W. R. 3, *Meah Khan* v. *Narain,* 18 W R 197, and *Megh Lall* v *Shib Pershad,* 7 C. 34, p 38 *See* also *Subed* v *Emperor,* 40 C 849

STAY OF EXECUTION.

When Court may stay execution.

26. (1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby or if application for execution had been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execu-

tion may order the restitution of such property or the discharge of such person pending the result of the application. [S. 239.]

Power to require security from, or impose conditions upon, judgment-debtor.

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor, the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit. [S. 240.]

COMMENTARY.

The stay of execution contemplated by this rule, if allowed, will only be for such a period as is necessary for applying to the Court which passed the decree or to the Appellate Court for any order relating *to the execution of the decree*

Stay of Execution.—Where, in the opinion of the Court, sufficient cause has been shown against the execution of a decree transferred for execution, the Court should follow the procedure prescribed by this rule. But it is beyond its jurisdiction to question the correctness or propriety of the order under which the decree has been transferred to it for execution —*Beer Chunder* v *Maymana*, 5 C 736. *See* also *Mulla Abdul* v. *Shakhinaboo*, 21 B 456, *Ramchunder* v. *Mohendro*, 21 W. R. 141; *Dhunesh* v. *Oolfut*, 21 W R 219, *Ram Lall* v *Radhay*, 7 A 330.

Under this rule a Court to which a decree has been transferred may refer the objector to the Court which passed the decree.—*Jasoda Koer* v *Land Mortgage Bank of India*, 8 C 916, 11 C. L. R 348.

A Court is competent to stay execution of decree of the High Court for a sufficient time to enable the judgment-debtor to apply to the High Court for a new trial, on the ground that the decree had been obtained *ex parte* without his knowledge —*Mritoonjoy* v. *Cocharane*, 8 W. R 202

Costs.—Where the defendants applied to the Appellate Court for stay of execution of the decree pending the appeal they must pay the costs of the application —*Chuni Lal* v *Anantram*, 25 C 893

As to the jurisdiction of the Court to which a decree is sent for execution to try the question of limitation, *see* notes under section 42

As to the extent of liability of a surety and the mode of enforcing a surety bond, *see* notes under section 145, and Order XLI, rules 5 and 6

Appeal.—Formerly, under the old Code an order relating to stay of execution was held to be appealable as a decree under s 47; see *Steel* v. *Ichhamoyee*, 13 C 111; *Kristomohiny* v *Bama Churn*, 7 C. 733; *Ghazidin* v. *Fakir*, 7 A. 73; *Lingam* v *Kandula*, 20 M. 366; *Ishawargir* v. *Chudasama*, 12 B. 30; *Udayla* v *Gregson*, 12 C. 624; *Luchmeeput* v. *Seetanath*, 8 C. 477. The omission of the words "*or to the stay of execution thereof*" from cl. (1), s. 47 of the present Code, does not bring an order relating to stay of execution, within s 47. Even in a decision under the old Code it was held that *an order relating to stay of execution* does not come under s 47 and is not appealable (see *Nihal Chand* v. *Rameshari*. 9 C. 214 and also *Gambhirmal* v *Chejmal*, 11 B. 151) It has been held

that an order for security to stay execution is neither an order under s 47 nor a "decree" within s. 2, (2) and is not appealable; *Saraswati* v. *Golap Das*, 41 C. 160 (*Deokinandan* v. *Bansi*, 14 C. L. J. 35; *Srinibash* v. *Keso Prasad*, 38 C. 754 *referred to*).

Liability of judgment-debtor discharged.

27. No order of restitution or discharge under rule 26 shall prevent the property or person of a judgment-debtor from being retaken in execution of the decree sent for execution. [S. 241.]

COMMENTARY.

This is an exception to the ordinary rule. *Cf.* s. 58 (2).

A judgment-debtor, once arrested and imprisoned in execution of a decree, cannot, under the Code, be again arrested under a fresh writ of attachment on the same decree, *Secy of State* v. *Judah*, 12 C. 652. (Followed in the matter of *Bolye Chund Dutt*, 20 C. 874; distinguished in *Rajendra* v. *Chunder*, 23 C 128). But see *Shamji* v. *Poonaji*, 26 B 652, where it has been held that re-arrest is not forbidden (20 C. 874 *dissented from*; 12 C 652 *distinguished*).

Order of Court which passed decree or of appellate Court to be binding upon Court applied to.

28. Any order of the Court by which the decree was passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution. [S. 242.]

COMMENTARY.

Principle.—The transfer of a decree to another Court for execution amounts to a *qualified delegation* of the powers possessed by the Court that passed the decree in discharging its functions relating to the execution of that decree. Such delegation however, is not complete, nor does it entirely divest the Court which transfers the decree, of its powers and functions in relation to the execution of such decree; *Gazaidin* v. *Fakir Baksh*, 7 A. 73 (76).

Where a Sub-Judge's Court in one district executes a decree of a Sub-Judge's Court in another district, it is bound to comply with a requisition from the latter Court to transmit to it the record of the case — *Indur Chunder* v *Gopal Chand*, 11 W R 230

For the powers and functions of the Court to which a decree is transferred for execution, see notes to s. 42.

Stay of execution pending suit between decree-holder and judgment debtor.

29. Where a suit is pending in any Court against the holder of a decree of such Court on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided. [S. 243.]

COMMENTARY.

The words "*either absolutely*" in the old section have been omitted

Scope.—There is no provision in the law which empowers the Court passing a decree to set aside the proceedings under which the decree-holder has already been placed in possession in execution of his decree The provisions of this rule have no reference to a case in which execution has already been carried out, and the decree-holder has been placed in possessoin of the property decreed to him —*Gazidin* v. *Fakir Baksh*, 7 A 73.

Any Court to which a decree is sent for execution can, under this rule, stay execution, notwithstanding that the suit pending between the judgment-debtor and the decree-holder is pending in such Court, and not in the Court which transmitted the decree.—*Cooke* v. *Hisceba Beebe*, 6 N. W P. 181.

The Court has ample power to stay execution under s. 151, in cases not provided for by this rule; *Bhagwan* v *Harnam*, 82 P. R 1910. As for instance when the *ex parte* decree is obtained by fraud; *Fitzholms* v *Waryam Singh*, 75 I C 419

" Such Court."—The words "*such Court*" do not limit the exercise of the powers only to decrees passed by the Court in which the suit is pending, but that Court is empowered to stay execution of decrees transferred to it for execution from either a Court of co-ordinate jurisdiction or a Court of appeal.—*Kassa Mal* v. *Gopi*, 10 A. 389.

Whether Provisions relating to Execution of Decrees Apply to Awards.—An award filed in Court under s. 11 of the Indian Arbitration Act (IX of 1899) is nothing more than an award although it is enforceable as if it were a decree and execution of such award cannot be stayed under this rule; *Tribhuwandas* v. *Jivan Chand*, 35 B. 196; *see* also *Gajjar* v. *Dharam Chand*, 12 Bom L R. 860. It has been held by the High Courts of Calcutta and Allahabad that an award filed in Court under s. 11 of the Arbitration Act being enforceable under s 15 of that Act, as if it were a decree, the provisions of the Code applicable to the execution of decrees apply to an award so filed; *Gladstone Wyllie & Co.* v. *Joosub*, 27 C. W. N. 666: 77 I C. 868: A I R. 1924 C. 117; *Sital Prasad* v. *Clement Ratson & Co*, 43 A 394 61 I. C 401.

Appeal.—*See* notes to r 26

Limitation.—Where the execution of a decree is stayed under this rule an application for execution of such decree, after disposal of the suit is governed by Art. 178 and not by Art. 179 of the Limitation Act —*Rungiah Gounden* v *Nanjappa Row*, 26 M. 780.

MODE OF EXECUTION.

Decree for payment of money.

30. Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judg-

ment-debtor or by attachment and sale of his property, or by both. [S. 254.]

COMMENTARY.

The language of the old section has been recast and made more explicit. The word *order* has been omitted as s 36 says that provisions relating to execution of decrees shall apply to execution of orders.

See r. 21 which lays down that Court may refuse simultaneous execution against person and property

This rule does not constitute a limitation upon the general right conferred by s. 51; *Lahanu* v. *Harak*, 11 N L R 113.

Alternative to Some Other Relief.—*See* Or. XX, r. 10 An order made under the Land Acquisition Act, directing a party, to whom a sum of money was awarded as compensation, to refund the money, may be enforced under this rule.—*Nobin Kali* v *Banalata*, 32 C. 921: 2 C. L. J. 595.

Where a decree is for the delivery of movable property, and states the amount to be paid as an alternative the goods must be delivered if capable of delivery, but if not capable of delivery, then assessed damages should be paid.—*Kashee Nath* v. *Debkisto*, 15 W. R. 240.

Option as to Mode of Execution.—Under this rule a judgment-creditor has the option of enforcing his decree against the person or property of the judgement-debtor, and the fact that such decree is an *ex parte* one makes no difference —*Raj Crunder* v. *Shama Soondari*, 4 C 583.

It is for the decree-holder to decide whether he should execute the decree for payment of money by the arrest of the judgment-debtor, or by the attachment and sale of his property, or by both While the Court has discretion to refuse execution against the person and property simultaneously under Or. XXI, r 21, it has no authority to refuse an order of committal to prison on the ground that the decree-holder should proceed in the first instance against the property of the judgment-debtor, *Hargobind Kishan Chand* v *Hakim Singh*, 6 L. 48: 93 I. C. 54: A. I. R. 1926 L 110.

"Decree for payment of money."—The words "decree for payment of money" include all sorts of decree for payment of money, except mortgage-decree, *see* notes under rule 20

A suit on mortgage-bond was adjusted by the defendant agreeing to pay the amount claimed and costs, with interest, by instalments within a fixed time, and that, in the event of default, the plaintiff should be at liberty to bring such property to sale *Held* that such decree was a mere money-decree, and not one which gave the plaintiff a lien on such property.—*Janki Prasad* v *Baldeo Narain*, 3 A. 216 *See*, however, *Debi Charan* v. *Pirbhu Din*, 3 A. 388, and *Jagannath* v *Debi Pursad*, 73 I. C. 598, where it has been held that no attachment is necessary in the case of a decree for money when it is provided that if it is not paid by a certain date specific immovable property should be sold

Where a landlord obtains a decree, for rent against his tenant without creating a charge and which is on the face of it a decree for money, he is at liberty in execution to bring to sale the property of the judgment-debtor, other than the tenure.—*Tarini Prosad* v. *Narayan Kumari*, 17 C 301. *See* also *Fatick Chunder* v. *Foley*, 15 C. 492 (14 C. 14 *explained*) *See* also *Bhabani Charan* v. *Pratap Chandra*, 8 C. W. N. 575 and *Sourendra Mohan* v *Surnomoyi*, 26 C 103; 3 C. W. N 38.

Detention in Civil Prison.—The High Court's power to imprison for contempt is a jurisdiction inherited from the old Supreme Court, and it has *not been affected by the Code.—Martin* v. *Lawrence*, 4 C. 655. *See* also *Hassonbhoy* v. *Cowasji*, 7 B 1, and *Norivahoo* v. *Naratamdas*, 7 B 5

An insolvent, who has obtained a protection order, is not liable to arrest or imprisonment for arrears of maintenance included in the schedule filed by him.—*Tokee Bibee* v *Abdool Khan*, 5 C. 536; 5 C. L R 458.

Decree for specific movable property

31. (1) Where the decree is for any specific moveable, or for any share in a specific movable, it may be executed by the seizure, if practicable, of the movable *or share, and by the delivery* thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment-debtor, or by the attachment of his property, or by both.

(2) Where any attachment under sub-rule (1) has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of movable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months, from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease. [S 259.]

COMMENTARY.

Alteration.—In sub-rule (1) the words " *or for the recovery of a wife* " which occurred after " any share in specific movable," in the old section have been omitted; for there can be no such decree under the law, as a wife cannot be treated as a chattel to be delivered over to the husband. Where any third person prevents the wife from returning to her husband,

the latter may obtain an injunction against him, which may be enforced in case of disobedience, either by the imprisonment of the defendant or by the attachment of his property, or by both

Applicability.—This rule is not applicable where the property sought to be attached is not in the possession of the judgment-debtor, *e g.*, with the Bank. *Padmanund* v. *Chundi Dat*, 1 C. W. N 170

" Specific moveable property."—This means the property recovered in *specie*, *i e.*, the very property itself, not any equivalant, substitute or reparation It does not include money, *Sankunni* v *Govind*, 37 M. 381. As to what entitles the plaintiff to obtain delivery of specific movable property by suit and to enforce the decree, see *Jaldu Venkatasubba* v. *Asiatic S. N. Co*, 39 M. 1.

A decree for certain movable and immovable property was given, and it was directed that the amin was to ascertain the extent of the moveables. *Held* that the Court in execution could not enquire into the value of such of the movables as could not be found in order to give alternative damages —*Bhoobun Mohinee* v *Gobind Chunder*, 19 W R 82.

See sec. 11 of the Specific Relief Act.

Decree for specific performance, for restitution of conjugal rights, or for an injunction.

32. (1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or in the case of a decree for the specific performance of a contract or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both.
[Para 1, S. 260.]

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or with the leave of the court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention. [New.]

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application. [Para 2, S. 260.]

(4) Where a judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of one year from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease. [Para. 3, S. 260.]

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done, the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree. [New.]

Illustration

A, a person of little substance, erects a building which renders uninhabitable a family mansion belonging to *B* *A* in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by *B* and directing him to remove the building The Court is of opinion that no sum realizable by the sale of *A*'s property would adequately compensate *B* for the depreciation in the value of his mansion *B* may apply to the Court to remove the building and may recover the cost of such removal from A in the execution-proceeding

COMMENTARY.

Alterations.—In sub-rule (1) the words, " *or for an injunction, has been passed*," have been substituted for the words, " or for the performance of, or abstention from, any other particular act has been made," and the words, " *detention in the civil prison*," have been substituted for the word " imprisonment " The italicized words in sub-rule (1) were added by Amendment Act XXIX of 1923.

Sub-rule (2) is new, there was no similar provision in the old section

Sub-rule (5) with the illustration is new and corresponds with R S C Or. XLII, r. 30, *see* notes.

Applicability.—This rule applies equally to cases where a party is directed to carry out something as well as to cases where he is directed to abstain from doing an act, *Makaran* v. *Somayajipad*, 6 I. C. 289: 7 M L. T. 227. It applies also to cases where the injunction restrains certain persons from doing certain things in prepetuity and not only to cases where the imprisonment or attachment can be continued until the decree has been executed; *Anjana* v. *Vathiar*, 32 I. C. 698: 19 M. L. T 132

Decree for Specific Performance of Contract.—*See* ss. 12-30 of the Specific Relief Act (I of 1887)

"Decree for restitution of conjugal rights."—These words were added in the Code of 1877, as s. 200 of the Code of 1859 was held to be inadequate for enforcement of a decree for restitution of conjugal rights (see *Gatha Ram* v. *Moohita*, 23 W. R. 179). It was however held that a decree for restitution of conjugal rights between Mahomedans or Hindus may be enforced under this section —*Yamunabai* v *Narayan*, 1 B. 164; *see* also *Chotun Beebee* v. *Ameer*, 6 W. R 105; 1 Ind. Jur. N. S. 317. The introduction of rule 33, now gives the Court a discretion where executing such a decree.

In an application for execution of a decree for restituton of conjugal rights, the Court will not issue an attachment,without notice to the defendant. The Court must also be satisfied on affidavit that the decree has been served on the defendant, and that he has had an opportunity of obeying it, that the plaintiff has a house to take her to, and that he has given her notice thereof, and that she had refused —*Troylokho Nath* v. *Radharani*, 3 C W. N (S N) xxxix (39).

A mother directed by a decree to refrain from preventing her daughter returning to her husband, permitted her to reside in her house. *Held* that such conduct does not justify execution of the decree against her under this rule.—*Ajanasi Kuar* v *Suraj Prasad*, 1 A 501

A plea by wife that sexual intercourse is impossible owing to her incurable disease or physical malformation, is not a good defence. A Judge has no discretion to refuse a decree for restitution of conjugal rights for other causes than those which in law justify a wife from refusing to return to live with her husband —*Purshotamdas* v. *Bai Mani*, 21 B. 610. *See* also *Dadaji* v. *Rukhmabai*, 10 B 301 (reversing 9 B 529).

Where it was the universal custom that a child wife should remain away from her husband until a certain event had occurred, a Court was held to have been justified, while such contingency had not happened, in refusing to order such a wife to go to her husband —*Suntosh Ram* v. *Geru Pattuck*, 23 W R 22

The effect of a Civil Court decree in a suit for restitution of conjugal rights, is to supersede the order of the Criminal Court for maintenance.—*Nur Muhammad* v *Ayesha Bibee*, 27 A 483 (23 B 484 *followed*).

Form of Decree in Suits for Restitution of Conjugal Rights.—A decree should be passed in the form that the husband is entitled to conjugal rights, that his wife do return to live with him, and that the parents do not interfere in any manner to prevent her so doing —*Ram Tahul* v *Madho*, 2 Agra 111, *Koobur Khansama* v *Jan Khansama*, 8 W. R 467; *Jaffree Khanum* v *Imdad Hossein*, 2 N W P 314, *Kuroonamoyee* v *Gungadhur*, 20 W R 50, *Lall Nath* v *Sheo Churn*, 20 W R 92; *Toofeah* v. *Jussauda*, 2 Agra 337, and *Imamum* v *Mahomed*, 3 Agra 98. A decree that "the case be decreed awarding the plaintiff to take the defendant as his married wife," is not a proper form of decree —*Gatha Ram* v *Moohita Kochin*, 14 B L R 298 23 W R 179

As to the discretion of Court while passing a decree for restitution of conjugal rights, *see* r 33, which is new.

Sub-rule (1).—Decree for Injunction.—Sub-rule (1) applies t prohibitory and mandatory injunction; *Sachi Prasad* v *Amarnath*, 163: 45 I C 864 Where a decree for perpetual injunction was restraining a party from erecting a *pucca* building and he in d erected it, *held* that it was not obligatory on the Court to make a of attachment under this rule against the judgment-debtor withou vious service of notice upon him, calling upon him to comply w order; *Durga Das* v *Dewraj*, 33 C 306 3 C L J. 112 · 10 C. W. N C. W N. 174 *commented on*)

A decree ordering the removal and pulling down of a wall sho executed by the imprisonment of the judgment-debtor or by attac of his property, or by both —*Protab* v *Peary*, 8 C. 174; 9 C. L. I (followed in 2 C L J 59-n.) *See* also *Bhoobun Mohun* v. *Nobin*, L. R Ap 12 18 W R 282

Held that a decree, directing performance of specific acts, an declaring rights of the decree-holders was not incapable of execut the objection that it was only declaratory —*Kishore Bun* v. *Duar* C. 784, P C

It was held under the old section, that an order directing a def to render accounts within a specified time was " an order requiri performance of a particular act " within the meaning of that sectio that disobedience to the order was punishable under that section; I *bar* v. *Kallynath*, 7 C 654, *Raghunath* v *Ganpatji*, 27 A. 374

Where a decree directs particular acts to be performed in the m ment of a temple, it may be enforced by the imprisonment of the d ants, or by the attachment of their property, or by both —*Damoda* v. *Bhogi Lal*, 24 B 45.

A decree restraining a defendant in his use of certain land, can executed against the purchaser of the said land, as the injunction do run with the land —*Dahyabhai* v *Bapa Lal*, 26 B. 140. *See* also *setji* v. *Hari Dayal*, 32 B 181. But in *Saharlal Jaswantrai* v. *Parb* 26 B. 283, it has been held that such a decree can be executed the heirs of a deceased person against whom the decree had been

The plaintiff obtained a decree for mandatory injunction directi defendant to remove a wall erected by him within two months. Two after the plaintiff sued for damages alleging his cause of action defendant's disobedience of the mandatory injunction *Held* th suit was not maintainable as the plaintiff's remedy was in execut *Jawtiri* v. *Emuli*, 13 A 98

A suit is not maintainable for enforcement of a prohibitory inju embodied in decree but the remedy lies by execution under Or XXI, of the C. P. Code; *Sachi Prasad* v *Amarnath*, 22 C. W. N. 851 L J 506: 46 C 103

Sub-rule (3).—The rule is a highly penal one and must be con strictly. Under it the following conditions must exist before a s ordered: (a) a valid original attachment; (b) application within on of that attachment by decree-holder for sale; (c) lapse of one year date of attachment; *Badri* v. *Fakira*, 10 I. C. 341 · 170 P. L. R. 1

Sub-rule (5). Disobedience to Order for Injunction or for Specific Performance of Contract.—This sub-rule is new. It has been borrowed from O. XLII, r. 30 of the English Rules, and supplies a distinct want. The illustration, newly added, clearly explains its meaning. Under the old Code, it was held that a decree for injunction could only be executed by the imprisonment of the judgment-debtor or by attachment of his property as laid down in the old section. That relief was not adequate; *Protab* v. *Peary*, 8 C. 174; *Durgadas* v *Dewraj*, 33 C 306; *Sakarlal* v. *Bai Parvathi;* 26 B. 283. The new provision will give immediate relief wherever possible by causing the decree to be executed through the agency of the decree-holder so far as practicable or by appointment of some officer of the Court by removal of the obstruction or building.—*Sachi Prasad* v. *Amarnath*, 46 C 103: 45 I C 864. But the Court has no power under this rule to order the police to see that its decree is carried out; *Goswami Gordhanlalji* v. *Goswami Mahsudan*, 40 A 648 48 I C 26

The expression " the act required to be done " in sub-rule (5) means what has to be done to enforce the injunction; *Sachi Prasad* v. *Amarnath*, 46 C 103: 45 I C 864

Disobedience to Order of Injunction—Contempt of Court.—The proper remedy for disobedience of an order of injunction passed by a Civil Court is committal for contempt —*In the matter of Chandra Kanta*, 6 C. 445: 7 C. L. R. 350 *See* also *Pran Jivan Das* v *Mayaram*, 1 B. 148 and *Advocate-General of Bombay* v *Gangji Akhai*, 19 B 152.

Where a plaintiff has once obtained a perpetual injunction directing the defendant to refrain from certain acts, it is not necessary for the plaintiff to sue again for similar relief, if in future the defendant ignores such injunction Disobedience is contempt of Court, and the Court can take proceedings to enforce its authority, notwithstanding art. 179 of the Limitation Act, 1877 —*Ram Saran* v *Chatar Sing*, 23 A 465 Followed in *Bhagwan Das* v *Sukhdei*, 28 A 300 (1906) A W N 10 3 A. I. J. 836.

Even a temporary disobedience is punishable, *Aiyana* v *Vathiar*, 32 I. C. 648 The procedure is to punish for contempt and not to discharge the decree so as to prevent a decree-holder from taking further steps; *Ahmadi Begam* v *Anant*, 1 A L J 431

As to failure to carry out Court's order and contempt of Court, see *Dharmapal* v *Krista Dayal*, 10 C. L J 631

Limitation.—Where a perpetual injunction has been granted, on each successive breach of it, the decree may be enforced under this rule by an application made within 3 years of such breach under art. 178 of the Limitation Act 1877 The decree-holder is not bound to take action in respect of every petty infringement, and the injunction does not by his inaction become inoperative after 3 years from the date of the first petty breach so as to disentitle him to take action where a serious breach is afterwards committed.—*Venkatachallam* v *Veerappa Pillai*, 29 M 311, *see* also *Bhagwan* v *Sukhdei*, 28 A 300 2 A L J 836

" An opportunity of obeying "—Notice Not Obligatory.—Before issuing execution the Court is to see whether the judgment-debtor had

ample opportunities of obeying the injunction or decree, and has wilfully disobeyed it. Where there was opportunity of obeying but the defendant wilfully failed to obey, no notice is necessary. It is not obligatory to issue any notice before execution under this rule. It is in the discretion of the Court; *Durgadas* v. *Deoraj*, 33 C. 306: 10 C. W. N. 297: 3 C. L. J. 112. *See* also *Bhagwan* v. *Sukhdei*, 28 A. 300. The proper course is to issue a notice first, fixing a time within which to comply with the order; *Pratap* v. *Peary*, 8 C. 174 (distd. in 33 C. 306). Where an application has been dismissed on the ground that the debtor has had no opportunity of obeying, there is no bar to a subsequent application after such opportunity was given; *Kishore* v. *Dwarka*, 21 C. 784.

Discretion of Court in executing decree for restitution of conjugal rights.

33. (1) Notwithstanding anything in rule 32, the Court, either at the time of passing a decree *against a husband* for the restitution of conjugal rights or at any time afterwards, may order that the decree *shall be executed in the manner provided in this rule*.

(2) Where the Court has made an order under sub-rule (1), it may order that in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments.

(3) The Court may from time to time vary or modify any order made under sub-rule (2), for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money. [New.]

COMMENTARY.

Alteration in the Rule.—The italicized words, "*against a husband*" in sub-rule (1), were added by Amendment Act XXIX of 1923 and the words, "*shall be executed in the manner provided in this rule*," were substituted for the words, "shall not be executed by detention in prison." The words, "and the decree-holder is the wife," which occurred in sub-rule (2), were omitted by the same Act.

34. (1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court. [Para. 1, S. 261.]

Decree for execution of document, or endorsement of negotiable instrument.

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf. [Para. 2, S. 261.]

(3) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft as it thinks fit. [Para. 3, S. 261.]

(4) The decree-holder shall deliver to the Court a copy of the draft with such alteration (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force ; and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered. [Paras. 3, 4, S. 261.]

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely :—

"C. D., Judge of the Court of.................................. (or as the case may be), for A. B., in a suit by E F. against A. B.",

and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same. [S. 261.]

(6) The Court, or such officer as it may appoint in this behalf, shall cause the document to be registered if its registration is required by the law for the time being in force or the decree-holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration. [New.]

COMMENTARY.

Alterations.—This rule embodies the provisions of ss. 261, 262, C. P. Code, 1882, in a re-arranged and modified form. Throughout, the word

'*document*' has been substituted for "*conveyance*" The rule has been brought into conformity with the chronological order of events, and a provision has been added to meet the requirements of the Indian Registration Act (*see* sub-rule 6) It was pointed out, in decisions under the old Code, that endorsement by the Judge on the back of a mortgage deed of over Rs. 100, showing its transfer to auction-purchaser requires registration; *Kanahia* v *Kali Din* 2 A 392

Execution of Document or Endorsement by Court.—This rule prescribes the machinery for enforcing a decree, which directs the execution of a conveyance, and the form and the effect of such a conveyance—*Atul Kristo* v *Mutty Lal*, 3 C W N 30

Where decree directs the defendant to execute a conveyance and provides that if he failed, the Court would execute it, and the conveyance was executed by Court nothing further remained to be done in execution proceedings, and if either of the parties wanted to enforce his rights under it, a separate suit is maintainable, *Kali Narain* v. *Harinath*, 12 C L J. 599

Where a decree based upon a compromise directed that one party should execute a *kobala* in favour of another within a certain time after the date of the decree, *Held* that the proper course for the parties would have been to proceed regularly as if a decree for specific performance was made Either party ought to have submitted to the Court a draft of the *kobala* to be served on the other side, the other side having the right to object to the terms of the draft Then the matter should have been taken up by the Court, or by a proper officer of the Court to settle the terms of the *kobala* and then the person who was to execute the document should have executed it and filed it in Court and the execution should have been attested by persons known to the recipient of the *kobala* or by other respectable persons —*Hare Krishna* v *Priya Nath*, 10 C W N 345

Where in a suit for declaration of title, a compromise decree was passed under which the respondents were directed to execute a mortgage bond within a specified time and the respondents having failed to execute the mortgage bond, the appellants applied for execution of the mortgage bond in execution of the decree, held that the question what is the subject-matter of a suit must depend upon the facts of each case and in the present case, the decree was capable of execution under this rule, *Soudamini* v. *Behari*, 25 C W N 68

The provision in a *solenama*—which *solenama* has been embodied in a decree—that one of the parties shall execute a *patta* in favour of the other, can be executed under Or. XXI, r. 34, *Ashwani* v. *Ram Gopal*, 95 I C. 179: A I R 1926 C 975

So also a decree directing transfer of shares may be executed under this rule; 41 I. C. 77.

The Registrar of the High Court has authority, when so directed, to execute a conveyance on behalf of a party refusing to do so, so as to pass his estate, if any, but has no authority to bind him by entering into any conveyance on his behalf.—*Ram Chunder* v *Dwarka Nath*, 16 C. 330.

In a suit for specific performance of an oral agreement, if the defendant fails or refuses to comply with the decree, the Court shall proceed to exercise the power under this rule for carrying out the conveyance.—*Chunder Kant* v. *Krishna*, 10 C 710

In a suit for specific performance of a contract of sale and to execute a sale-deed, the Court ordered the defendant to execute a deed of sale. On failure of the defendant to do so, the Court executed a deed of sale in plaintiff's favour under this rule —*Nathu Pandu* v. *Bhika*, 18 B. 537.

Courts in British India cannot direct agent to convey to the principal properties situate outside jurisdiction The only way to grant relief is under Or. XXI, r 52; *Ramasami* v *Karuppan*, 29 M L J. 551.

Form of Decree.—Form of decree under this rule pointed out.—*Goffur* v. *Bhikaji*, 26 B 159 *See* also *Sarju Prosad* v *Wazir Ali*, 23 A. 119.

Registration.—*See* notes under "ALTERATION," *ante.*

Appeal.—An order on an objection to draft conveyance or endorsement under this rule, is appealable under Or XLIII, r 1 (i)

35. (1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such persons as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property. [S. 263.]

Decree for immovable property.

(2) Where a decree is for the joint possession of immoveable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree. [New.]

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession. [New.]

COMMENTARY.

Alterations.—Sub-rule (1) corresponds with s. 263 C. P. Code 1882 with some verbal changes only.

Sub-rule (2) is new. It makes provision for delivery of joint possession of immoveable property, to the owner of an undivided share or the purchaser of the rights of a co-sharer, as there was no such provision in the old Code

Sub-rule (3) is also new The provision is made in this rule for delivery of *khas* possession by removing or opening any lock or bolt or by breaking open any door, etc, etc

"Bound by the decree."—In delivering possession the first thing to to be seen is, whether the person who refuses to vacate is bound by the decree or not If he is not bound by the decree and is a stranger then he cannot be removed, nor his doors can be broken open.

This rule should be read with s 146, and proceedings under it may be taken against persons claiming under the judgment-debtor, *e.g.*, the representatives of a deceased judgment-debtor

Delivery of Possession—Symbolical and Actual.—Possession may be delivered in two ways, *viz*, delivery of *actual* or *khas* possession and delivery of *formal* or *symbolical* possession Sub-rule (1) and (3) speak of *actual* possession, and sub-rule (2) contemplates symbolical possession Rule 95 contemplates *actual* possession to the auction purchaser. Rule 36 (next rule) and r 96 contemplate *symbolical* possession Rules 95 and 96 deal with possession to be given to auction purchaser.

Distinction between actual or *khas* possession under this rule and formal possession under r 36 explained and the mode of taking possession under each of the above rules pointed out by Edge, C J —*Sitaram* v *Ram Lal*, 18 A 440, F B (pages 449, 450 and 451)

"Constructive" possession by receipt of rent from tenants is not physical possession —*Batul Begum* v *Mansur Ali*, 20 A. 315 F B

Symbolical possession does not amount to dispossession as contemplated by s. 335 C P Code, 1882, (Or XXI, rr. 97, 103) —*Ibrahim* v. *Ram Jadu*, 30 C 710

Effect of Symbolical Possession.—Delivery of symbolical possession in execution operates in point of law and fact, *as between the parties*, a complete transfer of possession from one party to another, and forms, as against the judgment-debtor, a fresh starting point for limitation in respect of a suit for possession of the property, although such possession is *of no avail as against third parties* —*Jaggobundhu* v. *Ram Chunder*, 5 C 584, F B 5 C L R 548, *Juggobundhu* v. *Purnanund*, 16 C 530, F. B (10 C 402 *overruled*), *Shama Charan* v. *Madhub Chandra*, 11 C. 93; *Janaki* v *Baikunthanath*, A I. R. 1922 C. 176; *Radha Krishna* v. *Ram Bahadur*, 22 C. W. N 330 P C · 43 I. C. 208 P. C.; *Mahadevappa* v. *Bhimsa*, 46 B. 710. 66 I C 320. A I. R. 1922 B. 28; *Ranganatha* v. *Srinivasa*, 49 M. L J. 656 90 I C 1037 · A. I. R. 26 M. 42, *Jogendra Krishna* v *Joy Shib*, 96 I. C 481 · A I. R. 1926 C. 1172.

Though symbolical possession is delivered, where actual possession should have been given, still so far as judgment-debtor and other persons bound by the decree are concerned, it operates as delivery of actual possession; *Maharaja Protap* v. *Bhaiani Sunder Bans*, 71 I. C. 999. Fernat

delivery under rule 35 (1) amounts to actual delivery. *Pandurang* v. *Sampat*, 72 I. C. 318; *Babu Edal Singh* v. *Babu Ram Bahori Lal*, 2 Pat. L. T. 743. But the delivery of symbolical possession is effective only in cases where C. P. Code recognizes such possession. Such symbolical possession does not affect persons impleaded as parties to the suit against whom, however, there is no decree for possession; *Raghunath* v. *Kanduba*, 68 I. C. 91: A. I. R. 1922 B. 2.

Symbolical Possession and Limitation.—Merely *formal* possession of immoveable property by *a purchaser at a Court sale* cannot prevent limitation running in favour of the judment-debtor where the latter remains in actual possession and the property is not in the occupancy of a tenant or other person entitled to occupy the same; *Mahadev* v. *Janu Namji*, 36 B. 373 F. B.; *Raghunath* v. *Kondiba*, 24 Bom. L. R. 499: 68 I. C. 91. A. I. R. 1922 B. 2; *Shridhar* v. *Ganpati*, 43 B. 559. The effect of this decision is that symbolical possession given in circumstances in which actual possession ought to have been given is a nullity, and the period of limitation for a suit for actual possession is 12 years from the date of sale. The Allahabad High Court in *Jang Bahadur* v. *Hanwant*, 43 A. 520 F. B., took the same view as the Bombay High Court. The Madras High Court, in an earlier case (*Govind* v *Venkata*, 17 M. L. J. 598), took the same view as the Calcutta High Court, but in later cases, (*Kamayya* v. *Bhimavasetti*, 49 M. L. J. 303: 86 I. C 439: A. I. R. 1925 M. 1140; *Govinda Swami* v. *Petha Perumal*, 44 I C. 839), it followed the Bombay decisions. A contrary view has been taken by the Calcutta High Court where it has been held that a suit by an auction purchaser who has obtained symbolical possession for actual possession of land, brought within twelve years from the date of symbolical possession is not barred by limitation; *Harimohan* v. *Baburali*, 24 C. 715; *Bhulu Beg* v. *Jatindra*, 27 C. W N 24 77 I. C. 1035. A. I. R 1923 C. 138 *See* also the Calcutta cases noted above under " Effect of Symbolical Possession "

It should be noted that symbolical possession though effective against the judgment-debtor, is of no avail against third persons or strangers, *Harimohan* v. *Babur Ali*, 24 C 715, *Giri Narain* v. *Modhusudan*, 17 C. W. N. 324; *see* cases noted above under " Effect of Symbolical Possession." Thus *D* conveys his property to *A* but remains in possession *A* sells the property to *P*. In execution of a decree against *D* the property is sold as *D's* property and purchased by *Q*. *P* then sues *A* and *D* for possession and gets a decree in execution of which he obtains Symbolical Possession When he went to take actual possession he was resisted by *Q* whose adverse possession was for more than twelve years including *D's* adverse possession against *A*. *P* then brings a suit against *Q* The suit is barred, as the *Symbolical* Possession obtained by *P* did not break the continuity of *Q's* possession, *Harjivan* v. *Shivram*, 19 B 620 In *Kocherlakota* v. *Vadreru*, 27 M 262 it has been *held* that symbolical possession will affect even a third party when it is delivered with his knowledge and in his presence, *see* also *Lakshman* v *Moru*, 16 B 722, *Namdeb* v *Ram Chandra*, 18 B 37, *Doyanidhi* v *Kalai*, 11 C L R 395

Symbolical possession, as may be given by sticking a bamboo into the ground or the like, of a dwelling-house of which actual possession might have been granted, is not such *bona fide* possession as will save limitation —*Sholee Nath* v. *Obhoy Nund*, 5 C. 831.

Held that when the lease purports to be a perpetual lease reversion to the grantors, and no rights reserved to them, but only nal rent, symbolical possession as against the grantors would not b tive against the lessee, and thus save the bar in limitation.—*Gossa mar Puri* v *Bipin Behary*, 18 C 520 (4 C 327 *referred to*)

If a person obtaining formal possession in execution of a decree 12 years to elapse without taking any steps to acquire and assert possession, he loses the title conferred by the decree.—*Pearee Mo Jugobundhu*, 24 W R 418 *See* also, *Bagdu Majhi* v. *Durga Pr* C W. N 292; *Ramlal* v *Masum*, 25 A 35

Where a decree declared that plaintiff was to get possession of land after *batwara* being made, and the decree-holder, after allow right to be barred by lapse of time, applied to the Collector, had a b effected and obtained merely formal possession; *held* that such po gave him no fresh cause of action —*Kishore Singh* v. *Gobind Su* W. R 33

Where formal possession has been given under a final fore decree but mortgagor continued in actual possession, the remedy i suit and not under s 47 of the C P Code, consequently the law of tion applicable is that governing suits, not execution proceedings.— *Nath* v *Milap Chand*, 28 A 722 3 A L J 504: (1906), A. W (11 C 93, 24 C 715, 19 A 499, *referred to*)

Delivery of Actual or Khas Possession.—A decree, which is decree for possession, cannot be executed by an order for delivery of p sion of property in the possession of a third party who has acquired subsequently to the institution of the suit —*Ameerounissa* v. *Abedo* 16 W R 307

The delivery of possession under this rule contemplates the d holder being placed in actual possession by possibly dispossessing, eye of law, a third person who is not affected by the decree The formal delivery of possession cannot of itself effect such disposse unless the deprivation of possession be complete as a fact, a conc which the Court has to form on the whole of the evidence.—*Ram Ch* v. *Ravji*, 20 B 351 F B (13 B 213 *referred to*).

If in execution of a decree for *khas* possession, it is necessary to re any of the defendants from the land covered by the decree, the Cou application is authorized to remove such person; but if the decr silent as to the building situated on the land, it is not within the pro of the Court which executes, to direct that the building be pulled do *Radha Gobinda* v *Brojendro Coomar*, 18 W. R. 527.

Where plaintiff sued defendant as trespasser, the prayer in the being for *khas* possession and the defendant set up adverse title, the d given against the latter for possession was held to give the judgment-cr the possession sued for, *i e*, legal possession as provided by this secti *Raj Mungul* v *Anund Moyee*, 11 W R. 63

Delivery of possession of land under a decree for redemption, inc standing crops thereon.—*Aung Bow* v. *Tuno Gaung*, 3 L. B. R. 129.

Second Application.—A decree-holder who has been put in possession under this rule and has been obstructed by a third person on behalf of the judgment-debtor cannot put in a second application for possession under this rule; *Thandavaroja* v. *Subramania*, 29 M. L. J 501

But a decree-holder in a partition suit who has been given partial possession of portion of the property allotted to him in an execution case which was dismissed after delivery of formal possession, can maintain a second application in execution for actual possession under this rule, *Khetra* v. *Jogendra*, 45 I. C. 7

Delivery of Khas Possession After Delivery of Symbolical Possession.—Where a plaintiff obtained a decree against certained *putnidars* to recover possession of a share of *ijmali* talook, it was held that the Court executing it, was bound to put him in possession of the property adjudged, and if necessary, by removing any person who might refuse to vacate, and that his having already been put in possession under r 36 was no bar to his being put into the more direct and actual possession contemplated by this rule.—*Adormonee Dassee* v *Prem Chand*, 9 W. R. 454 *See* also *Banee Muhtoon* v *Gopee Bhuggut*, 12 W R 285, and *Hur Kishore* v *Sudoy Chunder*, 17 W R 80, where it has been held that a Court had jurisdiction to issue an order for *khas* possession to be given under r. 36

A person who has obtained symbolical possession under r 36 may subsequently ask for actual possession under this rule —*Robson* v *Maseyk*, 3 W. R. Mis. 2

Joint Possession—Undivided Share.—When in execution of a decree held by her, the decree-holder purchased an undivided share in a house which the judgment-debtor owned jointly with *S* a third person, and the judgment-debtor resisted the decree-holder when attempting to get possession—*held* on a construction of the rule and r 95, he was entitled to have the judgment-debtor removed from the premises, *Sarvi Begum* v *Taj Begam*, 36 A. 181

The provisions of this rule clearly show that a plaintiff who is entitled to joint possession can be granted decree for joint possession, whether he was originally in joint possession, and was subsequently dispossessed or whether he had never been in possession; *Jagannath* v *Ramphal*, 34 A. 150 (*Phani Singh* v *Nawab Singh*, 28 A 161 *dissnted from*)

Per *Oldfiled*, J —An usufructuary mortgagee of the share of a coparcener in a joint family property is not entitled to a decree for joint possession —Per *Napier*, J , *contra* in *Kota Balabhadra* v *Ketra*, 16 M. L. T. 229.

Break Open.—In a case in which the officers of a Court were unable to give possession on account of the house being locked up by the judgment-debtor, *held* that the Court was bound to remove the lock and to place the decree-holder in possession of the house —*Gunesh Chander* v. *Ram Dhunee*, 22 W R 283

Where a decree only directed plaintiff's right of passage through a doorway, and to remove the brick work with which it was filled· *Held*

that, in executing it, the decree-holder was not authorized to remove a wooden door in existence there.—*Rooknee Kant* v. *Nund Lall*, 25 W. R. 120.

Use of Force in Giving Possession.—A bailiff authorised to give possession may use a reasonable degree of force in order to effect the removal of persons bound by the decree and refusing to vacate the same. If the writ simply authorizes "to give possession" and there are no words expressly authorising forcible removal, the omission is immaterial, *Meredith* v *Sanjibani*, 42 C 313 19 C W N. 278

Resistance or Obstruction to Delivery of Possession.—*See* r 97 *et seq* and notes

Decree for delivery of immovable property when in occupancy of tenant.

36. Where a decree is for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property. [S. 264.]

COMMENTARY.

Symbolical Possession and Khas Possession.—*See* note to r. 35 above 970

Procedure for Delivery of Possession.—This rule imperatively requires that a copy of the writ of delivery of possession should be affixed in some conspicuous place on or near the property, the object of the provision being that the co-sharers and tenants may know that possession has been transferred to the decree-holder Failure to comply with this procedure is fatal to the delivery of possession; *Jahuri* v. *Peman*, 55 I C. 19, *Nidhi* v *Parsu*, 74 I C. 1

Applicability of the Rule.—Or XXI, r. 36 applies only to a case where the property is in exclusive possession of a person not bound by the decree and entitled to remain in possession. It does not apply to a case of a joint holding, which is covered by r. 35; *Devi Sahai* v *Ramji Lal*, 27 P L. R 617 97 I C 170 A I R. 1926 L. 668.

Delivery of Property in Occupancy of Tenants, etc.—Where a decree is partly for a share of land in the *khas* possession of the defendant, and partly for a share of land in the possession of the ryots, the decree as to the former can only be executed under r. 35 and as to the latter according to this rule —*Shama Soondery* v. *Jardine Skinner & Co.*, 7 W. R. 376 (reversing 3 W. R. 144).

If there is a decree for partition and the lands are in possession of tenants, delivery can be given under this rule.—*Uppala Raghava* v. *Uppala Ramanuja*, 26 M. 78.

Order for delivery of possession of a house according to this rule is correct when the objector asserts that he has a right of residence in it; *Jiban* v. *Simrikha*, 20 I. C. 571.

A person disturbing the possession of another, without any right legitimately derived from any competent person to do so, is not a "person entitled to occupy" the property within the meaning of this rule; *Ibrahim* v. *Konammal*, 43 M. L. J 179. 70 I. C. 755: A. I. R. 1923 M. 25

Possession Without the Intervention of Court.—The Code of Civil Procedure does not limit the applicant to any particular manner of obtaining possession, and there is nothing in the Code to prevent the decree-holder or auction-purchaser to obtain possession without the assistance of the Court Possession actually taken without the intervention of Court is equally effectual.—*Obhoya Churn* v. *Rajendra Coomar*, 22 W R. 406; *Salig Ram* v. *Meheen Lall*, 2 Agra 235, *Lallu* v. *Annaji*, 5 B. 387; and *Bandu* v. *Naba*, 15 B 238.

Suit for Khas Possession After Symbolical Possession.—A suit by auction-purchaser to obtain possession of lands the subject of his purchase, will lie when, it is shown that attempt has been made to obtain possession in execution proceedings, and that such attempt has become unsuccessful.—*Iswar Pershad* v *Jai Naram*, 12 C. 169 (10 C L R 258 *distinguished*). *See* also *Seru Mehun* v *Bhagoban Din*, 9 C. 602; *Balvant Santaram* v. *Babaji Bin*, 8 B. 602; and *Sevu* v *Muttu Sami*, 10 M 53. A plaintiff who has obtained only symbolical possession in execution of a former decree, is entitled to maintain a fresh suit against the same defendant to obtain actual possession.—*Shankar Bisto* v. *Narsingrav Ram Chandra*, 22 B 667.

Magistrate to Give effect to Civil Court's Decree for Possession.—A magistrate is bound to give effect to the decree of the Civil Courts and to maintain the party in possession, who under the decree has already been put in possession of the property in dispute —*Kunja Behari* v *Khettra Pal*, 29 C 208 6 C W N 38 (26 C 625 *referred to.* Distd. in 31 M 416)

It is duty of the magistrate in proceedings under s. 145, C. P. Code, to find possession in accordance with the decree of the Civil Court under which possession has been delivered —*Gulraj Marwari* v *Sheik Bhatoo*, 32 C. 796 (22 C 297 *cited*); approved in *Kuloda* v. *Danesh*, 33 C 33; 10 C. W. N. 257 2 C L J. 71, *Akshoy* v *Basu Rai*, 37 C. L. J 256.) The weight to be attached to such previous orders depends on the particular circumstances of the case; see *Parmeshwar* v *Kailaspati*, 1 Pat. L J 836; *see* also *Krishna* v *Abdul*, 80 C 155

ARREST AND DETENTION IN THE CIVIL PRISON.

Discretionary power to permit judgment debtor to show cause against detention in prison.

37. (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of a money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court may, instead of

issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison.

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor. [S. 245-B.]

COMMENTARY.

See rr 11 and 21 of this Order

Issue of Warrant when Judgment-debtor does Not Reside Within the Jurisdiction of the Court.—The fact that the judgment-debtor does not reside within the jurisdiction of the Court is not a sufficient reason for refusing to issue warrant for his arrest, although such a warrant can be executed only within the Court's territorial jurisdiction. In such cases Court should fix a date for the return of the warrant; *Krishna* v *Bidya* 44 I C 296.

"Issue notice."—Court may issue notice against a judgment-debtor who in other execution proceedings has applied for insolvency; *Ganpat* v *Mahadeb*, 22 B 731

The issue of a notice under this rule is not a revivor of decree for purposes of limitation; *Chatterput* v *Daya Chand*, 11 I. C 216

Appearance After Notice.—*See* r 40 for procedure to be followed after appearance.

38. Every warrant for the arrest of judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid. [S. 337.]

Warrant for arrest to direct judgment-debtor to be brought up.

39. (1) No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court.

Subsistence allowance.

(2) Where a judgment-debtor is committed to the civil prison in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 57 or, where no such scales have been

fixed, as it considers sufficient with reference to the class to which he belongs.

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance before the first day of each month.

(4) The first payment shall be made to the proper officer or the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) should be made to the officer in charge of the civil prison. [S. 339.]

(5) Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in the civil prison shall be deemed to be costs in the suit:

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed. [S. 340.]

COMMENTARY.

Arrest.—Subsistence money must be paid into Court before the order for arrest can be made, *Kastur Chand* v. *Raoji*, 4 B. 65

Subsistence Money to be Paid in Advance.—Subsistence money for a month must be paid in advance, a similar payment must be received in advance every successive month pending the imprisonment; and that, if any such payment be not made, the prisoner is entitled to be released and further detention is illegal.—*In re Kanoy Lall, Bourke*, O. C 51, *Aga Ali* v *Joydoyal, Bourke* O. C. 52 *See* also *Speyer* v. *Janssen*, Bourke O. C. 28, *In re Sumboo Chunder*; *In re Doorga, Bourke* O. C 59; *In the matter of Thompson*, Bourke O C 421, *Dutt* v. *Cornelius*, 5 B. L. R. Ap 79 Subsistence money must be paid before the commencement of the month for which it is paid; *Haladhar* v. *Ambika*, 5 B L. R. Ap. 80

Arrest Before Judgment.—Where a defendant is arrested before judgment, his subsistence money is to be fixed in the same way as in the case of an arrest in execution of a decree; and if the plaintiff fails to pay the subsistence money fixed by the Court, the defendant is entitled to his discharge from prison —*In the matter of Callachand Das*, 1 Ind Jur N. S 327; Bourke O C 423

Proceedings on appearance of judgment-debtor in obedience to notice or after arrest.

40. (1) Where a judgment-debtor appears before the Court in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money and it appears to the Court that the judgment-debtor is unable from pover-

ty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof, the Court may upon such terms (if any) as it thinks fit, make an order disallowing the application for his arrest and detention, or directing his release, as the case may be.

(2) Before making an order under sub-rule (1), the Court may take into consideration any allegation of the decree-holder touching any of the following matters namely:—

(a) the decree being for a sum for which the judgment-debtor was bound in any fiduciary capacity to account ;

(b) the transfer, concealment or removal by the judgment debtor of any part of his property after the date of the institution of the suit in which the decree, was passed, or the commission by him after that date of any other act of bad faith in relation to his property, with object or effect of obstructing or delaying the decree-holder in the execution of the decree ;

(c) any undue preference given by the judgment-debtor to any of his other creditors ;

(d) refusal or neglect on the part of the judgment-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it ;

(e) the likelihood of the judgment-debtor absconding or leaving the jurisdiction of the Court with the object or effect of obstructing or delaying the decree-holder in the execution of the decree.

(3) While any of the matters mentioned in sub-rule (2) are being considered, the Court may, in its discretion, order the judgment-debtor to be detained in the civil prison, or leave him in the custody of an officer of the Court, or release him on his furnishing security, to the satisfaction of the Court, for his appearance when required by the Court.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) Where the Court does not make an order under sub-rule (1), it shall cause the judgment-debtor to be arrested if he has not

already been arrested and, subject to the other provisions of this Code, commit him to the civil prison. [S. 337-A.]

COMMENTARY.

This rule corresponds to s. 337-A of the C. P. Code, 1882, with change of wording. It was added to the C P Code of 1882, from the Debtor's Act VI of 1888, (s. 4)

"May disallow arrest."—A judgment-debtor who is not able to get in his assets readily may be unable to escape arrest and imprisonment. But the Court is armed with sufficient power under this rule to prevent such a debtor from being unnecessarily harassed, *Ponnuswami* v *Narayanaswami*, 25 M. L J. 545: 21 I. C 293

After notice the judgment-debtor appeared and pleaded poverty. The Court after enquiry under this rule disallowed the objection and directed his immediate arrest and commitment to jail. If the cause is insufficient the Court is bound to order arrest; *Gubboy* v. *Ram Doyal*, 2 C. W. N. 588. Lunacy is a good cause for refusal of warrant for arrest. *Bhanabhai* v. *Chotabhai*, 22 B. 961.

Where a decree is passed against three persons, and the Court is satisfied that one of them is really unable to pay while the other two possess property, the Court may reject an application made by the decree-holder for the arrest of the judgment-debtor who is unable to pay; *Lala Das* v. *Mina Mal*, 4 L. L J. 266 79 I C. 551· A. I. R. 1922 L. 259

Insolvency.—An insolvent who has not inserted in his schedule a debt for which a decree is subsequently obtained is not protected from arrest in execution of such decree, merely because his property is in the hands of the receiver; *Panna Lall* v. *Kanhaiya*, 16 C. 85. There is nothing to prevent the Court from issuing a warrant of arrest against a judgment-debtor at the instance of one decree-holder pending an enquiry into the judgment-debtor's application for insolvency in execution of a decree of another decree-holder, *Ganpat* v *Mahadeb*, 22 B 731

Failure to Apply for Insolvency—Surety.—A judgment-debtor applied under s. 55 (4) and a person stood surety for his appearance on fixed date. Before the due date, the judgment-debtor applied under this rule instead of applying for insolvency The Court postponed its consideration to a date subsequent to the date finally fixed for his appearance; but on this date the judgment-debtor remained absent. *Held* that the surety was absolved from liability as the original date fixed for judgment-debtor's appearance was, no longer to be regarded as the date fixed for his appearance and no proceedings took place on that day, *Bhagwan* v *Bhagat*, 61 P. W. R. 1910

Transfer, Concealment, Removal or any other Act of Bad Faith.—The Code contemplates a case of active concealment, or removal of substantive property since the institution of the suit in which was passed the decree in execution of which the judgment-debtor was arrested or imprisoned, with intent to deprive the creditors of available assets for division, *Suhrit Narain* v. *Raghunath*, 7 A 445.

The words "*bad faith*" mean bad faith in respect of the debt for which he has been imprisoned and with regard to which the application has been made.—See *Oriental Bank* v. *Mani Madhub*, 3 B. L. R. Ap 14, *In re Guru Das Bose*, 7 B. L. R. Ap. 23; *Butler* v. *Lloyd*, 12 B. L. R. Ap. 12, *Anonymous*, 1 Ind Jur N. S. 8: *see*, however, *Smith* v. *Boggs*, 5 B L R Ap 22, where it has been held that the words "bad faith" meant bad faith not only in respect of the application but included bad faith on previous occasions.—In *In re Soopersaud*, 2 Ind. Jur. N. S 91, and *In re Sub Chunder*, 2 Ind. Jur N. S. 93-*note*, it was held that the acts of bad faith are not limited to acts of bad faith committed by the prisoner in his application for discharge, but included acts of bad faith in the manner of incurring his original liability. Acts of bad faith must be done wilfully.—*Karim* v *Misri*, 7 A 295

Acts of bad faith towards creditors just at the period at which the applicant was contemplating insolvency may be held to be a part of the matter of the application.—*Bavachi Packi* v. *Pierce, Leslie and Co*, 2 M. 219 *See* also *Gopal Das* v *Bihari Lal*, 17 A. 218, where it has been held that the expression "any other act of bad faith" not only means any act of bad faith which bears directly upon the conduct of the debtor in the matters leading up to his application for insolvency but also includes acts of bad faith committed by the applicant for declaration of insolvency antecedent to his application Followed in *Gaya Din* v *Hira Lal*, 26 A. 517

The bad faith, the reckless contracting of debts, the unfair preference of creditors, the transfer, removal or concealment of property, the making of false statements in the application, are all acts of misconduct that will debar the applicant from obtaining the relief and the protection he seeks.—*Salamat Ali* v *Minahan*, 4 A. 337

The test of good faith is whether the transaction is genuine or colourable; 29 B. 428 (434).

Undue Preference.—This clause (c) applies to cases where the transfer would under any enactment for the time being in force, be void, as a fraudulent preference, if the debtor were adjudged an insolvent As to when a transfer of property by a debtor may be avoided as a fraudulent preference, *see* s. 37 of the Pro Insolvency Act (III of 1907), and s 53 of the Transfer of Property Act (IV of 1882).

A debtor, who gives an unfair preference to one creditor by giving him a large proportion of his property, so as to reduce the *aliquot* share of the other creditors, acts fraudulently; *Dadopa* v. *Vishnudas*, 12 B 424. But in *Brown* v. *Ferguson*, 16 M 490 (following *Butcher* v. *Stead*, L. R. 7 E. and I. Ap 839), it has been held that a mortgage by the debtor to one of his creditors to secure a barred debt, since renewed, did not amount to an act of fraudulent preference within the meaning of this section. *See* also *Joakim* v *Secretary of State*, 3 A. 530, where it has been held that an assignment by a debtor of all his property to one of his creditors, did not amount to an "undue preference" within the meaning of this section.

In deciding whether or not a payment made to a particular creditor amounts to an unfair preference, the Courts may fairly refer to, and be

guided by, the provisions of the Insolvent Act, which treats a transaction as an unfair preference only when it has occurred within a limited time before the insolvency proceedings.—*In the matter of Hastie*, 11 C. 451.

For the meaning of the word "creditor," see *In the matter of Chunni Lal*, 29 C. 503.

Refusal or Neglect to Pay the Amount of the Decree.—Reckless trading, although, unaccompanied by any legal or moral fraud, is a ground for suspending protection.—*In re Baggot*, Bourke Ins. 5.

A Judge would not be exercising a right discretion, if he refused relief in the case of persons, who, although knownig that they had no means of paying at the time the debt was contracted, yet honestly believed upon reasonable grounds that they would have the means of paying eventually.—*Bavachi Pachi* v. *Pierce, Leslie and Co.*, 2 M. 219.

"Some part thereof" in cl. (*d*) refer to decree for payment of money generally and not only to instalment decrees; *Cowie & Co.* v *Skidmore*, 7 Bur. L T. 242.

Likelihood of the Judgment-debtor Absconding.—A person must go away from his place of business for the purpose of being absent in order that it may be impossible or difficult for his creditors to find him, and a mere retirement to the private part of the house would not necessarily be such departure.—*In re Dhunput Singh*, 20 C 787, 794

Appeal.—An appeal lies from an order made under this rule disallowing an application by a decree-holder for the arrest and imprisonment of the judgment-debtor, such an order being appealable as a decree under s. 47; *Raj Karni* v *Karm Ilahi*, 1 L 77, *Lala Das* v. *Mina Mal*, 4 L L J. 266 · 79 I C. 551 A I R 1922 L 259 Similarly, an appeal lies from an order granting an application for release under this rule, *Abdul Rahaman* v. *Mahomed Kasim*, 21 M 29.

ATTACHMENT OF PROPERTY.

Examination of judgment-debtor as to his property.

41. Where a decree is for the payment of money the decree-holder may apply to the Court for an order that—

(*a*) the judgment-debtor, or

(*b*) in the case of a corporation any officer thereof, or

(*c*) any other person,

be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree ; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or document. [Cf. S. 267.]

COMMENTARY.

Alteration.—This rule has been substituted for s. 267 of the C. P. Code of 1882, which has been recast and changed The main distinctions between this rule and the old section, are (1) that this rule refers to a *decree for payment of money*, but the language of the old section covered all sorts of decrees; (2) this rule provides for the examination of the *judgment-debtor or any other person* at the instance of the decree-holder but under the old section the Court had power to act on its own motion.

Object.—The object of this rule is to obtain discovery for purposes of execution, to avoid unnecessary troubles in obtaining satisfaction of money decrees But orders for discovery or personal examination may operate harshly and ought not to be made unless the Court is satisfied about the *bona fide* of the application and urgent necessity; *National Bank Ld.* v. *Guznavi*, 43 C. 285 34 I C. 287 (on appeal; *see* 20 C W. N 562).

"**Any other person.**"—This rule is applicable to all the property of the judgment-debtor out of which the decree can be satisfied either by delivery in obedience to the decree or by sale. A person may be examined in respect of property which is *prima facie* the property of the judgment-debtor even though such person may allege that he is a mortgagee in possession of the attached property.—*In re Premji Trikum Das*, 17 B 514; *see* also 16 B. 152

Production.—On an application by decree-holder for execution of decree by attachment of debts, the Court may require the production in Court of judgment-debtor's books of account; *Ajoodhya* v. *Middleton*, 3 N. W. P. 334.

Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined.

42. Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money. [S. 255.]

COMMENTARY.

Attachment After Preliminary Decree.—A decree for possession and mesne profits to be ascertained after enquiry is a decree for money, and there is no irregularity in the decree-holder applying for attachment of the judgment-debtor's property, pending the ascertainment of mesne-profits — *Sharoda Moyee* v. *Wooma Moyee*, 8 W. R. 9: folld. in 18 Cal. 188; refd. to in 30 M. 255.

If the judgment-debtor dies after preliminary decree and before final decree, his representatives will not be bound unless they were brought on the record at the time of the ascertainment of the mesne-profits; *Radha Prosad* v. *Lal Saheb*, 13 A. 53 P. C.

43. Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof:

Attachment of moveable property, other than agricultural produce, in possession of judgment-debtor.

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the *attaching officer may sell it at* once. [S. 269, Paras. 1 and 2, and S. 128 (2) (B).]

COMMENTARY.

This rule corresponds to paras. 1 and 2 of section 269, C. P. Code, 1882, with some additions and alterations. The words, *"other than agricultural produce,"* have been substituted for the words " other than the property mentioned in the first proviso to s 266," which occurred in para. 1 of the old section.

Moveable Property.—Under the present Code moveable property includes growing crops. *See* sec. 2, cl. (18); but money is not " moveable property."—*Maung Lan Bye* v. *Maung Po Nyun*, 1924 Rang. 21.

Property Outside Jurisdiction.—The attachment under this rule can be effected only when the property is situate within the jurisdiction of the Court issuing attachment; *Begg Dunlop & Co.* v. *Jagannath*, 89 C. 104, 110.

Actual Seizure.—A warrant of attachment was executed *by affixing* it to the outer door of a warehouse in which goods belonging to the judgment-debtor were stored. The door was not broken open nor was physical possession taken of the goods inside. *Held* that this, in effect, was actual seizure within the meaning of this section.—*Multanchand* v. *Bank of Madras*, 27 M. 346.

" Shall be responsible for the due custody thereof."—An attaching officer deputed to attach moveable properties before attachment having attached the properties, entrusted them to a third person without the permission of the Court. The property was lost. *Held* that the attaching officer must make good the loss and not the third person entrusted with the property, and the Court had power under Or. XXI, r 43 to make the order; *Badri Prasad* v *Chokhelal*, 24 A. L. J. 561: 48 A. 510: A. I. R. 1926 A. 406. But where a person to whom goods attached were made over for safe custody by the attaching officer, on his executing a bond undertaking to produce them in Court, fails to produce the goods when required by the Court, *the decree-holder is not competent to proceed* against the surety under s 145; *Raja of Venkatagiri* v *Sura*, 39 M. L. J. 472: 60 I. C. 134. The Allahabad High Court, in *Madho Prasad* v. *Pearey Lal*, 19 A L. J. 217 · 62 I C 719, held that the surety could be proceeded against under s. 145

44. Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment—

Attachment of agricultural produce.

(*a*) where such produce is a growing crop, on the land on which such crop has grown, or

(*b*) where such produce has been cut or gathered, on the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited,

and another copy on the outer door or on some other conspicuous part of the house in which the judgment-debtor ordinarily resides or, with the leave of the Court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain ; and the produce shall thereupon be deemed to have passed into the possession of the Court. [New.]

COMMENTARY.

" Growing crops " are moveable property, *see* the definition in s. 2 (13). The definition of moveable property, as given in the present Code, has rendered the following cases obsolete and inoperative; 11 M. 193, 5 B. L. R. 194; 13 W R 275, 14 A 30, 15 A. 394, and 6 B. 592.

Agricultural Produce.—As to exemption, *see* s. 61.

45. (1) Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient and ; for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered.

Provisions as to agricultural produce under attachment.

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment-debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it ; and if the judgment-debtor fails to do all or any of such acts, the decree-holder may with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree-holder shall be recoverable from

the judgment-debtor as if they were included in, or formed part of the decree.

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been severed from the soil.

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit, and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment.

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered.

46. (1) In the case of—

Attachment of debt, share and other property not in possession of judgment-debtor.

(*a*) a debt not secured by a negotiable instrument ;

(*b*) a share in the capital of a corporation;

(*c*) other moveable property not in the possession of the judgment-debtor, except property deposited in or in the custody of, any Court.

the attachment shall be made by a written order prohibiting—

(*i*) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court ;

(*ii*) in the case of the share the person in whose name the share may be standing from transferring the same or receiving any dividend thereon ;

(*iii*) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

(2) A copy of such order shall be affixed on some conspicuous part of the court-house, and another copy shall be sent, in the case of the debt, to be debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other moveable property (except as aforesaid), to the person in possession of the same.

(3) A debtor prohibited under clause (i) of sub-rule (1) may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same. [S. 268.]

COMMENTARY.

"Debt."—The term 'debt' in this rule is used in its legal sense of a debt either due or accruing due. An annuity not yet due is not a debt and cannot be attached; *Padmanund* v. *Rama Prosad*, 14 C. L. J. 127 A debt is a sum of money which is now payable or will become payable in future by reason of a present obligation—*per* Lindley, L. J., in *Webb* v. *Stenton*, 11 Q. B. D (1883) 518. *See* also *Bancharam* v. *Adyanath*, 36 C. 936. 13 C W N 966 An existing debt though payable at a future date, is attachable; *Tafazzul* v. *Raghunath*, 14 M. I. A. 40, 50 A sum payable upon a contingency however, is not a debt and does not become a debt until the contingency happens. Thus when A is bound under a deed to pay to B a monthly allowance during the lifetime of the latter, there can not be a valid attachment of any portion of the allowance by prohibitory order issued to A of a date anterior to the time when the same falls due to B; *Haridas* v *Baroda*, 27 C. 38; *See* also *Padmanund* v. *Rama Prasad*, 14 C L J 127.

Attachment of Debt Payable by Person Outside Jurisdiction.—It is not competent to a Court, in execution of a decree for money to attach under this rule, at the instance of the decree-holder, a debt payable to the judgment-debtor outside the jurisdiction, by a person not resident within the jurisdiction of the Court. Thus J in execution of a decree against H in the Burdwan Court applied there for an order of attachment of Rs. 6,750 alleged to be due to H from a firm in Calcutta and a prohibitory order was issued upon the said firm—*Held* that the debt could not be attached by the Burdwan Court; *Begg Dunlop & Co.* v. *Jagannath*, 39 C 104 (*Obiter dictum* in *Re Hollick*, 2 B. L. R. 108: 10 W. R. 447, *not followed*).

Effect of Attachment.—This rule does not mean that, while a debt is under attachment, the person to whom the debt was originally owing should be debarred from bringing a suit in respect of it. What it prohibits is the recovery of the debt and the payment of it by the debtor to the creditor. An order of attachment under this rule is not an injunction or order staying a suit within the meaning of section 15 of the Limitation Act.—*Shib Singh* v. *Sita Ram*, 13 A. 76. Followed in *Collector of Etawah* v. *Beti Maharani*, 14 A. 162 (*affirmed by* the P. C. in 17 A. 198, P. C.). *See* also, *Musst. Sheoraja* v. *Jagan*, 49 I. C. 88.

An order of attachment under this rule only operates so as to give the judgment-creditor certain rights in execution. It does not operate, when those rights are not exercised before the presentation of an insolvency, so as to create in favour of the judgment-creditor a title which prevails against that of the Official Assignee, under the vesting order in insolvency made after the order of attachment.—*Krishnasawmy* v. *Official Assignee*, 26 M. 673.

An attaching creditor is not in the same position as an assignee for value without notice of a prior assignment but stands in respect of prior assignments in no better position than his judgment-debtor; *Megi Hansraj* v *Ramji*, 8 B H. C. 169.

Requisites to Make a Debt Attachable.—It is essential that the relation of creditor and debtor should exist between the jugdment-debtor and the garnishee (judgment-debtor's debtor) and two practical tests are applied: (1) Could the judgment-debtor sue the garnishee for the amount, and recover it? (2) Would the debt vest in the judgment-debtor's trustee in the case of bankruptcy.

Where the debt is not due, there is nothing to be attached, *Webb* v. *Stenton*, 11 Q. B. D. 518 C. A.

Annuity.—Annuities payable by trustees are attachable, *Nash* v. *Pease*, 47 L. J. Q. B 766, but the money must have reached their hands and be also payable, *Webb* v *Stenton*, 11 Q B D. 518. Annuity not yet due is not a debt; *Padmanand* v *Rama Prosad*, 14 C L J 129.

Right to Receive Debt or Rent.—A right to receive a debt or to collect rent can be attached under this rule, *Basanayya* v. *Syed Abbas*, 24 M. 26 Dissented from in *Chindambara* v. *Ramasamy*, 27 M 67.

Rent due can be attached, *Mitchell* v *Lee*, (1867) L. R 2 Q B. 259. But it is not attachable unless it becomes payable by the tenant, *Barnett* v. *Eastman*, (1898) 67 L J. Q B. 517

Monthly Allowance.—Monthly allowance payable to a judgment-debtor is a debt, and is attachable under this section —*Maharani Dambar Koeri* v. *Rai Sham Kissen*, 9 C. W. N. 703

Debt Payable by Instalments.—A garanishee order can be made where the debt is payable by instalments, for payment of the accruing instalments as they become payable from time to time; *Tapp* v *Jones*, (1875) L. R. 10 Q B 591.

Decree.—A decree of Revenue Court stands in the position of an ordinary debt, and may be dealt with under this rule.—*Aulia Bibi* v. *Abu Jafar*, 21 A. 402 (7 Bom L P 318, 15 W R. 34, 2 A. 290 *referred to*).

Attachment of Debt Already Paid by Cheque.—If the attachment is made after a cheque for money due on contracts has been delivered, the payment of the cheque cannot be stopped —*Bhagwan Das* v *Abdul Hussein*,) 3 B. 46.

Where the judgment-debtor has been paid by cheque which is stopped by the garnishee upon his being served with a garnishee order *nisi*, there is an attachable debt; *Cohen* v *Hale*, (1871) 3 Q B D 371; but not if the garnishee does not stop the cheque nor is he bound to do so, *Elwell* v. *Jackson*, (1885) 1 Times L. R. 454 C A

Debt Not Immediately Payable.—An attaching creditor can attach any debt though not immediately payable. Money deposited by judgment-debtor as security for the due performance of a contract can be attached, though it is not payable to judgment-debtor till the completion

of the contract and may even be liable to forfeiture; *S. B. Das* v. *Muthu Chetty*, 56 I. C. 948.

Joint Decree Against Two or More Persons.—A judgment-creditor who has got a joint decree against two or more persons, can attach a debt owing to any of his judgment-debtors (*Miller* v. *Mynn*, 1859, 28 L. J. Q. B. 524) by a third person, but not apparently by one judgment-debtor; *Chapman* v. *Callis*, (1862) 6 L. T. 282.

Attachment of Mortgage Debt.—It was held that if the property to be attached is a mortgage debt, where the mortgagee is not in possession nor is entitled to possession, it is attachable under this rule and not under r. 54; *Aulia Bibi* v. *Abu Jafar*, 21 A. 405. The question was considered in a recent case in Madras and it has been held that the words "*debt not secured by a negotiable instrument*" are undoubtedly wide enough to cover a debt secured by a hypothecation bond or a simple mortgage and for the purpose of execution, a debt due to a judgment-debtor under a hypothecation bond is moveable property within the meaning of this rule and the procedure as to moveable property is applicable. *Or. XXI, r. 54* is not applicable to such cases though the General Clauses Act and the T. P. Act speak of such debt as an interest in immoveable property; *Nataraja* v. *South Indian Bank of Tinnevelly*, 37 M. 51 (*Sami Ayyar* v. *Krishnaswami*, 10 M. 169 and the view of the majority in *Appaswami* v. *Scott*, 9 M. 5, *not followed*). This decision follows and is in agreement with the earlier decisions in *Dependra* v. *Ruplal*, 12 C. 546; *Kashinath* v. *Sadasiv*, 20 C. 805; *Baijnath* v. *Benoyendra*, 9 C. W. N. 5; *Baldev Dhanrup* v. *Ram Chandra*, 19 B. 121; *Tarvadi* v. *Bai Kashi*, 26 B. 305; *Muniyappa* v. *Subrahmaniya*, 18 M. 437 (12 C. 586: 20 C. 805 *approved*), *Karimunnunnissa* v. *Phul Chand*, 15 A. 134; *Satya Charan* v. *Madhub*, 9 C. W. N. 693; *Lal Umrao* v. *Lal Singh*, 22 A. L. J. 840: 80 I. C. 890: A. I. R. 1924 A. 796. The same view has been taken in *Chullile* v. *Nambiar*, 27 M. L. J. 239, where it has been held (following 37 M. 51) that the attachment of a mortgage debt should be made under this rule. The fact of the mortgagee being in possession, actual or constructive of the mortgaged property makes no difference. There is diversity of judicial opinion on the question, and in another series of cases it has been held that a debt secured by a mortgage of immoveable property cannot be sold in execution under the provisions of the Code applicable to moveable property; but such interest is immoveable property for the purpose of attachment and sale, see *Srinath* v. *Gopal*, 9 C. 511: 12 C. L. R. 445, *Parashram* v. *Gobind*, 21 B. 226, *Appaswami* v. *Scott*, 9 M. 5; *Sheo Charan* v. *Sheo Shewak*, 18 A. 469; *Sewa Ram* v. *Dheru*, 18 I. C. 838; 125 P. L. R. 1913. It would appear that the weight of opinion is in favour of the first view. *See* also, *Sha Mahammad Yusuf* v. *Lachminarain*, 50 I. C. 157.

When a debt which is not secured by a negotiable instrument is attached under this section a claim may be preferred by a third party and may be investigated under r. 58; *Chidambara* v. *Ramasamy*, 27 M. 67.

It was held under the corresponding section in the Code of 1877 (s. 268, under which an attachment could not remain in force for more than six months) that bonds on which recovery will be time-barred before

the date on which a sale can be legally made, cannot be made available for satisfaction of judgment-creditor's debt, by a Court of Small Causes; *Narsing* v. *Tulsiram*, 2 B. 558.

As to form of prohibitory order *see* App. E., No. 10, First Schedule.

See notes to r. 53, under the heading "Attachment of Mortgage Debt."

Usufructuary Mortgage Debt.—In the case of an usufructuary mortgage there is no debt payable by the mortgagor to mortgagee which can be attached under this rule. The procedure should be by attachment of the interest in immoveable property under r. 54 and sale thereafter: *Manilal* v *Motibhai*, 35 B. 288 (26 B 305 *explained*)

Shares.—A deed of transfer of shares in a Company which does not comply with the formalities prescribed by the Indian Companies Act and the Articles of Association of the Company, is invalid as against a person who has purchased the shares in execution of a decree against the share-holder; *Nagabhushanam* v. *Rama Chandra*, 45 B. 537: 70 I. C. 659: A. I. R. 1923 M 241.

"Other moveable property not in possession of judgment-debtor."—This rule provides for the attachment, in execution of a money-decree, of moveable property belonging to the judgment-debtor in the possession of a third person, while r 52, applies to a case where the property of the judgment-debtor is deposited in or in the custody of any Court or public officer.—*Pudmanund* v *Chundi Dat*, 1 C. W N. 170

Money deposited as security for performance of duties of servant may be attached subject to the employer's lien, but cannot be sold or realised until the deposit is at the disposal of the judgment-debtor freed from the lien; *Karuthan* v *Subramanya*, 9 M 203

Money deposited with third person for a special purpose which fails, is attachable in his hands, *Stumore* v *Campbell*, 1892, 1 Q. B 314 C. A. Money standing at bank to judgment-debtor's credit is attachable; see *Rogers* v. *Whiteley*, 1892 A. C. 118. Money placed on deposit at a bank is not an attachable debt until notice of withdrawal has been given; *Cowley* v. *Taylor*, 1908, 124 L. T J 569. Money is not attachable in the hands of the police, which was found upon a judgment-debtor when arrested, who is afterwards convicted, *Jervis* v. *Peel*, 1815, 1 Times L R 306

For form of prohibitory order, *see* App E., No 5 First Schedule.

Where Garnishee Denies Debt.—He cannot be asked to pay; *Kishen* v. *Bhowya*, 18 W R 40

If the property of which the sale is sought, is debt, and the Court receives notice from the alleged debtor that no debt exists, the Court should satisfy itself as to the existence or otherwise of the debt, and, if it comes to the conclusion that no debt exists, should abstain from proceeding to sale —*Hari Lal Amthabhai* v *Abhesang*, 4 B 323

When a debt alleged to be due by a third party (garnishee) to judgment-debtor has been attached by a prohibitory order, the Court may

make an order to pay the debt to the judgment-creditor in case he admits the debt; but if he denies the debt, there is no other course open to the judgment-creditor than to have it sold or to have a Receiver appointed *Toolsa* v. *Antone*, 11 B. 448, *Maharaja of Benares* v. *Patraj Kunwar*, 28 A. 262; (1905) A. W. N. 277, *Nanak Chand* v. *Chheda Lal*, 97 I. C. 467; *Saw Yin* v. *Hocktoo*, 4 R. 100: A. I. R. 1926 R. 175: 97 I. C. 247.

"May pay into Court"—Where Attached Debt is Not Paid into Court.—A sued B and obtained attachment before judgment of a debt on the allegation that B was the real creditor. The debt was ostensibly due from C to D. The Court issued a prohibitory order on C and called him to pay the money into Court which he did, on a conditional order that it would be retained till the adjudication of the question whether B or D was beneficially interested therein. A obtained an *ex parte* decree against B and withdrew the money. D subsequently sued C and got judgment. C now sued A to recover the money withdrawn. It was incumbent on the Court to enquire as to who was the real creditor of C and it had full authority to compel the defendant (A) to bring back the money, *Harinath* v. *Haradas*, 20 C. W. N. 188: 23 C. L. J. 163.

A voluntary payment by a debtor of his own choice and at his own risk, into a Court of inferior jurisdiction with full knowledge of the attachment by a higher Court will not discharge him, *Ramasamy* v. *Chakrapany* 17 M. L. J. 488.

Where A has been ordered to pay money into Court, a third party cannot be compelled by garnishee proceedings to pay into Court a debt owing from him to A, *In re Greer*, (1893) 2 Ch. 217.

Where a debt attached under this rule was not paid into Court: the Court cannot call on the person to pay or to show cause, why he should not pay his debt into Court. The Court is bound to satisfy itself that a debt is due; the debt then must be sold and delivery made; *Siriah* v. *Muckanachary*, 10 M. 191.

It has been held in Bombay that the Court may make an order for payment of the debt into Court which the person is to obey as also an order for payment to the judgment-creditor; *Toolsa Goolal* v. *Antone*, 11 B. 488.

Payment out of Court.—Where a debt, attached under this rule was paid out of Court to the only person who, had the money due been paid into Court as required would have been entitled to withdraw the said money from Court, and such payment was certified to the Court, it was held that this amounted to a sufficient compliance with the requirements of this rule, *Mida Husain* v. *Moula Bukhsh*, 21 A. 145.

Garnishee's Right to Set-off.—If a cross-debt is due to the garnishee at the date of the attachment, from the judgment-debtor, the garnishee has a right of set-off; and the equity can be set up without payment of Court fee; *Tayaballi* v. *Atmaram*, 38 Bom. 631, 636 (*Tapp* v. *Jones*, L. R. 10 Q. B. 591, 593 *followed*).

Service of Prohibitory Order.—When the service of the prohibitory order was effected by affixing it to the wall of the dwelling-house of the person on whom it was intended to serve, it was not a sufficient service

It ought to have been served by delivery, or by registered letter.—*Gobind v. Kherode*, 10 B. L. R. Ap. 12. Until notice is given, the debtor is bound to pay the debt to the creditor, and it is no part of the duty of the debtor to make enquiries whether his creditor is or is not entitled to receive money.—*Thakoor v. Luchmeeput*, 7 W. R. 10

Notice to Debtor.—Where the decree-holder attached certain money held in deposit by him on behalf of the judgment-debtor, no notice on the judgment-debtor is necessary as the property was not in his possession: *Rajab Ali v Upper India Cowper Mills Co.*, 15 O. C. 289.

" Copy of order shall be affixed in Court house."—Omission to comply with this invalidates an attachment as against a subsequent assignment: *Satya Charan v. Madhab*, 9 C. W. N. 693

Procedure where Debtor of Attached Debt Admits Liability but does Not Pay.—The procedure to be followed when a debtor who admits he owes money to a judgment-debtor, but does not pay it into Court is indicated in Or. XXI, r. 46 (*a*), and was added to the Code by the Chief Court of Lower Burma. All that can be done is to warn him that if he fails to pay the amount due by him, he may be subjected to a suit, 33 I. C. 169.

Attachment of share in moveables.

47. Where the property to be attached consists of the share or interest of the judgment-debtor in moveable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way. [New.]

This is a new rule

Attachment of salary or allowances of public officer or servant of railway company or local authority.

48. (1) Where the property to be attached is the salary or allowances of a public officer or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and, upon notice of the order to such officer as the Government, may by notification in the Gazette of India or in the local official Gazette, as the case may be, appoint in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be.

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the offi-

cer appointed by the Government in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment.

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule (2), shall without further notice or other process, bind the Government or the railway company or local authority, as the case may be, while the judgment-debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of His Majesty's Indian revenues or the funds of a railway company carrying on business in any part of British India or local authority in British India ; and the Government or the railway company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule [S. 268, last three paras.]

COMMENTARY.

Attachment of Salary of Public Officer, etc.—This rule is not altogether new It was embodied in the provisions contained in the last three paras. of s. 268, C P. Code, 1882, with considerable additions and alterations. It is on the lines of s 151 (3) of the Army Act (44 and 45 Vict., c 58), which applied only to officers of the Army It has been made applicable to all public officers and servants of Railway companies or public authorities.

Under the law as existed before the Code of 1908, it was held that the salary of a public officer or railway servant, could not be attached, unless the disbursing officer was within the local limits of the *jurisdiction* of the Court executing the decree; see *Rango* v. *Bal Krishna*, 12 B. 44. *Saiyad Khan* v. *Davies*, 28 B. 198; *Abdul Gofur* v. *Albyn*, 30 C. 713: 7 C. W. N 821 (6 A 48 and 2 C L R 30 *followed*). This led to considerable difficulties in the execution of such decrees, and in most cases yielded no result although the expense was great. The Legislature has by this rule provided a less expensive and at the same time a more effective remedy

The Court has now full power to attach the salary of a public officer or of a railway servant, *whether the disbursing officer or the judgment-debtor is or is not within the local limits of its jurisdiction. It overrides the decisions noted above.*

This rule as well as r. 3 is an exception to the general rule that a Court cannot attach the property of a judgment-debtor situate beyond the local limits of the jurisdiction of the Court executing the decree. See *Begg Dunlop & Co.* v *Jaganath*, 39 C. 100, noted under r. 46

The salary of a public officer is to be attached under this rule and not under r. 52 which does not allow of an anticipatory attachment of money expected to reach the hands of a public officer, but applies only to moneys actually in his hands.—*Tulaji* v. *Balabhai*, 23 B. 39.

It does not apply to the wages of a domestic servant.—*Ayyavayyar* v. *Virasami Mudali*, 21 M. 393.

Where money deposited with a Railway Company by one of its servants as a guarantee for the due performance of the duties, is attached by a judgment-creditor of such servant, the creditor is not entitled to have his decree satisfied out of the deposit but was entitled to a stop-order and also to payment of the interest, if any, due by the Company on such deposit to the servant.—*Karuthan* v. *Subramanya*, 9 M. 203.

Compulsory deposit under the Provident Funds Act (IX of 1897) is not liable to be attached under this rule.—*Veerachand* v. *B. B. & C. I. Ry. Co.*; 29 B. 259.

Extent of Attachment.—*See* s. 60 (*h*), (*i*).

Sub-rule (2).—In case of previous attachment, the return of the subsequent order suggests that there can be no rateable distribution of salary already under attachment. The attachable portion can be attached again, after the satisfaction of the decree in execution of which it was attached before.

It has however been held that where the salary of a Government officer is once attached and then another attachment takes place, the party attaching subsequently is entitled to claim rateable distribution under s. 73 because it amounts to assets within the meaning of that section. There is no inconsistency between the explanation to s. 64 and clause (2) of this rule; *Velchand* v. *Nusson*, 14 Bom. L R. 633.

Sub-rule (3)—indicates that if the judgment-debtor lives beyond the limits of British India, and receives salary or emoluments from the Indian revenues or from the funds of a Railway Company in British India, they will also be available and unless the order is returned in accordance with the provisions of sub-rule (2) it will bind the Government or the Company.

When an officer commanding, refuses to comply with an order under this rule, the Civil Court should proceed to recover from Government the sums which should have been paid from judgment-debtor's pay leaving the Government to settle up as it pleases with its officer and the judgment-debtor; *Oakes & Co Ltd* v *Discarcie*, 5 I. C 802: 10 P R. 1910. No order can be made against Government without bringing it on the record. Therefore Government money cannot be attached on an application in which the debtor alone is impleaded; *Ntadar* v. *Biddulph*, 14 I C. 737: 98 P. R. 1912.

Attachment of partnership property.

49. (1) Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

(2) The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree, and may, by

the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or, made if a charge had been made in favour of the decree-holder by such partner, or as the circumstances of the case may require.

(3) The other partner or parters shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same.

(4) Every application for an order under sub-rule (2) shall be served on the judgment-debtor and on his partners or such of them as are within British India.

(5) Every application made by any partner of the judgment-debtor under sub-rule (3) shall be served on the decree-holder and on the judgment-debtor, and on such of the other partners as do not join in the application and as are within British India.

(6) Service under sub-rule (4) or sub-rule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served. [New.]

COMMENTARY.

This rule is new. Sub-rules (1), (2), (3) have been taken from s 23, English Partnership Act, 1890 (53 and 54 Vict., c. 39), with variations, and the rest from Or. XLVI, rr 1-A and 1-B of the English Rules

" Shall not be attached or sold in execution of a decree, etc."—This rule provides that no execution can issue against any partnership property except on a decree passed against the firm or against the partners of the firm as such; *Karimbhai* v *Conservator of Forests*, 4 B. 222; but the decree-holder of a partner in a firm can under sub-rule (2) apply for an order charging the interest of such partner and for the appointment of a receiver. The share of a partner in partnership business is liable to attachment; *Jagat* v *Iswar Chandra*, 20 C 693.

" Against the partners in the firm as such."—These words in sub rule (1) do not occur in the English Act They are added to make it clear that this rule is applicable even if the decree is passed not against the firm but the partners *as such* Execution under this rule can therefore issue only when the decree is against the firm or against the partners in the firm as such. But a judgment-creditor of a partner in a firm may apply for an order charging that partner's interest.

Decree Against Individual Partner.—A decree against an individual partner can be made; such a decree is contemplated by Or XXI, r. 49,

C. P. Code, and Court can also direct accounts to be taken; *Krishna* v. *Sanyas*, 23 C. W N. 500: 29 C. L. J 280.

"Direct accounts."—The discretion given to direct accounts should only be exercised under special circumstances, *e.g.*, with a view to dissolution; *Brown Janson & Co* v. *Hutchinson & Co*, 1895, 2 Q C 126.

Execution of decree against firm.

50. (1) Where a decree has been passed against a firm, execution may be granted—

(*a*) against any property of the partnership;

(*b*) against any person who has appeared in his own name under rule 6 or rule 7 of order XXX, or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;

(*c*) against any person who has been individually served as a partner with a summons and has failed to appear:

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872.

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (*b*) and (*c*) as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed such Court may grant such leave, or where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determind.

(3) Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer. [New.]

COMMENTARY.

This rule corresponds with Or. XLVIII-A, r. 8 of the English Rules.

"Where a decree has been passed against a firm."—Execution under this rule can only be granted where a decree has been passed against a *firm in the firm's name*.

Sub-rule (1).—Execution under this rule may be granted against the *partnership* property or against the *partners* themselves In the latter case, their separate property will be liable. Where decree has been passed against a firm, execution will be granted as a matter of course against a person referred to in clauses (*b*) and (*c*) of sub-rule (1), but where the decree-holder claims to execute it against any person other than those mentioned in clauses (*b*) and (*c*) as being a partner, he is enabled by sub-rule (2) to apply for leave, and that sub-rule provides the procedure then to be applied; *Jagat Chandra* v. *Gunny Hajac*, 53 C. 214. 91 I C. 824 A. I R. 1926 C. 271.

Where a judgment is against a firm, execution may issue only against any property of the partnership, so far as partners, who are not individually served and those who have not appeared, are concerned; *Shaib Thambi* v *Hamid*, 2 M. W. N. 534.

In a suit against a firm, the names of the partners were not disclosed in the plaint, but summons was served by order of Court on *B* as a partner of the firm. A decree was passed against the firm—*Held* that execution could be proceeded with against *B* under sub-rule (1), cl. (*c*); *Baishnab Charan* v. *Bank of Bengal*, 19 C. L. J. 581 *Per* BEACHCROFT, J.—Sub-rule (2) is only applicable in the absence of the conditions in sub-rule (1).

But a decree against a firm as such will not affect a partner who has not been served with summons to appear and answer so far as his other property is concerned —*Jivraj* v. *Bhagaban Das*, 68 I. C. 627: 1923 B. 66.

Sub-rule (2)—Execution by Leave.—Sub-rule (2) applies to the case of persons against whom a decree-holder seeks to execute the decree other than the persons mentioned in clauses (*b*) and (*c*) of sub-rule (1). Clauses (*b*) and (*c*) refer to person who have appeared or who have been individually served as partners and who have failed to appear. The intention of sub-rule (2) is that when an application for leave mentioned in the sub-rule is made, it should be on notice to the person who is alleged to be liable as a partner; he is to be served with a summons and called upon to answer the application. Then if the Court finds that the liability is not disputed, the Court may grant leave to execute the decree against the person who does not dispute the liability. If the person who is sought to be made liable as a partner, having been served with the summons and having appeared to answer, disputes his liability, then the issue is to be tried in any manner in which any issue in a suit may be tried and determined. "In my opinion the meaning of sub-rules (2) and (4) is that a decree obtained against the firm cannot be forced except as to partnership property against a person alleged to be a partner, and against whom an application has been made under sub-rule (2), unless he has been served with a summons to appear and answer the application and has had an opportunity of disputing his liability as a partner if he desires to do so."—*Per* Sanderson, C. J., in *Jagat Chand v. Gunny Hajee*, 53 C 214: 91 I. C. 824: A. I. R. 1926 C. 271. The decree-holder, however is not entitled to cause the decree to be executed against a partner who left the firm to the knowledge of the plaintiff before the institution of the suit Leave cannot be granted in such case, in view of the proviso to Or. XXX, r. 3. If there has been a dissolution to the knowledge of the

plaintiff, he cannot make an out-going partner liable unless he serves the writ upon him. If he omits to do this, and applies under this rule for leave to issue execution on the ground that he was a partner when the debt was contracted, the Court will refuse to issue execution against such partner because he was not made liable by being served with the writ; *Wigram* v. *Cox*, 1894, 1 Q. B. 792. The wording of sub-rule (2) is wide enough to cover the case of a deceased partner; *Jivraj* v. *Bhagvandas*, 24 Bom. L. R. 1037: 68 I. C. 627: A. I. R. 1923 B 66. In such a case a combined notice under sub-rule (2) and Or. XXI, r. 22 may be given; *Jagat* v. *Gunny*, 53 C. 214. A I. R. 1926 Cal. 271

R. 50 (2) applies only where members of partnership who have not been impleaded as such are sought to be arrested in execution of decree against the firm; *Bank of Bengal* v. *Ramanadhan*, 28 I C. 260: 1915 M. W. N. 180.

Representatives of a Partner Dying Before Institution of Suit can be Proceeded against in Execution of such Decree.—Where a decree is obtained against the firm in a suit brought against the firm, the legal representatives of a person who was a partner in such firm at the time when the cause of action arose, but who died before the institution of the suit, can be proceeded against in execution of such decree under Or. XXI, r. 50 (2): *Firm of Gokaldas Khataoo* v. *Lachmandas*, A I. R 192! Sind 130 F. B

"Execution may be granted."—As to subsequent proceedings, *see* Or XXX, rr 6-8. Where judgment is recovered by a firm suing in the firm's name, and afterwards one partner dies, the surviving partner may issue execution by leave; *Davis* v *Andrews*, W. N 84 (94)

"Against any person who has appeared, etc."—As to the effect of entry of appearance, *see* Or XXX, rr 6-8

"Has failed to appear."—Where one person is trading as a firm, execution cannot issue against him under cl. (c) unless he has been individually served (either personally or by substituted service) and the judgment in default is based upon such service or leave has been obtained under this rule. *See* Or XXX, r. 10

"Claims to be entitled to cause the decree to be executed."—*See* notes under the heading "EXECUTION BY LEAVE"

Minor Partner.—Where a decree has been passed against a firm having a minor partner who is admitted to the benefits of a partnership, execution may be granted against the property of the firm including the share of such minor partner in the partnership property, but it cannot be executed against the separate property of the minor, see *Sanyasi* v *Krishnadhan*, 49 I A 108. 49 C. 560: A I R 1922 C 237

Sub-rule (4).—"The summons to appear and answer" mentioned in this sub-rule means a summons or a notice to appear and answer the decree-holder's application for leave mentioned in sub-rule (2) The object of sub-rule (4) is to give the person, against whom the decree-holder seeks to execute his decree as an alleged partner, an opportunity of disputing his liability as a partner if he desires to do so, *Jagat* v *Gunny*, 53 C. 214;

91 I. C. 824: A. I. R 1926 C. 271; *Jivraj* v. *Bhagwandas*, 24 Bom L R. 1037: 68 I. C 627: A I. R. 1923 B. 66

Insolvency of firm.—The insolvency of firm after the passing of the decree is no bar to execution of the decree against any individual partner who was served with the summons; *Vaishno Das* v *Tirath Das*, 7 L L J. 165; 89 I C 138. A I. R. 1925 L. 379

Attachment of negotiable instruments.

51. Where the property is a negotiable instrument not deposited in a Court, nor in the custody of a public-officer, the attachment shall be made by actual seizure, and the instrument shall be brought into Court and held subject to further orders of the Court. [S. 271.]

Attachment of property in custody of Court or public officer.

52. Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued:

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court. [S. 271.]

COMMENTARY.

Attachment of Negotiable Instrument.—The proper mode of attaching a promissory note is by its actual seizure and not by the issue of a prohibitory order; *Subramania* v. *Chokalinga*, 46 M. 415: A I. R 1923 M. 317 · 72 I. C. 189.

"**Property to be attached.**"—A judgment-debtor was entitled to a life-interest in certain trust funds of which the Official Trustee was the trustee. The life-interest was attached by a decree-holder by giving notice to the Official Trustee but there were no funds in the hands of the Official Trustee which would have been attachable under r. 46. *Held* that the interest of the judgment-debtor was not validity attached.—*Abdul Lateef* v. *Dautree*, 12 M 250.

Letters in the Post Office, addressed to certain judgment-debtors, were attached. The day before the attachment, the senders had applied to have the letters returned to them. *Held* that the letters in the Post Office were held in trust for the judgment-debtor and were, therefore, attachable on the application of the decree-holder.—*Narasimhulu* v. *Adiappa*, 18 M. 212.

Property attached yielding a revenue or producing interest or dividends is within the meaning and contemplation of all garnishee orders under this rule; and such revenue, interest or dividend payable *in future* can be attached under the same rule; *Umabai Shankar* v *Amritrao*, 39 B. 80: 17 Bom. L. R. 133: 28 I. C. 18.

"Custody of Court."—This rule does not allow of an anticipatory attachment of money expected to reach the hands of a public officer, but applies only to moneys actually in his hands —*Tulaji* v. *Valabhai*, 22 B. 39 (Followed in *Raja Padmanund* v *Rama Prasad*, 14 C L. J. 127) The principle of the rule is that what is attached must be something in existence and not merely *in futuro*, *Umabai* v. *Amrit Rao*, 39 B. 80. *See* also *Takurdas* v. *Joseph*, 44 C. 1072: 25 C. L. J. 595: 21 C. W. N. 887; where all these cases have been followed and discussed. Where the fund consisted of surplus sale proceeds payable to defendant mortgagor and it was attached before money was paid in to Court; *held* the attachment was bad as it was before it came in the custody of Court; *Tiruvengadiah* v. *Tiruvengadiah*, 26 M L J. 364: 24 I C. 617.

This rule also applies to property in the custody of the same Court which executes the decree; *Surjamull* v *Ramchandra*, 20 C. W. N. 412: 28 I. C. 123.

Property in Receiver's Hands.—An attachment of money in the hands of the receiver, without previous permission or sanction of the Court, is improper and irregular, as he is an officer of the Court.—*Mahommed Zohuruddin* v. *Mahommed Nooroodeen*, 21 C 85 *See* also *Khan* v. *Alli Mahomed*, 16 B 577.

A receiver is an officer of the Court and money in his hands is regarded as being in the custody of the Court Therefore the only Court which has jurisdiction to decide disputes relating to such money is the Court in whose custody the money is and not any other Court, *Rani Debendra Bala* v *Chandra Sekhar*, 1 Pat L J 449 35 I C 589

Attachment of Dividends in Official Assignee's Hands.—The Official Assignee being a public officer within the meaning of s 2 (17) of the Code moneys in his hands, payable by way of dividend to a creditor of an insolvent, may be attached in execution of a decree against the creditor under this rule, *Hardayal* v. *Haji Adam*, 49 B 638 87 I C 1011 A. I R. 1925 B. 344

Determination of Question of Title or Priority.—An attachment under this rule does not confer any priority upon the person at whose instance it was made, since at most it is an injunction relating to the fund, *Katum Sahiba* v *Hajee Badsha*, 38 M 221 29 I C 239, *see* also *Thakurdas* v. *Joseph*, 44 C 1072 But see *Visvanathan Chetty* v *Arunachellam Chetty*, 44 M. 100 · 60 I. C. 302, which has overruled the case reported in 38 M 21 and where the case reported in 44 C 1072 has been dissented from. *See* also *Nachiappa* v *Subbier*, 46 M 506 72 I C 820 A I R 1923 M 505

The proviso is merely intended to mean that any question of title or priority is to be determined by the Court in which, or in whose custody the property is, and not by the Court which made the order of attachment. *Quaere* —Whether an order under this section is final or not. *Gopee Nath*

v. *Achcha Bibee*, 7 C. 553 9 C. L. R. 395. Question of priority is not to be determined by a regular suit; *Dabee Pershad* v *Gujadhar*, 20 W R. 73.

Attachment under decree of High Court, of property already attached under decree of S C. Court, *held* that the S. C. Court was the only Court to decide the question of priority.—*Jeynarayan* v *Ismail*, 19 B. 710

A suit will lie to set aside an order such as is contemplated by the proviso to this section, *Tikum Singh* v. *Sheoram*, 19 C. 286

If attached funds are in the hands of the receiver, the Court to decide a dispute as to priority between mortgagee and holder of money decree, is the Court in whose custody the money is, *Rani Debendra* v. *Chandra Sekhar*, 35 I C 580 1 Pat L J 449

Effect of Attachment under this Rule on any Previous Attachment.—If there was a previous attachment, the mere fact that the respondent by way of abundant caution prayed for formal attachment under this rule, would not take away the effect of the former attachment; *Surjamull* v *Ramchandra*, 20 C W N 412

An attachment order takes effect only from the date of actual promulgation and not from the date the order itself was served, *Simrick* v *Radharaman*, 32 I C 276.

Attachment of decrees.

53. (1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made,—

(a) if the decree were passed by the same Court, then by order of such Court, and,

(b) if the decree sought to be attached was passed by another Court, then, by the issue to such other Court of a notice by the Court which passed the decree sought to be executed, requesting such other Court to stay the execution of its decree unless and and until—

(i) the Court which passed the decree sought to be executed cancels the notice, or

(ii) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree.

(2) Where a Court makes an order under clause (a) of sub-rule (1), or receives an application under sub-head (ii) of clause (b) of the said sub-rule, it shall, on the application of the creditor who has attached the decree or his judgment-debtor proceed to execute

the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1), the attachment shall be made, by a notice by the Court which passed the decree sought to be executed to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and, where such decree has been passed by any other Court, also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent.

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force. [S. 273.]

COMMENTARY.

Alterations and Scope.—This rule corresponds to 273, C P. Code, 1882, with several additions and alterations. The most important change is the addition of the words "*or sale in enforcement of a mortgage or charge*" in sub-rule (1) The present rule has been made applicable to money-decrees as well as to mortgage-decrees The addition seems to have been made to meet those cases, in which it was held that a [illegible] e within the meaning of s 273 [illegible] 6 C W N. 5, *Macgnaghten* [illegible] *Delhi London Bank* v *Partab*, 28 A. 771 F. B., *Jogendra* v *Hiranya*, 2 C L J 499. The old section has been recast and re-arranged with some changes in the details of procedure to be followed when attaching a decree.

Cl. (a) of sub-rule 1, sub-rule (2), (3) and (6) are new

This rule applies to attachment before judgment; *Venkayya* v *Lakshmiah*, 22 M L J 394.

Decree for Money.—The following have been held to be money-decrees —Decree for mesne profits to be ascertained; *Sharodamoyee* v *Wooma*, 8 W R 9 Decree for arrears of rent, *Banku Behary* v. *Shyama Charan*, 25 C 322 Decree for dissolution of partnership; *Sidlingappa* v. *Sankarappa*, 27 B 556 (16 B 522 and 577 and 21 C. 85, *referred to*) Attachment may be made after judgment though decree not drawn up as the decree when drawn up relates back to the time of judgment, *Ram Kanai* v. *Purna Chandra*, 34 C. L J 494

It has been held that money-decrees and mortgage-decrees are not to be realized by sale, *Vithal Das* v *Subraya*, 45 B. 343; *Maung Lun Bye* v. *Maung Po Nyun*, 1 R 360 · A I. R. 1924 R. 21. They can only be realized in the manner prescribed by sub-rule (2). *Sultan Kuar* v. *Gulzari Lal*, 2 A. 290, *Tiru Vengada* v *Vythilinga*, 6 M. 418. *Jotindra Nath* v. *Dwarka Nath*, 20 C 111; *Sidlingappa* v. *Sankarappa*, 27 B. 556; there is no provision made in this rule for the realization of a decree for partition, or for foreclosure of a mortgage, or a decree for specific performance These decrees are to be realized by a sale thereof; *Gopal* v. *Joharimal*, 16 B 522; *Barhma Din* v *Baji Lal*, 26 A. 91. But for the special procedure prescribed by sub-rule (2) of the present rule for the realization of money-decrees and mortgage decrees, they would have been attachable and saleable under s 60 as coming within the expression " all other saleable property " The special procedure prescribed by sub-rule (2) is therefore an exception to the general rule that all properties when attached can only be realized by a sale thereof.

Mortgage-Decrees.—The addition of the words " *or for sale in enforcement of a mortgage or charge* " in sub-rule (1) now makes the rule applicable to mortgage decrees, and it is now clear that mortgage-decrees are to be attached and realized in the same manner as money-decrees

This rule lays down that the holder of a decree sought to be executed by the attachment of another decree for sale, in enforcement of a mortgage or charge, shall as the representative of the holder of the attached decree, be entitled to execute in any manner lawful to the holder thereof. *Kuppusami* v *Subboraya*, 22 M L J 161 · 13 I. C. 224

Sub-rule (4). Attachment of Other Decrees.—The right, title, and interest of judgment-debtors, in a decree for possession and mesne profits was held liable to be attached and sold in execution of a money-decree— *Ganesh Lall* v. *Shamnarain*, 6 C 213

A certificate under Or XXI, r 71, certifying deficiency in purchase price, being declared by that rule to be in effect " a decree for the payment of money " for the purpose of the method of its recovery, such a certificate is attachable as a decree for the payment of recovery under the provisions of this rule, *Abdul Jabbar* v. *Sita Ram*, 21 A. L J. 385 A I R. 1926 A. 379. 95 I. C. 1033.

The right, title, and interest of a judgment-debtor in a partly executed decree for possession of a moiety of a taluk is liable to be attached and

A decree of a Revenue Court is not capable of attachment and sale under this section, in execution of a Civil Court decree; such decree stands in the position of an ordinary debt, and may be dealt with under s. 60 —*Aulia Bibi* v. *Abu Jafar*, 21 A. 405 (16 A. 496, *referred to*). See *Gholam Mohamed* v. *Indra Chand*, 7 B. L. R. 318: 15 W. R. 34, where also *Gholam Mohamed* v. *Indra Chand*, 7 B L R. 318· 15 W. R. 34, where it has been held that a decree of a Court falls within the description of " other property."

Decrees Passed by the Same Court.—Under the Code of 1877 this was held to apply also to cases where the decrees were passed by different Courts but were being executed by one Court; *Sultan* v. *Gulzari*, 2 A. 290.

Irregular Attachment.—The defect in the attachment in consequence of the order being passed by the executing Court, instead of by the Court which passed the decree, is not such a jurisdictional defect as to make the order void —An objection to the issue of notice under r. 53 (2) is one that the parties could waive—*Per* Sundara Iyer, J., in *Arumuga* v. *Yogamba*, 17 I. C. 523: 13 M L T. 227

Effect of Attachment.—The attachment of a decree under this rule has the effect of staying further execution and debarring the Court from proceeding further until that bar has been removed in either of the ways specified therein. Where a sub-Judge after receiving an attachment order from a Munsif's Court, returned it on the ground that it did not state the amount of the decree and proceeded with execution which resulted in the sale—*held* that the Sub-Judge was bound to comply with the order and had no jurisdiction to proceed with the sale —*Manik Lal* v *Bonomali*, 32 C. 1104· 10 C W. N. 193· 3 C L J. 27

The attaching judgment-creditor is the only person who can execute the decree, and the original holder of the decree is precluded from executing his decree, unless the Court which issued notice cancels the notice. *Thachakavil* v. *Arapayi*, 21 M L J 577 9 I C 786 (14 M L J 265: 2 M 417· 24 C 778, *referred to*)

The only two persons who can take out execution are the holder of the attached decree or the attaching creditor The assignee from the holder cannot apply for execution; *Thiruvengadam* v *Doredla*, 13 I C 659; 11 M. L. T 144.

If after attachment of a decree, the judgment debtor of the attached decree pays into Court all moneys due under the attached decree, interest on the attached decree as well as on the decree executed ceases to run, *Madan* v. *Bishnupada*, 35 C. L J 109 61 I C 780

Sub-rule (3). A person Attaching Decree is a Representative of the Decree-holder.—A person attaching a decree is representative of the decree-holder within s 47 and in every case is entitled to enforce execution of the decree which he has attached —*Peary Mohan* v. *Romesh*, 15 C. 371. (*Referred to* in *Adhar* v. *Lal Mohan*, 21 C. 778) *See* also *Brojonath* v *Gaya Sundari*, 6 C L J 141 and *Rangasami* v *Parasami*, 17 M. 58, where it has been held that attaching decree-holder is entitled to take all steps necessary for the realization of the proceeds of the attached decree by the Court *See*, however, *Sami Pillai* v *Krishna Sami*, 21 M 417, in which a different view seems to have been taken.

A decree-holder purchased immoveable property at an auctio held in execution of the same, but before the sale was confirmed decree was attached by a judgment-creditor of the decree-holder. that the effect of the attachment was to place the attaching creditor i position of the decree-holder so as to entitle him to have the sale firmed.—*Boharia Rudrani Koer* v *Ram Pertap*, 11 C. W. N. 158

Where A in execution of a decree against B attaches, under section, a decree which B holds against a company in liquidation Court will direct the liquidator to recognize A as the representative and allow him to prove for the decree-debt in the name of B, a *receive and apply dividend payable to B in satisfaction of A's* judg debt subject to the rights of other attaching creditors to rateable dis tion —*Sesha Ayyar* v. *T S Sugar Mill, Co.*, 30 M. 533.

Sub-rule (6) Adjustment of Attached Decree.—This sub-rule is and gives effect to the decision in *Gopal* v. *Jaharimal*, 16 B. 522 XXI, r 53 (6) applies also to cases where the attachment was already before judgment, *Gorigala* v *Mugunta*, 14 I. C. 285 · 22 M J 394.

A decree-holder attached a decree obtained by his judgment-d against a third person The Court directed him to execute the atta decree. The decree-holder applied several times but the applications *struck off for default Judgment-debtor then paid a sum to* his de holder *Held* that rule 57 was inapplicable The attachment was sisting and the payment was invalid, *Prem* v. *Habibullah*, 24 I C (16 B 522, *relied on*)

Attachment of immoveable property.

54. (1) Where the property is immoveable, the attach shall be made by an order prohibiting the j ment-debtor from transferring or charging property in any way, and all persons f taking any benefit from such transfer or charge.

(2) The order shall be proclaimed at some place on or jacent to such property by beat of drum or other customary m and a copy of the order shall be affixed on a conspicuous par the property and then upon a conspicuous part of the court-ho and also, *where the property is land paying revenue to the* Gov ment, in the office of the Collector of the district in which land is situate. [S. 27

COMMENTARY.

Alterations.—In sub-rule (1) the words "*from taking any be from such transfer or charge*" have been substituted for "from recei the same from him by purchase, gift, or otherwise." In sub-rule (2) words "*upon a conspicuous part*" have been added before "C house."

Immoveable Property.—Or XXI, rr. 53 and 54 make it quite c that a decree for sale in enforcement of a mortgage is not to be regar

as an attachment of immoveable property within the meaning of those Orders—*Surbani* v. *Puran*, 8 A. L. J. 1327.

Attachment of Immoveable Property.—A decree for redemption is not attachable under this rule, but under r. 53 (2); *Naigar Timapa* v. *Bhaskar*, 10 B. 444. The equity of redemption of a mortgagor is immoveable property within this rule; *Parashram* v. *Govind*, 21 B. 226; *Barendra* v. *Martin & Co.*, 33 C L. J. 13: 62 I. C. 167. Bequest to a Parsi widow, of income of immoveable property, with obligation of maintaining and educating children, is an interest in immoveable property, under this rule.—*Natha Kerra* v. *Dhunbaiji*, 23 B. 1.

An attachment is not complete until the procedure provided by this rule has been fully followed; *Kanailal* v. *Ahed Bux*, 39 I. C. 562; *see* also 42 M. 844: 53 I C. 207 F. B. But once it is made under this rule it is immaterial that the Collector did not enter it in his Touzi Register; *Ram Khelwan* v *Sunder*, 34 I. C. 34. An omission to affix a copy of an attachment order on a conspicuous part of the Court house or to post it in the office of the Collector or to post it in some conspicuous part of the land attached is a fatal defect which invalidates an attachment of land; *Attar* v. *Ghulam*, 60 I. C. 527. But see *Jodhan* v. *Kapil Nath*, 69 I. C 563 · A. I. R. 1923 Nag. 78, where it was held that omission to post a copy of the order of attachment in the office of the Collector, as required by Or. XXI, r. 54 (2), does not render the attachment invalid if all the other formalities prescribed by that rule have been observed.

This rule does not apply to property of the nature of debt secured by hypothecation bond. The preponderance of judical opinion is in favour of the view that mortgaged debts are moveable properties; *Nataraja* v. *S. I. Bank Ltd*, 10 M L. T. 503. 2 M. W. N 590 (15 A. 134· 12 C. 546; 20 C. 805 6 C W N 5, *referred to*).

See notes to s. 16.

Attachment of Mortgage Debt.—*See* notes to r 46, under the heading "Debt Not Secured by Negotiable Instrument—Mortgage Debt"

In the case of a purely usufructuary mortgage, where no debt was payable by the mortgagor, the procedure should be by attachment of the interest under this rule Or XXI, r 46 does not apply; *Manilal* v. *Motibhai*, 13 Bom. L. R. 233. 10 I C. 812. The substantial difference between attaching the interest of a usufructuary mortgagee under this rule and under r. 46 is that under r 46 the mortgagor would have received a written order of the Court prohibiting him from making the payment to the mortgagee; and under this rule he would receive no such order nor any notice of the attachment; *Ramasami* v *Srinivasa*, 39 M 389. 28 I. C. 284: 28 M. L. J 338

Proof of Attachment.—An attachment under this section must be strictly proved, mere production of order sheet is not sufficient —*Gonesh Pershad* v. *Brij Behary*, I C L J 565.

Proof of Service of Prohibitory Order.—When the prohibitory order under sub-rule (1) was found to be duly served on the judgment-debtors, but the return to prove the service, having been destroyed, could not

be produced to prove the service, it was held that the failure to produc the return did not render the execution sale invalid; *Muhammad Abdi* v *Akram*, 22 A L J 703 · 83 I. C 878: A I. R. 1924 A. 747.

Effect of Attachment.—Where an attachment of land was made b written order under this rule the conditions prescribed had to be fulfille in order to render any private alienation of the property attached nul and void—*Indra Chandra* v *Agra and Masterman's Bank*, 1. B. L R S N 20: 10 W R 264 *See* also, *Nur Ahmad* v. *Altaf Ali*, 2 A. 58

Where no order for attachment of the property is passed in favour o the decree-holders in the manner provided, their claims are not entitle to the protection conferred by s. 64 against private alienations; *Gangadr* v. *Kushali*, 7 A. 702.

Attachment by prohibitory order under this section does not con stitute a dispossession of the party in actual possession of the property—*Narayanrav* v *Damodar*, 4 B 529

An attachment only prevents alienation, but does not confer title—*Moti Lal* v *Karrabuddin*, 25 C 179, P C (Referred to in *Lachmidayal* v *Har Danni Lal*, 25 A 347. p 350).

An execution creditor does not by attachment acquire such an interest in the attached property as will enable him to maintain an action for its wrongful removal The rights of attaching creditors are regulated by the C P. Code, and the provisions of s. 91 (*f*) of the T. P. Act, 1882. do not apply to them The remedy, if any, of the attaching creditor is by proceedings in execution and not by separate suit.—*Karappa Chetti* v *Kandasami*, 30 M 207 17 M L J. 84 (27 A. 278 *doubted*) On appeal 30 M. 413 · 17 M L J 334, where it has been further held that where attached property is removed by a third party the decree holder must enforce his claim by a separate suit and not in execution *See* also 26 M 673

Effect of Re-attachment.—A re-attachment of property after decree does not imply an abandonment of the attachment obtained before decree.—*Ram Krishna* v *Surfunnissa*, 6 C. 129; *Kosuri Surparaju* v *Mandapaka*, 26 I. C. 81. But when an application is made for attachment of property which has been previously attached under the decree, a Court may presume that the prior attachment had ceased before the application for a second attachment was made—*Hafiz Suleman* v. *Abdullah*, 16 A. 133 (12 B L. R 411 *referred to*)

Absence of, or Defective, Attachment—Irregularity.—If in the attachment order there be any incorrect description as to the right and interest of the judgment-debtors, in the property attached, the attachment is not good in law and does not affect actual rights and interests—*Hargu Lal* v. *Mahommad Raza*, 13 A 119

An attachment of immoveable property is not voidable, merely because all the forms prescribed in this section have not been followed, when the irregularities complained of are immaterial.—*Koranee Dassee* v. *Bhuban Mohan*, 6 W. R. Mis 52.

Where copy of order for attachment was not fixed up in the Collector's Office: *held* that the defect in the mode of attachment might

render the attachment ineffectual for the purpose of avoiding alienations made, but the attachment was effectual against the judgment-debtor, and the defect did not afford a ground for declaring the execution proceedings ineffectual —*Rai Balkishen* v. *Rai Sitaram*, 7 A. 731.

Omissions to have a drum beaten as required is a material irregularity so as to render a sale held in execution of a decree liable to be set aside —*Trimbak Ravji* v *Nara*, 10 B. 504.

Where revenue-paying lands were described as revenue-free lands in the order of attachment: the misdescription protected the *bona fide* purchaser from having the alienation set aside as void under r. 64 —*Gumani* v *Hardwar*, 3 A 698.

If there had been no attachment or a defective attachment, but valid order for sale had been made during the life-time of the judgment-debtor, the effect will be as that of an attachment followed by an order for sale —*Peari Lal* v. *Chandi Charan*, 11 C. W. N. 163: 5 C L. J. 80.

After confirmation of sale and grant of certificate to the purchaser, the sale is not to be considered as a nullity merely by reason of the absence of any attachment.—*Kishory* v. *Mahomed*, 18 C. 188 (Followed in *Hari Charan* v. *Chandra Kumar*, 34 C. 787, p. 802). *See* also, *Sharoda Moyee* v. *Wooma Moyee*, 8 W. R 9 and *Sheodhyan* v. *Bholanath*, 21 A. 311, where it has been held that the absence of an attachment, prior to the sale of immoveable property in execution of a decree amounts to no more than a material irregularity; but is not sufficient, unless substantial injury is caused thereby to vitiate the sale (10 A 506; 11 A. 333; 21 C. 66, P C., *referred to*). But see *Mahadeo Dobey* v. *Bhola Nath*, 5 A 86, where it has been held that a regular attachment is an essential preliminary to a sale in execution of a money decree. There is no provision in Act X of 1859 under which the sale of a jote in execution of a decree is liable to be set aside on the ground of non-attachment and non-proof of publication of the sale proclamation.—*Palit Sahu* v. *Hari Mahanti*, 27 C. 789

Invalid Attachment.—An attachment is null and void, if at the time of attachment the decree under which it was made had been set aside and was not in existence The fact that a renewed decree was subsequently passed in terms of the original decree, could not make the attachment valid.—*Chettiattil Muhamed* v. *Kunhi Koru*, 29 M. 175

" Order shall be proclaimed " etc.—This section does not require that the sale proclamation should be served in each of the villages comprised in the property to be sold. The word " *property* " evidently refers to each. " lot " to be sold separately from the rest Though it is a sound rule to follow, *viz*, to serve a separate proclamation in each of the villages embraced in the same process when they are at such a distance from one another that there is no moral certainty of communication to persons on or interested in the one of what is publicly done on the other, the fact that the processes were not served in each does not necessarily constitute an infringement of the provisions of this section.—*Moulvi Abdul Kashem* v *Benode Lal*, 12 C. W N 757 (11 C. 74 *referred to*; 12 B. 368 *commented on*). In *Tripura Sundari* v *Durga Charan*, 11 C. 74, it has been held that, where distinct properties are proclaimed

for sale, the omission to affix a copy in each of such properties amounts to irregularity. But in *Pedro Antonio* v. *Jaibhoy Ardeshir*, 12 B. 368, it has been held that a mere breaking up of an area into lots does not necessarily make it several distinct properties for the purposes of a proclamation of attachment or sale. *See* r. 67 (3) and notes.

It is necessary that a copy of the sale proclamation should be affixed to some conspicuous place on the property attached —*Kalytara* v. *Ram Coomar*, 7 C. 466 9 C. L R. 114.

The proclamation of sale, required to be made at some place adjacent to the property to be sold, and the affixing up of a copy of the order in a conspicuous part of the property, are acts which must precede the posting of the notices in the court house; *Megh Lall* v. *Shib Pershad*, 7 C. 34: 8 C. L. R. 369 *See* also *Mahendra* v. *Gopal*, 17 C. 769 (779). *See*, however, *Ram Chander* v *Kamta Prosad*, 4 A. 300.

In order to constitute a valid attachment, the proclamation described in the second portion of R. 54, Or. XXI, must be made; *Mularam* v *Jivinda Ram*, 4 L 211. 5 Lah L J 200: 72 I. C. 452.

Irregularity in Publishing Sales.—*See* r 90, and notes.

Attachment Not Necessary in Mortgage-decree.—If the decree contains a direction for sale of the mortgaged premises, it is not necessary to issue an attachment The direction for sale in the decree is in itself sufficient authority for the sale —*Daya Chand* v *Hem Chand*, 4 B. 515 *See* also *Pedro Antonia* v. *Jaibhoy*, 12 B 368, and *Jogendra* v *Debendra*, 26 C. 127, page 129, where it has been held that under the Act no attachment is necessary, and *Dosibhai* v. *Iswardas Jagjivandas*, 9 B 561, affirmed by the P. C in 15 B. 222

The omission to cause an attachment to be made in execution of a decree for the realization of a mortgage-debt, does not affect the validity of a sale of the mortgaged property in execution of such decree —*Tincowri* v. *Shib Chandra*, 21 C 689, *Muniappa* v *Subramania*, 18 M. 437

"Land paying Revenue to Government."—*Shrotriyam* villages in the Madras Presidency are lands paying revenue to Government within the meaning of this rule, *Ganamma* v *Ketiredddi*, 46 M. 736. A. I R. 1924 Mad. 217: 75 I C 369; *Yar* v *Bose*, 7 Lah. L. J. 501: A. I. R 1925 Lah. 583: 88 I C. 321.

55. Where—

Removal of attachment after satisfaction of decree.

(*a*) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or

(*b*) satisfaction of the decree is otherwise made through the Court or certified to the Court, or

(*c*) the decree is set aside or reversed, [S. 275.]

the attachment shall be deemed to be withdrawn, and in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule. [New.]

COMMENTARY.

Alterations.—The words " *or certified to the Court* " in cl (*b*) and the last para. are new. As to certifying payment, *see* rule 2 The effect of the added para. is that on the happening of any of the events in clauses (*a*), (*b*) or (*c*), the attachment shall be deemed to be withdrawn, *i.e.*, it shall cease of itself. Formerly an application and an express order of the Court were necessary. It is now optional with the judgment-debtor to make an application for same

Cases.—Part satisfaction of decree does not effect withdrawal of attachment and does not defeat the claims of those who have applied for rateable distribution; *Khub Chand* v *Niadarmal*, 10 A L J 165 Where property has been attached, an order dismissing an application for execution but not specifically withdrawing attachment or declaring the decree incapable of execution does not raise the attachment; *Bank of Upper India* v. *Sheo Prasad*, 19 A 482. The death of judgment-debtor does not affect the attachment, *Sheo Prasad* v *Hira Lal*, 12 A 440. In the case of the death of a judgment-debtor of a joint *Mitakshara* family, the attachment does not cease even though the estate passed to the surviving members of the family; *Beni Pershad* v *Parbati*, 20 C. 895.

Sums paid into Court under this rule are not assets under s 73 for rateable distribution; *Sorabji* v *Kala Raghunath*, 36 B 156. 18 Bom. L. R. 1193.

Revival of attachment.—Where a decree under which an attachment has been made is set aside on first appeal but restored on second appeal, the attachment is revived.—*Parameshwar Din* v *Debi Prasad*, 48 I. C 386

Satisfaction in part.—Where satisfaction of the decree *in part* only is certified, the attachment cannot be deemed to be withdrawn; *Khub Chand* v. *Niadar*, 15 I C 677 10 A. L J 165.

Order for payment of coin or currency notes to party entitled under decree.

56. Where the property attached is current coin or currency notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same. [S. 277.]

COMMENTARY.

The word " *current* " has been added before the word "coin " The effect seems to be that if the coins attached be not current coins, they cannot be paid over to the decree-holder, but should be sold, as other moveable properties

57. Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease. [New.]

Determination of attachment

COMMENTARY.

Object and effect.—The purpose of this rule is to put an end to doubts which from time to time have arisen as to the continuance of an attachment by reason of the practice of "striking off proceedings" or "removing proceedings from the file," for which there was no justification under any of the earlier Codes, *Duwan Chand* v. *Bedha*, 52 I C 291

It has been inserted to set at rest a long mooted point upon which there was much diversity of judicial opinion. The conflicting rulings have been noted under s. 64 and it has overidden all those cases in which a view contrary to this rule were expressed. The effect of this rule would be that all previous attachments shall cease with the dismissal of an application for execution, and the judgment-debtor will get sufficient opportunity to make a private alienation of his property, if once an execution case be dismissed under this rule. This rule has put some difficulty in the way of decree-holders realizing money. Under the old Code it was settled by a long course of decisions that, when property has once been attached in execution of a decree, an order merely dismissing an application for execution, which order does not contain specific words withdrawing the attachment, will not have the effect of raising the attachment *Quaere*—Although upon the dismissal of an application for execution the attachment shall cease under this rule; whether the Court under the powers vested in it by section 151 of the Code and under the circumstances of any particular case, and for the ends of justice, can make a special order maintaining the attachment, where it considers that the judgment-debtor is likely to alienate the property to defraud the decree-holder?

Under the old Code execution cases were "struck off" for relieving the congestion of the file or some fault of the applicant *i.e*, default in appearance, failure to deposit process fees, or to file copies of necessary papers, or for not taking any steps. The effect of such "striking off" was considered in numerous cases (see *Dhonkal* v. *Phakkan*, 15 A 84; *Thakur* v. *Fakirullah*, 22 I A 44, *Srinivasa* v. *Sami Rau*, 17 M. 180; *Bank of Upper India* v. *Sheo Prasad*, 19 A 482 and other cases noted under s 64, under the heading "Effect of striking Off Execution Proceedings") The decisions were not harmonious and in numerous cases it was held that such an order did not necessarily put an end to the attachment and it was open to the decree-holder to revive the execution proceedings and continue it from the point where it has previously stopped This rule sets at rest the various interpretations that were put on the previous practice Under this Code there can be no "*striking off*" of applications. If there is any default of the decree-holder, the applica-

tion must be *dismissed* and the attachment ceases forthwith, even though the Court and the parties intended that the attachment should subsist; *Namuna* v. *Rosha Miah*, 38 C. 482: 15 C. W. N. 428; *Dildar Hosain* v. *Sheo Narain*, 41 A. 157: 49 I. C. 113; *Fateh Din* v. *Qutab Din*, 3 L. 7: 67 I. C. 543: A. I. R 1922 Lah. 108.

A revival of execution proceeding does not operate as a revival of the attachment, so as to prejudice the rights of strangers who have in the interval acquired a title to the property; *Patringa* v. *Madhavanand*, 14 C. L. J. 476.

Applicability.—This rule can apply only to orders of dismissal passed after the Act came into force; *Vardiparthi* v. *Kosrukonda*, 27 I C. 568 It cannot have a retrospective effect; *Khande* v *Nara Subba*, 27 I. C 792, *see* also 31 I. C. 911. This rule does not apply to a case where a Court strikes off an execution proceeding or consigns the record to the record room to suit its own convenience, or to reduce its pending file without any default having been committed by the decree-holder or without its having been asked to take any further steps necessary for proceeding with it; *Bijai Saran* v. *Deo Kishen*, 24 A. L. J 901: 97 I. C. 702: A. I. R. 1926 All. 734. It was also held in the above case that an application which is in substance as well as in form an application to revive a pending execution which had been suspended for no act or default of the decree-holder, is not an application to initiate a fresh appli cation, and the effect of such an application, if granted, is that the proceeding is continued from the stage at which it was left An order restoring an attachment relates back to the date when the attachment is first made, and its effect is to invalidate any private sale made during the subsistence of that attachment

Attachment Before Judgment.—The provisions of this rule have no application to attachment before judgment under Or. XXXVIII It applies only to attachment "*in execution of a decree*" An order for attachment before judgment subsists for the benefit not only of the first application for execution but also for subsequent application; *Gones Chandra* v. *Banuari*, 16 C. L. J. 86 14 I. C 345: *Banuddin* v *Arunachalla*, 22 I. C. 351· 26 M L J 215, *Bohra Alkhey Ram* v. *Basant Lal*, 46 A. 891: 80 I C 106: A I. R 1924 All. 860. But see *Meyyapachettiar* v. *Chidambaram*, 47 M 483 83 I C 91. A I R. 1924 Mad 490, in which it was held (*following* 44 M 902 and *overruling* 42 M 1) that the provisions of this rule apply to attachment before judgment which become converted into attachment in execution when application is made to execute the decree passed in the suit; hence upon the dismissal of such an application by the decree-holder's default, the attachment made upon judgment ceases.

"Default."—There is no reason for giving a restricted meaning to the word "*default*" and confining it to default in appearance, in the payment of process fees, or in the production of documents Omission to serve notice under r. 66 is a default; *Namuna Bibi* v. *Roshan*, 15 C. W N. 428; 9 I. C 558. 38 C 482; *Lakhpat Rai* v. *Mayya Mal*, 75 I C. 821. So also is omission to file proclamation; *Mandhyan* v. *Badram*, 17 C. W. N. 204.

Where an execution sale is set aside for any reason other than the decree-holder's default, the antecedent attachment is revived so as to support a second application for execution of the decree by sale of the same property, and no fresh attachment is necessary; *Mahabharat v. Surjakanta*, 3 Pat. L J 310 45 I C 598, *Venkatesuarayyan v. Ananatha*, 45 M L J. 315 75 I C 491 A I R 1923 Mad. 703.

A decree-holder in execution of a decree attached the properties of the judgment-debtor but subsequently accepted a payment made by him towards the satisfaction of the decree and agreed to give time for payment of balance of the decree amount. Thereupon the court dismissed the application after recording the part payment *Held* that the effect of the dismissal of the execution application was to put an end to the attachment and that the dismissal was due to the default of the decree-holder. No doubt the Court has no power to dismiss an application for execution unless there is default on the part of the decree-holder but, as has been held, default means a failure to do what one is legally bound to do, *Jai Krishna v Bibi Sokhia*, 4 Pat L T 418 · 71 I. C. 881.

Cases.—Where, by mistake of the court, an application for execution against property under attachment was dismissed, but the decree holder obtained a review and the executing Court was directed to proceed, and there was no order removing the attachment, *held* that the attachment subsisted and was valid or against a sale made by the judgment-debtor previous to the review ; *Aziz Baksh v Kaniz*, 34 490: 15 I C. 49

The dismissal of an execution application under this rule has the effect of vacating a prior order passed under Or XXI, r. 23, ordering execution to proceed, *Penakaruppan v. Manikka*, 2 L. W. 1055 (24 A 282, *dissented from*).

An attachment ceases upon the dismissal of the application for execution. A subsequent application for sale only is defective but curable under s. 153 by amendment, *Kunchapudy v Mallikarjuna*, 25 I. C. 883.

Where after attachment by a court of first instance, the sale was stayed by an order of the appellate Court and the first Court thereupon dismissed the application *held* that the attachment subsisted ; *Vahakath Puthiah v. Thachar*, 35 I C 240 3 L. W. 601 (38 C. 482 *not folld*, 34 A. 490 *approved*).

After decree-holder attached a property, a claim was filed and the Court recorded the following order on the execution petition: "Decree-holder's Vakil states that he will file a fresh application as the claims petition is pending Struck off" The claim was allowed and decree-holder filed a suit and succeeded in it More than three years after the previous application, decree-holder applied for execution. *Held* that the former attachment subsisted and this Rule did not apply ; *Karaturi v Gopi Setti*, 21 M. L. T 88.

"**Striking off.**"—Where a sale proclamation was not made owing to the laches of the decree-holder and an order was passed "proclamation not filed, struck off" *Held* that it amounted to a dismissal of attachment ; *Mandhyan v. Badram*, 17 C. W. N. 204: 18 I. C. 441.

INVESTIGATION OF CLAIMS AND OBJECTIONS.

58. (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit :

Investigation of claims to, and objections to attachment of, attached property.

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

Postponement of sale.

[S. 278.]

COMMENTARY.

If an order is passed after investigation under the rule, the party against whom such order is passed may bring a regular suit under, r. 63. As to when an order is said to be passed on investigation, *see* notes to r 63, under the heading " Limitation of One Year When Applies and When does Not."

Object and Scope.—The object of this rule is to give a claimant a speedy and summary remedy and not to deprive him of his remedy by suit. The summary remedy given by this rule is alternative to the remedy by way of suit ; *Kanhaya Lal v. National Bank of India*, 40 I A. 46: 40 C. 598 ; *Raghunath* v. *Sarosh*, 23 B. 266 , *Krishnabhupati v Vikrama*, 18 M. 13, 17 , *Sundar Singh* v. *Ghasi*, 18 A. 410 , *Bibi Aliman* v. *Dakeshwar Prasad*, 1 C L J. 296

Claims may be preferred in execution proceedings, by parties to the suit or their representatives or by third persons All objections raised by *parties to the suit* or their representatives come under s 47, and the objector should proceed by an application under that section, a separate suit for the purpose is barred Claims preferred to attached property by *third persons* come under this rule It is important to note the distinction, as orders passed under s 47, allowing or disallowing an objection to attachment, is a " decree " and is therefore *appealable*, whereas an order rejecting a claim under this rule is not appealable; *Abdul* v. *Muhammad*, 4 A. 190, *Dayaram* v *Gorardhan Das*, 28 B 458 An unsuccessful claimant has the option to institute a separate suit for establishing his title under r. 63 and if this is not done, the order dismissing the claim is conclusive; *Rahim Bux* v. *Abdul Kader*, 32 C. 537, *Sardhari Lal* v *Ambika*, 15 C. 521: 15 I. A. 123; *Rajaram* v. *Raghubansman*, 24 C. 503. There was

a diversity of judicial opinions as to whether an objection or claim prefer by a party or his representative come under this rule or s. 47, when t objection is based on the ground that the property is held by him on beh of a third party as shebait, trustee etc. As to this see notes to sec under the heading "Objection by Trustee or Shebait When Falls Wit this Section.

If a Court is invited by a decree-holder to sell property not duly attac ed and the Court is apprised of that fact by a person claiming to be intere ed therein, it has inherent power to investigate the matter; *Sarirama Meherban*, 13 C. L J 243: 9 I C. 918.

The words of r 59 show that a claim may be made by a person wl has *some interest* in the property, although he is not in possession mortgagee in possession is in possession partly on his own account ar partly on account of the mortgagor i e., to the extent of his interest. Tl Code requires the Court to investigate the claim of a mortgagor in such case and to the extent of the mortgagor's interest; *Nga Tok v Subran ahim*, 10 I. C 991. *See also Bhagwan* v. *Raj Nath*, 9 A L. J. 474. I I C. 790

An usufructuary mortgagee cannot prefer a claim under this rule but h may come in under r 100, *Biswanath v Lingaraj*, 1 Pat. 159.

Objections or Claims by Parties or their Representatives.—*See* s 47 and notes

Objections or Claims by Trustee or Shebait.—Where a decree is passed against a judgment-debtor in his individual capacity and he take an objection to attachment of certain property in his possession upon the ground that, although it is in his possession, it is not in the possession of him in his personal capacity but in possession of him as a manager of endowed property, the question is one between the parties to the suit in which the decree was passed relating to the execution, discharge or satisfaction of the decree, and objection would lie under s 47 and not under Or. XXI, r 58; *Shah Naim Ata v Girdhari Lal*, 4 O W N. 102: A I R. 1927 Oudh 120 *See* notes under s. 47.

"Shall proceed to Investigate."—It is the duty of the Court to investigate Where a munsif improperly *refused to investigate* a claim under this rule, he was held to have refused to exercise a jurisdiction which he was bound to exercise and the Appellate Court set aside the order and ordered the investigation, *Jameela v Lachman*, 4 C. L. R. 74; *see* also 17 W. R 74: 8 W R 26 11 W R 54 1 C. W. N. 24: 22 B 875.

The extent to which the investigation should be carried, depends upon the circumstances of the case —*Sardhari Lal* v. *Ambica Persad*, 15 C. 521, P. C.

Limits of Enquiry.—*See* notes to r. 60 under the heading "Extent of Investigation."

Proviso.—If the Court is of opinion that an application has been designedly or unnecessarily delayed, it may refuse an investigation, but if it makes an investigation it is bound to pass orders under r 60 or r 61 and dismissal after investigation on the ground of delay would be illegal,

The word "unnecessarily" must be construed in a generous way; *Nga San Babu* v *Mi Thaik*, 39 I. C 345: (1916) 24 B. R. 136: 11 Bur. L. T. 41 After a property which had been attached in execution of a decree, has been sold, the Court has no jurisdiction to hear an application putting forward a claim which, if successful, would result in the release of the attached property; *Kali Charan* v. *Sarojini* A. I. R. 1926 Cal. 468.

Burden of Proof.—The onus is on the claimant to prove that the property attached is his or in his possession, *Nga Tha* v. *Bum*, 2 B. L. R. 91 F. B: 11 W. R. 8 (8 W R 352 and 362, *overruled*) See *Abdul Rahman* v. *Mahomed Azim*, 4 C W N 151 noted under s 50.

Remedy under this Rule is Alternative.—The summary remedy given by this rule is permissive and alternative. The object is not to deprive a claimant of his remedy by suit, but to give him a more speedy and summary remedy —*Raghunath* v *Sarosh*, 23 Bom 266, *See* also *Krishnabhupati* v *Vikrama*, 18 M 13, p 17, and *Sundar Singh* v. *Ghasi*, 18 A. 410; *Kanhaya* v. *National Bank of India*, 17 C W. N 511 P. C.: 40 C 598 But see *Man Kaur* v *Tara Singh*, 7 A 583

Cases that Come under this Rule.—Defendants who are exempted from the operation of a decree are not parties to the suit within the meaning of s. 47 and their objection to the properties attached is to be investigated under this rule.—*Ram Pershad* v *Jagannath*, 30 C 134 6 C W. N. 10. When a suit is dismissed against one of the parties but decreed against the rest, the former is not a party to the suit within s. 47, and his objection to attachment would fall under this rule —*Rahimuddi* v. *Lalt Meah*, 29 C. 696. 6 C. W. N 727.

Where the right, title, and interest of the judgment-debtor in certain lands were attached, a claim to a fractional share of the property is to be investigated under this rule —*Raj Coomar Roy* v *Kadumbini*, 13 W. R. 68, F B . 4 B L R 175 F B.

Held that an objection, made by one whose property was attached and sold in execution of a decree for the payment of money for the performance of which he had become a surety, might have been taken under this rule at the time of attachment, and was not entertainable under Or. XXI, r. 90.—*Hub Lal* v *Kanhia Lal*, 7 A 365

A claim set up in an investigation held under s 287, C P Code, 1882 (Or. XXI, rr 66, 70), cannot be treated as a claim under s. 278, C P Code, 1882 (Or. XXI, r 58), the latter section having reference to claims and objections to attachment of property under attachment —*Bhika Bal* v *Khem Chand*, 14 B 369

Where, in execution of a money-decree against the father alone for the personal debt, the decree-holder attached the whole of the joint family property, a claim by the sons that they are entitled to a share in the property and for its release from attachment, is to be investigated under this rule.—*Ram Dayal* v. *Durga Singh*, 12 A 209

An objection of a third party in execution of a decree for delivery of possession falls within the provisions of this and not of Or XXI, r. 90.—*Mahabir Prasad* v. *Parma*, 14 A. 417.

Claim to " Debts " Attached in Execution.—It was held in a Bombay case that where a decree-holder attached a debt due to ment-debtor the Court could not entertain under this rule claim *by the person served with the prohibitory order; Harilal* v *Abhesa* 323. It has however been held in a Madras case that when a secured by a negotiable instrument is attached a claim by a thir may be preferred under this rule, *Chidambara* v. *Ramasamy*, 2 (Followed in *Tayabali* v *Atmaram*, 38 B 631· 16 B. 520 where was not *followed*)

Claim to " Decrees " Attached in Execution.—Where in e of a decree for money obtained by A against B, A attached a cer perty (in this case a decree) belonging to B, but before the attac had obtained a sale deed in his favour in respect of the property *Held* that the question whether C's title is good, or whether the in C's favour is fictitious, is a question relating to title to the sought to be attached, and so it clearly comes within the purvie XXI, r. 58, and not under s. 47 The fact that the property to be happened to be a decree made no difference; *Pearey Lal* v. *A Bank*, 24 A L. J 334 92 I C 14 A. I. R. 1926 All. 244.

Claim to " Property " Attached in Execution of Rent De
170 of the B T Act, VIII of 1885, bars a claim under this rule to or holding attached in execution of a decree for arrears due therer cases —*Amritta Lal* v *Nemai*, 28 C 382, F. B.. 5 C. W. N. 474, C W N 732, *approved*, 4 C W. N 734 *overruled*), even wher lord's interest is sold after decree.—*Khetra Pal* v. *Kritarthamoy* 33 C 566, F B 10 C W N 547· 3 C. L J. 470. (3 C. W *overruled*) But a decree for arrears of rent in respect of two holdin a decree for rent as contemplated in Ch. XIV of the B. T. Act. W holdings are attached in execution of the decree, a claim under thi maintainable —*Bipra Das* v. *Rajaram*, 13 C. W N. 650 (11 C. W and 676, *followed*).

An attachment of a tenure or holding in execution of a decree by a fractional co-sharer for arrears of rent of his separate share is an attachment as is contemplated by section 170 of the Bengal Act, (VIII of 1885), and therefore this rule is applicable to such a *Beni Madhub* v *Jaod Ali*, 17 C 390, F. B (14 C. 201 *referred to*

Where a claimant contended that the property attached was r tenure nor a holding but homestead land let out for building pur which B T. Act does not apply, the Court had jurisdiction to in the claim, *Sara Sundari* v *Harendra*, 7 I. C. 490

Claim by Official Assignee After Vesting Order.—Where, after ment of property, the judgment-debtor was declared insolvent, property vested in the Official Assignee, who made an applicatio moval of the attachment, *held* that the Court had jurisdiction matter under this rule, and not under s. 47.—*Kashi Prosad* v. *Mill* 752 *See* also *Sardar Mal* v *Aranvayal*, 21 B. 205; and *Turner* v. 20 B. 403 (10 C. 150, and 8 M 554, *followed*). *See*, however. *Lukhimani Debi*, 28 C 419, 5 C W N. 761 (14 W. R. 33, F. B., *f*

Where property has been attached under the C. P. Code, the rig objector and the jurisdiction of the Court to entertain the objection,

ousted by the mere circumstances that the judgment-debtor has been declared insolvent, and his property vested in a receiver.—*Paras Ram* v. *Karam*, 9 A. 232.

Claim to Property Seized by a Receiver.—Where property of insolvent is seized by receiver in insolvency, claim cannot be preferred under this rule. The remedy is under s. 22, Prov. Insolvency Act; *Mulchand* v. *Murari*, 36 A. 8.

Claim to Property Ordered to be Sold under a Mortgage-decree.—"Though the execution of mortgage-decree is expressly incorporated in the Code, the Committee still think that claims and objections arising out of the execution of such decrees should not be the subject of summary procedure under this and the following rules, but should be determined in the ordinary course. This does not imply that the procedure under the later rules as to resistance to possession does not apply."—*Report of the Special Committee.*

Proceedings by way of claim as provided by this rule are not applicable where the property is directed to be sold under a mortgage-decree.—*Himat Ram* v. *Khusal*, 18 B. 98; *Deefholts* v. *Peters*, 14 C. 631 (*Folld.* in *Harimohan* v. *Lachmi Chand*, 18 I. C. 215), *Joy Prokash* v. *Abhoy*, 1 C. W. N. 701; *Sanwal Das* v. *Bismillah*, 19 A. 480, *Laladhur* v. *Chaturbhuj*, 21 A. 277; *Hukum Singh* v. *Raghubar*, 27 A. 700 (1905) A. W. N. 157; *Ragho* v. *Musst. Lachmi*, 50 I. C. 448; *Ratan* v. *Bala*, 44 I. C. 988; *Mahabir Prasad* v. *Jogendra Nath*, 26 C. W. N. 50: 68 I. C. 271; *Wamandheo* v. *Kanta Prasad*, 22 N. L. R. 94. 97 I. C. 178. A. I. R. 1926 Nag. 423.

Dismissal of Claim If Bars a Fresh Claim.—Where a claim is dismissed or struck off without any adjudication, a fresh claim may be entertained.—*Mohadeb Mundul* v. *Modhoo*, 16 W. R. 59. A Judge has no jurisdiction to try the same objector's claim under this section a second time as against the same attachment, or to re-open a question finally decided on the former occasion.—*Khelat Chunder* v. *Bhuggobutty*, 14 W. R. 144.

Where an objection under this rule was struck off for default, the High Court refused to interfere in revision, holding that the remedy of the petitioner was under Or. IX, r. 4 read with s. 141 or a suit under r. 63.—*Sheo Prasad* v. *Kastura Kuar*, 10 A. 119.

Rejection of Claim Debars Assertion of Title under Rules 97, 99, 101.—Rejection of a claim under this rule debars the claimant from asserting his title against an auction-purchaser in a proceeding under s. 335, C. P. Code, 1882 (Or. XXI, rr. 97, 99, 101).—*Nilo Pandurang* v. *Rama Patloji*, 9 B. 35. See also *In the matter of the petition of Banee Madhub Roy*, 13 W. R. 431.

Decision in a Claim Case is Binding upon the Parties Thereto.—When property which has been attached is ordered to be released, the order is made with reference to the particular claimant obtaining the order. This order is not to be regarded as a general decision (of which all the world can have the benefit) that the property does not belong to the judgment-debtor.—*Imam Bandee Begam* v. *Mahomed Tukee*, 8 W. R. 27; and *Badiroonnissa* v. *Kureemoonnissa*, 21 W. R. 230. See also *Jagannath* v. *Ganesh*, 18 A. 413, where it has been held that an order under this rule does not

enure for the benefit of other decree-holders, who are not parties to the proceedings. The order is not binding as against the judgment-debtor unless he has a party to the proceedings, and cannot be availed of by any one who is not a party to the proceedings.—*Vadappalle* v. *Dronamarju*, 31 M. 163: 18 M. L. J. 26. (13 M. 366: 25 M. 721: 30 M. 35: 18 A. 413, *followed*.)

59. The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in or was possessed of, the property attached. [S. 279.]

Evidence to be adduced by claimant.

COMMENTARY.

This rules does not mean that if the claimant establishes that he has some interest in the property, he is entitled to succeed irrespective of the question of possession, nor does it imply that if he fails to establish the particular interest he sets up, his claim must be disallowed irrespective of the question of possession of the judgment-debtor. In each of the cases mentioned in rr. 60 and 61, the Court must determine the question of possession of the judgment-debtor. The Court cannot base its decision on the question of the validity of the claim or the determination of the title to the property attached, *Sathan* v. *Tirtha Narain*, 24 I. C. 62.

"Some Interest."—To reconcile this rule with rr. 60, 61 the words "some interest" must be taken to imply such interest as would make the possession of the judgment-debtor, possession not on his own account but on account of, or in trust for, the claimant.—*Mohunt Bhagwan* v. *Khetter Moni*, 1 C. W. N. 617. *See* also *Sabhapathi* v. *Narayana*, 25 M. 555; *Satkari* v. *Thirtnanarayan*, 24 I. C. 62. A beneficial interest is as much an interest within the meaning of this rule as a legal interest in the property attached.—*Sabhapathi* v. *Narayanasami*, 25 M. 555.

"Was possessed of."—The word "possessed" is not used in a restricted sense as relating to a mere tangible or physical possession. It includes constructive possession, or possession in law, of debts and other intangible property.—*Chidambara* v. *Ramasamy*, 27 M. 67 (24 M. 2) *dissented from*). *See* notes to r. 60.

Extent of Investigation.—"Rules 58 to 62 are directed to give a means by which execution proceedings may be made effective and not too closely entangled with disputes between third parties and the debtor. Provision is made for investigation of claims in a limited fashion. The scope of the enquiry being confined, the investigation will not be at all elaborate, and the Privy Council, in *Sardhari* v. *Ambika*, 15 C. 521, have pointed out that sometimes that investigation may well be very slight indeed. Rules 58 to 62 provide for a summary investigation into possession as distinct from a thorough trial of ultimate right. It is impossible to separate altogether the question of possession and of title. Thus if the judgment-debtor was in possession, he may have been in possession as agent or trustee for another, and this has to be enquired into. To that extent the title may be part of the enquiry in a claim case, but no ultimate questions of trust can be threshed out"; (*per* Rankin, J.) *Nejimunnessa* v. *Nacha-*

raddin, 57 C. 548, A. I R. 1924 Cal. 711 · 83 I. C. 233 ; *Sardhari* v. *Ambika*, 15 C. 521, P. C. ; *Mohant Bhagwan Bamanuj* v. *Khettermani*, 1 C W. N 617 ; *Hamid Bakhut* v *Buktear Chand*, 14 C 617 ; *Sheoraj Nandan* v. *Gopal Suran*, 18 C. 290.

Benami.—Where the claimant alleges that the property attached is in his own possession on his account, and the decree-holder says that he is a *benamidar* of judgment-debtor it should be released as the question of *benami* is a question of title ; *Monmohiney* v. *Radha Kristo*, 29 C. 543 ; *Sheoraj* v. *Gopal*, 18 C. 290 ; *Hamid* v. *Buktear* 14 C. 617

Onus of Proof.—The *onus* is on the claimant to prove that the property attached was his or in his possession, and therefore not in the possession of the judgment-debtor. His evidence must be confined to proving his own claim, and he cannot be allowed to show a title in a third person. —*Nga Tha Yah* v. *Buru*, 2 B L R. 91, F B ; 11 W R 8 F. B (8 W. R. 358 and 362, *overruled*) See *Abdul Rahman* v *Mahomed Azim*, 4 C. W N 151, noted under s 50.

Release of property from attachment.

60. Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment. [S. 280.]

COMMENTARY.

"Possession of the judgment-debtor or of some person in trust for him" etc.—The question to be determined under this rule is the question of possession ; the words ' possession of the judgment-debtor or some person in trust for him," refer to cases in which the possession of a claimant as a trustee is of such a character, as to be really in the possession of the debtor, and not to cases in which very intricate questions of law may arise as to whether or not valid trusts may result in particular instances —*Hamid Bakhut* v *Buktear Chand*, 14 C 617 Approved in *Sheoraj Nandan* v *Gopal Saran*, 18 C 290, and followed in *Monmohiney* v *Radha Kristo*, 29 C 543 *See* also 1 C W N 617 , *Sualso Bhaiji* v *Administrator-General of Bombay*, 23 B 128

Held that the latter portion of this rule applies only where the property is in possession of the judgment debtor, " partly on his own account and partly on account of some other person,' and not where the property was at the time of the attachment, and had been for some months previously, in the sole possession of a trustee, and neither wholly nor partly in the

possession of the judgment-debtor —*Burjorji Dorabji* v. *Dhunbai*, 16 B 1 For the meaning of the expressions "on account of" or "in trust for," as used in this rule, see *Velji Hirji & Co.* v. *Bharmal*, 21 B. 287

Effect of Order of Release.—The order for release under this rule is not final but provisional, as r 63 declares it to be subject to the result of any suit which the attaching creditor may bring to establish the right which he claims to the property in dispute The order of release made under this rule has not therefore the effect of putting an end to an attachment duly made, so as to leave the claimant free to deal with the property in any way he likes The result is that any private alienation of the property by claimant, though made after the order of release passed under this rule, will be void under s. 64, if in a title suit subsequently brought by the aggrieved party under r. 63, the right to attach the property is established, *Bonomali* v *Prosunno*, 23 C 829 ; *Ramchandra* v. *Mudeshwar*, 33 C. 1158 ; *Pratap* v *Sarat*, 25 C W N 544 · 62 I. C. 348 ; *Ahmad Khan* v *Banshidhar*, 31 A. 367 ; *Anthaya* v. *Manjaiya*, 45 M. 84 · 69 I C 642 A I R 1922 Mad 176.

A release from attachment can only be made under this rule, which indicates the conditions on which alone that release can be directed A Court before directing release must hold those conditions established—*Chaman Lal* v *Macleod*, 8 Bom L R. 794.

This rule contemplates not only the entire release of the property from attachment, but also the retention of the attachment to such extent as the Court thinks fit —*Kashwant Shenvi* v. *Vithola Sheti*, 12 B. 231.

Where property has been released from attachment under this rule, and subsequently declared liable to attachment by a decree against which an appeal is pending, a sale of such property before the final result of the appeal is not illegal by virtue of the provisions of Or. XXI, r 63—*Fathula* v *Muniyappa*, 6 M 98.

As to whether a judgment-debtor is a party to the proceedings under this section or not, see notes under rule 63.

Disallowance of claim to property attached.

61. Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim. [S. 281.]

COMMENTARY.

Disallowance of Claim.—If the Court erroneously does not enter into the question of possession but disallows the claim on some other grounds, the order disallowing the claim cannot for this reason only be said to have been made without jurisdiction and therefore a nullity. Such an order is conclusive and binding on the claimant till a suit under r. 63 is brought by the claimant; *Bhagawan Das* v. *Rajnath*, 34 A. 365: 11 I. C. 790.

A certain property having been attached in execution, the plaintiff intervened claiming the property, and was directed to adduce evidence, which however, he failed to do, and the case was struck off. *Held* that the order striking off the case must be taken as an order disallowing the claim. —*Rash Behary* v. *Buddun Chunder*, 12 C. L. R. 550

When a claim is preferred, the Court should define the respective shares of the judgment-debtor and intervenor and sell the judgment-debtor's share only. If without doing so, the Court simply orders the sale of the property subject to the claim of the claimant, the order would not be a valid one, and one year's limitation would not be applicable ; *Udit Narain* v *Muntaza* 2 A. L. J 178 · 27 A 464 (4 W. R. 35 *folld.*)

The claim of a person in possession under a collusive sale should be rejected on the ground that the property was in possession in trust for the judgment-debtor ; *Mc Intosh* v. *Bidhu Bhusan*, 16 C. W. N. 959.

Effect of Order under this Rule.—The effect of an order disallowing a claim to attached property is to gave the auction-purchaser a title as against the claimant, unless the order is set aside by a suit —*Khub Lal* v. *Ram Lochun*, 17 C. 260 (15 C 521, P. C., *referred to*). An order in favour of one of several decree-holders made under this rule does not inure for the benefit of the other decree-holders who are not parties to the proceedings ; *Jagannath* v. *Ganesh*, 18 A. 413

Appeal and Revision.—In execution of a decree against a firm, certain property, was attached, to which a partner objected that it was his private property The Court disallowed the objection. *Held* that the order was not under s 47 and was not appealable —*Abdul Rahman* v. *Muhammad Yar*, 4 A. 190.

Where a Court disallowed an application for the release of certain property attached before judgment—*Held* that there being a remedy by suit under Or. XXI, r. 63 the High Court should not interfere in revision—*J. J. Guise* v. *Jaisraj*, 15 A 405 (8 M 484, F B , 11 A 119, and 11 A 383, *referred to*), *Subbu Reddiar* v. *Kumaraswamy*, 21 I. C 461 · 1913 M. W. N. 856. *See*, however, *Satkari* v *Tirtha Narain*, 24 I C. 62

Continuance of attachment subject to claim of incumbrancer.

62. Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge. [S. 282.]

COMMENTARY.

"Subject to a mortgage."—This rule lays down that where during the investigation of claims or objections, the Court is satisfied that the property is subject to a mortgage it may direct it to be sold subject to that mortgage, *i.e.*, the right of redemption is offered for sale. Rule 66 says that when a property is ordered to be sold, the sale proclamation should specify any incumbrance to which the property is liable. So that in the latter case the purchaser buys it simply with notice of mortgage or charge but there is no finding that the mortgage really exists. It may turn out

that there is no subsisting mortgage or that the mortgage is invalid The auction-purchaser is not debarred from contesting the validity or otherwise of the mortgage If such mortgage is declared invalid, he is entitled to the benefit and the judgment-debtor cannot claim the amount due on the mortgage (*Izzatunnissa* v. *Partab*, 13 C. W. N. 1143 P. C ; 588) Under this rule, the Court decides that a mortgage subsists and the property is sold subject to it.

The distinction between r 62 and r 66 is that in the former case the Court being satisfied of the existence of the mortgage sells only the judgment-debtor s right of redemption, so that the purchaser does not acquire any greater rights than those of redeeming the mortgage. In the latter, the Court decides nothing as to the existence of the mortgage and the purchaser buys subject to such risks as the notice might involve Thus in execution of a money-decree the rights of a mortgagor in certain property, ostensibly subject to mortgage, were sold The property was not sold subject to the mortgage as contemplated by this rule. But the existence of the mortgage was notified in the sale proclamation without enquiry, *held*, on a suit brought by the mortgagee for sale, that the auction-purchaser was not debarred from proving that the mortgage was fictitious and without consideration *Shib Kunwar* v *Sheo Prasad*, 28 A. 418. 3 A. L J. 200, 1906 A. W. N 68 (27 A 97, *referred to*), *Jairaj* v. *Radhakisen*, 35 A. 257 20 I C 182, *Shah Ziauddin* v *Kailash Chandra* 2 C. L. J. 599; *Lala Bhagwan* v *Chaudhuri*, 36 I. C 732, *Kalidas* v *Prasanna*, 47 C 446 55 I C 189 *Agha Sultan* v *Mohabbat Khan*, 43 A 489: 63 I. C 395, *Roshan Lal* v *Lallu*, 44 A 714 A I R 1922 All. 443: 68 I C. 790

G obtained a money decree against H and attached some property U preferred a claim alleging himself to the owner of the property The Court held that H was the owner but U had a lien. The property was sold subject to the lien and purchased by X U then sued X for the amount of the lien. *Held*, that X was not bound by the miscellaneous order for he was neither a party nor a representative. The Court's order was not under the rule but under r 66, *Narayen* v *Umbar*, 35 B. 275. 10 I. C 913

See notes to r 66 under the heading " Any Incumbrance to which the Property is Liable "

63. Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive. [S. 283.]

Saving of suits to establish right to attached property.

COMMENTARY.

Object and Scope.—The object of a suit, is not to have the order in the claim proceedings set aside, but to have the right of the claimant in the property in dispute established —*Bibi Aliman* v. *Dhakeshwar*, 1 C L. J. 290 (13 B 72: 18 B. 241, and 13 C 228, *dissented from*). In these latter cases it seems to have been held that the suit to be brought is one to set the order made in the claim case. In *Veera Pannadi* v. *Karuppa*, 2 I. C. 980· 6 M. L T. 154, it has been held that a suit under this rule is

one to set aside the order passed upon the claim, and is a form of appeal therefrom. The plaintiff in such a suit cannot ask for a declaration of a mortgage lien or charge. A suit under this rule is a suit to alter or set aside a summary decision or order of the Court and is a method of obtaining a review; *Jamahar Kumari* v *Asharan*, 22 C. L J. 27 (35 C. 202: 7 C L J. 86, *folld.*).

This rule is much wider in its scope than the corresponding s 283 of the Code of 1882, and unlike the latter section covers cases in which there has been no investigation. Under the new Code such orders become final if not set aside within one year, *Narasinha* v *Vijiapola*, 27 I. C 944: 2 L. W 206

A suit under this rule is maintainable although no claim is preferred under r. 58 and no order is made under r 61 The summary remedy given by r. 58, is alternative to the remedy by way of suit. The object of that rule is not to deprive a claimant of his remedy by suit, but to give him, if he is diligent, a more speedy and summary remedy.—*Raghunath* v. *Sarosh*, 23 B 266; *Sunder Singh* v *Ghasi*, 18 A. 410 (*Man Kuar* v. *Tara Singh*, 7 A 583 *dissented from*), *Krishnabhupati* v *Vikrama*, 18 M. 13 (17).

The effect of the judgment in the suit brought in accordance with this rule is to supersede the order under r 58 and to render it inconclusive — *Kissori Mohun* v. *Harsukh Das*, 17 C 436, P C

A suit under this rule is a continuation of claim proceedings. It is merely a form of appeal in the guise of an original suit. Certain property was released after a claim was put in. The claimant sold it to another person within one year from date of release The decree-holder sued under this rule to set aside the order in the claim case The purchaser is an alienee *pendente lite*, *Krishnappa* v *Abdul Khader*, 26 M L J. 449 (31 M 262 *referred to*)

In a suit under this rule the Court is not restricted to determine only the question as to whether property ought to be atached or not. The judgment debtor can plead that the decree was collusively obtained and the suit from the beginning to the end was a fraud, *Bama Charan* v *Bogala*, 23 I. C 755 (17 M. 387 *folld*).

It is open to a judgment-debtor to bring a suit under this rule without including a prayer for possession In a declaratory suit therefore it is unnecessary to consider whether the judgment-debtor is in possession or not; *Saleka* v *Malladi*, 16 M L T 300.

Person Objecting under Rule 58 can Plead Invalidity of Attachment When Suing under Rule 63.—A person who puts in a claim petition under r. 58 can, when asking for a declaration under r. 63 that his property is not liable to attachment, also show that either what was done was no attachment or that there was an invalid attachment which could not affect his rights in any way; *Venkatappayya* v *Venkatachalapathi Rao*, A I R 1927 M. 150.

Procedure under this Rule is Permissive.—The procedure prescribed by this Rule is only permissive and it does not in any way affect the right of a claimant to pay up the decretal amount in order to save the property from sale and then to sue to recover the amount from the party who wrong-

fully attached the property; *Kanhaiya Lal* v. *The National Bank of India Ltd.*, 40 C 598 17 C L. J. 478 P. C.

"Party against whom an order is made."—If the order is made against the decree-holder under r 60, he may bring a suit under this rule to get a declaration of his rights to attach and sell the property; *Mitchell* v. *Mathura*, 12 I. A 150, *Dallu Mal* v *Hari Das*, 23 A. 263; *Tofail* v. *Banee Madhub*, 24 W R 394 The claimant whose claim has been disallowed under r 61, may sue the decree-holder under this rule to establish his right to the property attached; *Narayanrav* v. *Balkrishna*, 4 B. 529 A judgment-debtor who is not in fact a party to the claim proceedings does not become such only because he happens to be the judgment-debtor. unless therefore he is a party in fact, the order of release made in favour of the claimant is not binding on him, and he may institute a suit even after the lapse of one year from the date of the order, provided he does so within the ordinary period of limitation applicable to the suit, to establish his title to and recover possession of the property from the claimant, *Krishna Sami* v. *Somasundaram*, 30 M 325; *Vadapalli* v. *Dronamraju*, 31 M. 163; *Shivappa* v *Dod*, 11 B 114, *Kedar* v. *Rakhal*, 15 C. 674 The fact that a person became a representative of the judgment-debtor who was no party to the claim proceedings does not override the estoppel or relieve against the disability imposed by this rule; *Ramu Iyer* v. *Palaniappa* 35 M. 35

Where a claim or objection is preferred by a mortgagee under r. 58 and the Court disallows the objection owing to the default of the mortgagee to produce the mortgage deed in time, the unsuccessful objector comes within the words "the party against whom the order is made;" *Debi Das* v. *Maharaj Rupchand*, 25 A L J 609; 102 I. C. 172; A. I. R 1927 All. 593.

Necessary parties in a suit under this rule.—This rule provides that a party against whom an order under rule 60 or rule 61 is made, may institute a suit to establish the right which he claims to the property in dispute. Such a suit must, under Art. 11 of the Limitation Act, 1908, be instituted within one year from the date of the order; otherwise the order made against him shall be conclusive The following persons are competent to file a suit under this rule.—

(1) The claimant whose claim to the attached property has been disallowed under r 61, may institute a suit against the decree-holder to establish his right to the attached property; *Narayanrav* v. *Balkrishna*, 4 B. 529 The judgment-debtor is a necessary party to such a suit; *Ghasiram* v *Mangal Chand*, 28 A 41

(2) The decree-holder against whom an order releasing the property from attachment is made, may institute a suit against the successful claimant for a declaration of his right to attach and sell the property; *Mitchell* v. *Mathura Das*, 12 I A 150. To such a suit the judgment-debtor is not necessary party, *Ghasiram* v *Mangal Chand*, 28 A. 41.

(3) The judgment-debtor may also, if he is affected by the order of release, institute a declaratory suit under this rule against the claimant

If the judgment-debtor is a party in fact, he will be bound by the order, unless he brings the suit within one year. If he is not a party

in fact, his rights are not affected and he may bring a suit within the ordinary period of limitation. An order made in a claim case is not conclusive against or in favour of the judgment-debtor unless he was a party to the proceedings in which the order was passed.—*Vadapalli Narasimham* v. *Dronamraju*, 31 M. 163; *Krishasami* v. *Somasundaram*, 30 M. 325; *Kedar* v. *Rakhal*, 15 C. 674; *Anantram* v. *Damodar Das*, 22 I. C. 797.

There were two claim petitions—one on the allegation of purchase prior to attachment, the other claiming by survivorship. Both petitions were heard and the Court found that the property had passed by survivorship to one claimant, and plaintiff who was the other claimant, could not make good his claim of *bona fide* purchase. *One* order was however passed raising the attachment *Held* that though the Court passed an adverse opinion, that did not make the plaintiff " the party against whom an order " was passed; *Ponaka Balarami* v. *Hazi Mahomed*, 26 M. L. J. 499.

Where a claim has been rejected and the properties have been sold and purchased by a stranger purchaser, the decree-holder is not a necessary party to a suit by the claimant; *Subbaraya* v. *Kandaswamy*, 32 M. L. T. 124: 70 I. C. 168.

In a suit under this rule, the other creditor of the judgment-debtor need not be necessarily added. The attaching creditor, the judgment-debtor and the alleged transferee are the only proper parties; *Surendra* v. *Kiranmoyi*, 1 I. C. 428.

Where the contest was throughout between objector and judgment-debtor and the objection was allowed, *held* that the judgment-debtor was a party to the proceedings; *Anant Ram* v. *Damodar*, 22 I. C 797: 84 P. R. 1914.

As to who are necessary parties generally under this rule, see *Durga* v. *Jatindra*, 27 C. 493

Position of Purchaser.—Where property is sold subject to encumbrance, purchaser cannot question the validity of the incumbrance—*Gurcharan* v. *Bachni*, 30 I. C. 238, but a distinction must be made between cases where property is sold subject to incumbrance and cases where merely incumbrances are notified In the former case, the purchaser cannot question the validity of the encumbrance, in the latter case he can, *Kali Das* v *Prosanna*, 47 C. 446: 24 C. W N. 269. 55 I. C 189; *Roshan* v. *Lallu*, 68 I. C. 790.

Claims to property Attached Before Judgment.—Rules 58 to 63 apply also to claims preferred to property attached before judgment —*Mallikarjun* v. *Matlapalli*, 41 M. 849. 47 I. C 1000 F B; *Prasada Nayudu* v. *Virayya* 41 M. 849. 47 I C 1000 F B. Difference between attachment in execution and attachment before judgment pointed out in *Pratab* v. *Sarat*, 33 C L. J. 201, where it has been held that even after a release of attachment in execution, the attachment will revive, if a suit under this Rule succeeds but the claimant must be made a party within the period of limitation, but the attachment before judgment falls with the dismissal of a suit and does not revive even if the appeal succeeds

Nature of Suit under this Rule.—" A suit under this rule is not limited by any special standard of evidence or law. The claimant may, if

necessary, thrash out his title in the fullest and most ultimate sense But if the title which he claims is not the ultimate full title to the property, then, of course, he must be content to assert whatever the title claimed may be So, too, the decree-holder may make out his debtor's title exactly as if it were a suit for possession by the judgment-debtor "; *per* Rankin J) *Najmunnessa* v *Necharaddin*, 51 C. 548: A. I. R. 1924 Cal 744: 83 I C 238; *Vasudev* v *Eknath*, 35 B. 79: 8 I. C. 630. There is nothing in this rule to limit the party unsuccessful in the claim proceedings under rules 60 and 61, to a suit for a mere declaration of his alleged right He is at liberty to pray for consequential relief to which he may be entitled. Thus it is competent for a plaintiff in a suit under this rule to pray for a declaration of his right to moveables and also for a direction that the defendant at whose instance they were attached, be ordered to pay him the value of the moveables; *Basivi Reddi* v. *Ranayya*, 40 M. 783. 31 M. L. J 394 36 I C 446, *Sadu Bin* v *Ram Bin*, 16 B. 609; *Abdul Rahim* v. *Sital*, 41 A 658, 54 I. C. 792 In a suit to establish a right under this rule, the plaintiff may include a prayer for refund of costs which he has been ordered to pay in the claim proceedings, and if he does not do so, the Court which tried the claim proceedings, cannot make an order for refund of the costs, *Raghunath* v *Bedri Prasad;* 6 A. 21.

"The right which he claims to the property."—The words *"the right which he claims to the property in dispute"* mean the right which is claimed in that proceeding in respect of the property, that is, the right to have it sold or the right to have it released from attachment. They do not mean the right or title to the property. Rr. 58, 61, 63 must be read together. Where therefore, a claimant being unsuccessful in a claim case has got the property released from attachment by coming to terms with the decree-holder without notice to the judgment-debtor, a suit subsequently brought by him against the judgment-debtor for recovery of possession is not barred by this rule —*Morshia Barayal* v. *Elahi Bux*, 3 C. L. J. 381 (15 C. 674, 31 C 228, *followed*) In an enquiry under this rule the Court may in a proper case go into questions of title and is not necessarily restricted to question of possession *Maung Po* v. *Somasundaram*, 39 I. C. 275.

"Subject to the result of such suit, the order shall be conclusive."—An order passed under r 61 rejecting a claim after investigation, will, if not contested by the claimant, operate as an estoppel in a subsequent suit —*Bailur Krishna* v. *Lakshmana*, 4 M. 302; *Velayuthan* v. *Laksmana*, 8 M 506; *Krishnan* v. *Chadayan Kutti*, 17 M. 17; *Nemaganda* v. *Paresha*, 22 B. 640; and *Surnamayi* v. *Ashutosh*, 27 C. 714. But an order passed without investigation is not conclusive.—*Karsan* v. *Ganpatram*, 22 B. 875 Nor an order passed without jurisdiction, in a claim preferred in execution of a mortgage-decree —1 C W. N 207. But under the present Code the order is conclusive, whether passed on investigation or not, and even when the claim case is dismissed for default *Satindranath* v. *Shiva Prasad*, 26 C. W N. 126. The alteration in the wordings of rr. 61-63 and Art. 11 of the Limitation Act to be particularly noticed. *See* also *Machi Raju* v. *Sri Rajah*, 41 M 985 . 48 I. C. 27 (F. B.), where it has been held that an order refusing to investigate a claim is one under this rule and therefore conclusive if not set aside by a suit within the time prescribed by Art 11 of the Limitation Act; and the practice of notifying claims to intending purchaser without deciding the claim case is condemned.

Where an order has been passed against any person making a claim to a property under attachment, if such person fails to bring a suit under this rule within the prescribed time, he is precluded from asserting his title against the auction-purchaser, whether plaintiff or defendant.—*Nilo* v. *Rama*, 9 B. 35; *Yashvant Shenvi* v *Vithoba Shebi*, 12 B 231; *Surnomoyi* v. *Ashutosh*, 27 C. 714; *Dinkar Ballal* v. *Hari Shridhar*, 14 B. 206; *Badri Prasad* v. *Muhammad Yusuf*, 1 A. 382; *Jooni* v. *Bhagwan*, 1 A. 541; *Bibi Aliman* v. *Dhakeshwer Pershad*, 1 C. L. J. 296. But see *Mannu Lal* v. *Harsukh Das*, 3 A. 283. *Haripada* v. *Surendra*, A. I. R. 1922 Cal 164; *Piara Ram* v *Ganga Ram*, 71 I. C. 45

Effect of Decision in Claim Case Regarding Possession—Whether Res Judicata.—The Code, in using the words "*shall be conclusive*" of the order made after the limited investigation contemplated by rr. 58 to 62, is thinking not of the subsequent effects of that decision as *res judicata*, but is thinking of and dealing with a Court that is doing something. The Court has attached and is going to sell. The meaning is that the act of the Court is to be void unless there is a suit. It means that the attachment held valid in the claim case shall be valid and the attachment removed shall be as though it never was, so far as the parties are concerned. The rule seems to mean that subject to a suit *factum valet*, the act of the Court shall not be questioned save in that way; the effect of the decision as to possession in other proceedings in which that question may again arise, is not the matter to which the words "shall be conclusive" are directly addressed; *Najumunnessa* v *Macharaddin*, 51 C. 548: A. I. R. 1924 C 744: 83 I C 288

Certain creditors attached some *wakf* properties and the *mutawalli* filed an objection. Court found the *wakf* invalid and the properties were sold. An heir of the *wakf* who was a judgment-debtor brought a suit for a declaration of his title in the properties *Held*, that the decision in the claim case was not *res judicata*, *Ashan Bibi* v *Awaljadi*, 21 C W N. 222.

Order When Not Conclusive.—A claimant whose claim is dismissed, but the attachment is withdrawn at the instance of another claimant subsequent to the order, is not bound to sue as once the attachment goes, the order dismissing his claim does not affect him; *Gollumpalli* v *Sankara*, 42 I. C. 683. But if after the rejection of the claim case, the claimant brings a suit, which is dismissed for default, and the execution case being withdrawn by the decree-holder for want of sufficient bid, the decree-holder makes a fresh application after 1 year, the claimant cannot bring a fresh suit, as the order in the claim case was conclusive as soon as the previous suit failed. This Rule has modified the old s 283 of C P Code.—*Gopal* v. *Ganpat*, 85 I. C. 321

Onus of Proof.—In a suit under this rule, the burden of proof is on the plaintiff and not on the defendant; *Ramnath* v *Brindaban*, 18 A 369; *Nanuhijan* v. *Bhuri*, 30 A 321· 5 A L J. 601; *Perayya* v *Venkayyama*, 47 M. L. J. 14: A I R 1924 M 770· 79 I C. 899; *Al Bai* v. *Kahan*, 8 Lah L. J 109: 67 I C 876

In a suit under this rule to establish the right to attach property, it is for the plaintiff to prove that the property in question is the property of the judgment-debtor, the onus of proof is upon him The defendant

in defending such a suit may rely upon the title of a third person.—*Adam Isufbhai* v. *Jamnadas*, 17 B. 94.

Period of Limitation for Suits under this Rule.—A suit under this rule is governed by Art. 11 of the Limitation Act IX of 1908, and the period is one year from the date of the order. "It (the order under r. 60 or r. 61) is not conclusive; a suit may be brought to claim the property notwithstanding the order; but then the law of limitation says that the plaintiff must be prompt in bringing his suit. The policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution sales, and for that reason, a year is fixed as the time within which the suit must be brought"; *Sardhari* v. *Ambika*, 15 I. A. 123. 15 C 521. Where an appeal is preferred from the order, the period of one year is to be calculated from the date of the appellate order; *Venugopal* v *Venkatasubbiah*, 39 M. 1196: 28 I. C. 867.

The order contemplated by r 61 is an order made after investigation into the facts of the case, and it is only where the order is made after such investigation that the limitation of one year is applicable to a subsequent suit under this rule.—*Chandra Bhusan* v. *Ramkanth*, 12 C. 108; *Venkapa* v *Chenbasapa*, 4 B 21 and 23-note; *Rashbehary* v. *Buddun Chunder*, 12 C L R 550; *Kachinamthodi* v. *Kachinamthodi*, 44 M. L. J 141; *Goberdhandas* v. *Makundilal*, 45 A. 438: 21 A. L. J. 342. Order dismissing claim for default is not an order made after investigation and need not be set aside within one year.—*Sarala* v. *Kamsala*, 31 M. 5; (*Sarat Chandra* v *Tarini*, 34 C 491 11 C W. N. 487 *followed*). *See also Umacharan* v *Heronmoyee*, 18 C. W N 770. *See*, however, *Ponnusami* v *Samu* 31 M L J 247 where it has been held that Art. 11 of Limitation Act, 1908, is more comprehensive and covers orders after full investigation as well as orders passed on default Where property is released from attachment after investigation under r. 60, limitation of one year is applicable.—*Sardhari Lal* v *Ambika Pershad* 15 C. 521, P. C.; *Khub Lal* v *Ram Luchan*, 17 C 260, and *Koyyana Chittemma* v. *Daosy Gararamma* 29 M 225 16 M L J 136; *Bal Makund* v. *Saiyed Maqsud*, 19 O. C. 357.

Where a claim is disallowed on the ground of the claimant not having given any evidence in support of the claim, the order is one under r 61 and therefore the rule of one year's limitation does apply.—*Rahim Bux* v *Abdul Kadir*, 32 C 537—[followed in *Kurada Venkata Chalanathi* v. *Gudivada*, 28 I. C 244 (1915) M. W. N. 188]; *Bibi Aliman* v. *Dhakeshwer Pershad* 1 C L J. 296 (15 C. 521; 12 C. L R. 43 *followed*). But see, *Kakar Singh*, v *Torib Manton*, 1 C. W. N. 24.

Where a mortgagee's claim or objection to attachment under r. 58 is disallowed, he comes within the words "the party against whom an order is made" and as such must sue within one year under Art. 11 of the Limitation Act to establish his mortgagee rights. The ordinary mortgagee's term of 12 years for suing is cut down to one year by such an adverse order, *Debi Das* v. *Maharaj Rupchand*, 25 A. L J. 609: 102 I. C. 792 A. I. R. 1927 A. 593

An essential condition precedent to a suit under this rule is the making of an attachment of some property; of objection being taken to such attachment; of investigation being made to such objection; and,

lastly, of its being allowed or disallowed: and where these do not exist, the rule of one year's limitation does not apply.—*Angan Lal* v. *Gudar Mal*, 10 A. 470.

Where an attachment in respect of which a claim is disallowed is finally withdrawn on judgment-debtor's paying the decretal amount into Court, the claimant is not bound to bring his suit to establish his title to attached property within one year.—*Ibrahimbhai* v. *Kabutabhai*, 13 B. 72; *Gopal Purshotam* v. *Bai Divali*, 18 B. 241; *Krishna Prasad* v. *Bepin Behari*, 31 C. 228. But all these cases have been dissented from in *Bibi Aliman* v. *Dhakeshwer Pershad*, 1 C. L. J. 296.

Suit under this Rule Not Necessary if Property is Released from Attachment Within the Period of Limitation.—A claimant is not compelled *de bene esse* to institute a title suit under this rule within a year after his claim under r. 58 has been rejected, when the object sought by him in making the application under r 58 has been attained by the release of the property from attachment, *e.g.*, by reason of the dismissal of the application under r. 57 for default of prosecution or by reason of the withdrawal of attachment on payment of the decretal amount by the judgment-debtor to the decree-holder. In circumstances such as those, Art. 11 of the Limitation Act of 1908 does not apply, and the claimant is not affected by any of the consequences which result from a failure to institute a suit under this rule, *Najmunnessa* v. *Nacharuddin*, 51 C. 548: 83 I. C 233: A I. R. 1924 C. 744, *Wamandhai* v. *Kanta Prasad*, 22 N. L R 94. 97 I C. 178; *Kumara* v. *Thevaraya*, 48 M. L. J 616. A I. R. 1925 M 1113, *Fateh Din* v. *Qutab Din*, 3 L. 7: A. I R. 1922 L. 108, *Mani Lal* v. *Natha Lal*, 45 B. 561; *Umes* v *Rajbullav*, 8 C 279.

Suit for Refund of Purchase-money.—Where the claimant whose claim to the property under r. 61 is disallowed, brings a suit against the judgment-debtor for refund of the purchase-money paid by him for purchase of the property, such a suit is not barred by limitation even if instituted more than a year after the date of the order. The reason is that r. 63 does not apply to such a suit, *Ratiram* v. *Brahmajit*, 46 A. 45: A. I. R. 1924 A. 302: 77 I. C. 82.

Payment by Claimant under Protest.—If the claim fails and the property is not released, the claimant is not compelled to bring a suit under this rule for a declaration of his title to the property. In such a case, he may prevent the sale of the property by paying the decretal amount to the decree-holder and then sue for the recovery of the amount so paid under pressure of execution proceedings; *Duli Chand* v. *Ram Kishen*, 7 C 648; *Jugdeo* v. *Rajah Singh*, 15 C. 656. He may also pay the decretal amount under protest and then sue for refund as stated above; *Kanhaiya Lal* v. *National Bank of India*, 40 C 598. 40 I. A. 56

One Year's Limitation does Not Apply to Persons Who are Not Parties to Claim Case.—The law of one year's limitation could not apply to a person whom the Court had refused to make a party to the proceedings under r. 58 because he came in too late.—*Raghoo Nath* v. *Bydo Nath*, 14 W. R. 864.

A judgment-debtor is not necessarily a party to an investigation under r. 58 so as to preclude his instituting a suit after the lapse of one year from

the date of the order to establish his title to the property which has been the subject-matter of a claim in execution proceedings.—*Kedar Nath* v. *Rakhal Das*, 15 C. 674. *See* also *Ghasi Ram* v. *Mangal Chand*, 2 A. L. J. 412: (1905) A. W. N. 172. 28 A. 41 and 30 M. 335: 17 M. L. J. 95, F. B.; *Sadaya* v. *Amurthachari*, 8 M. L. T. 417. In *Guruva* v. *Subbarayudu*, 13 M. 366, it has been held that, if there is nothing to show that the order releasing the attachment was an order against the judgment-debtor, or that he was a party to the proceeding, a suit by him for declaration of title to the property is not barred by one year's limitation. See also *Imbichi Koya* v. *Kakkunnat Upakki*, 1 M. 391; and *Karsan* v. *Ganpatram*, 22 B. 875. In *Shivapa* v. *Dod Nagaya*, 11 B. 114, it has been held that it must depend upon the facts of each case as to whether a judgment-debtor is to be regarded as a party to an investigation under r. 58.

If it appears that in a proceeding under r. 58 no notice was issued to the judgment-debtor, he cannot be regarded as a piaty to the proceedings, and the rule of one year's limitation does not apply to a suit brought by the judgment-debtor to establish his right to the property.—*Ambalathilakath Moidin* v. *Ambalathilakath Kunhi*, 25 M. 721. Followed in *Krishnasami* v. *Somasundaram*, 30 M. 335. 17 M. L. J. 95, F. B. Even if the judgment-debtor be a party to the proceedings but if the Court does not adjudicate upon the question of the judgment-debtor's title, but decides the case on the question of possession only, he or his heirs will not be bound by the order; *Vedalingam* v. *Veerathal*, 54 I. C. 580

Orders in Claim Proceedings to which the Present Rule Applies.—An order made on an application which does not come within the purview of r. 58, is not an order to which the present rule applies; *Bala Krishna* v. *Rangan*, 41 M. L. J. 334 69 I. C. 826; *Biswanath* v. *Lingaraj*, 1 Pat. 159: 70 I. C. 36. A. I. R. 1922 Pat. 408. It was held in some cases under the old Code that an order dismissing a claim for default, and without investigation, did not come under s. 283 (present rule), and such order not being "conclusive," the party against whom order was made, was not precluded from instituting a suit more than one year after the date of he order; *Sarala* v. *Kamsala*, 31 M. 5; *Sarat* v. *Tarini*, 11 C. W. N. 487; *Chandrabhusan* v. *Ramkanta*, 12 C. 108. But r. 63, which is more comprehensive than s. 283, applies to all orders made against a party under rule 60 or rule 61, even if the order was made for default or without full investigation; *Satindra* v. *Siva*, 26 C. W. N. 126: 64 I. C. 718 A. I. R. 1922 Cal 166; *Wamandhar* v. *Kamta Prasad*, 21 N. L. R. 94: 97 I. C. 179; *Nagendra* v. *Fani Bhusan*, 45 C. 785; *Gopal Singh* v. *Ganpat Rai*, 35 I. C. 821; *Gulab* v. *Mutassadi Lal*, 41 A. 623: 50 I. C. 746. Where the Court rejects a claim or objection preferred under r. 59 on the ground that it was designedly or unnecessarily delayed, the order is one made against the claimant or objector within the meaning of this rule; *Venkataratnam* v. *Ranganayakamma*, 41 M. 985, 45 I. C. 270 F. B., *Gobardhan Das* v. *Makundi Lal*, 45 A. 439: A. I. R. 1923 All 485: 74 I. C. 1024; *Ansamma* v. *Moidin*, 47 M. 160: A. I. R. 1924 Mad 111: 77 I. C. 264; *Kumara* v. *Thevaraya*, 48 M. L. J. 616: 87 I. C. 635. A. I. R. 1925 Mad. 1118.

Effect of Attachment on Adverse Possession.—Attachment of property in execution of a decree does not arrest the running of time in

favour of a party holding the property adversely to the judgment-debtor; *Seetami* v. *Venku*, 11 M. L. J. 344; *Ranganatha* v. *Srinivasa*, 49 M. L. J. 656: A. I. R. 1926 Mad. 42: 90 I. C. 1037. A contrary view was taken by the Calcutta High Court in *Najimunnesa* v. *Nacharuddin*, 51 C. 548: 83 I. C. 233: A. I. R. 1924 Cal. 744, and by the Bombay High Court in *Vasudeo* v. *Eknath*, 35 B. 79: 8 I. C. 639.

Step in Aid of Execution.—The institution of a regular suit by the decree-holder under this rule to set aside an order in a claim case, is a step in aid of execution within the meaning of Article 179 (4) of the Limitation Act, 1877.—*Rudra Narain* v. *Pachu Maity*, 28 C. 487 (1 A. 355; 23 W. R. 183; and 5 B. 29, *referred* to). But see *Raghunandun* v. *Bhugoo Lall*, 17 C. 268; and *Desraj Singh* v. *Karan Khan*, 19 A. 71, where a contrary view seems to have been taken. *See* also *Narayana* v. *Pappi Brahmani*, 10 M. 22, which has been overruled by 28 M. 50, F. B.

Limitation for recovery of compensation for wrongful attachment and sale of moveables—see notes under rule 78 of this Order.

Jurisdiction of Provincial Small Cause Courts to Entertain Suits under this Rule.—A suit will not lie in the Small Cause Court to establish right to moveable property after an adverse order under rr 60, 61, 62.—*Moosdeen* v. *Dinobundhoo*, 13 W. R 99; *Ilahi Buksh* v. *Sita*, 5 A. 462; *Mukand* v. *Nasiruddin* 4 A. 416; *Dakhyani Debea* v *Dole Gobind*, 21 C. 480: *Chhagan* v *Jeshan*, 5 B. 503 and 505-*note*; *Mahomed Koya* v. *Kasmi*, 9 M. 206; *Shiboo Narain* v. *Mudden*, 7 C 608: 9 C. L R. 8; *Godha* v. *Naik Ram*, 7 A. 152. *See*, however, *Pagi Partap* v *Varaj Lal*, 8 B. 259; *Raghu Nath Mukund* v *Sarosh*, 23 B 266.

A suit to recover moveable property attached under colour of the Rent Recovery Act (Mad Act VIII of 1865) is cognizable by a Court of Small Causes—*Davud Beg* v. *Kutlappa*, 11 M 264

See also Schedule II, clauses 19 and 20 of the Provincial Small Cause Court's Act, (IX of 1887)

An order made upon a claim to attach the property filed in the Small Cause Court of Calcutta under Or XXI, r 58, is " an order in the suit " within the meaning of section 37 of the Presidency Small Cause Court's Act (XV of 1882), and is final, subject only to the right to apply for a new trial. The Small Cause Court has full power and authority to determine the question of title under a mortgage over attached property; and that question is therefore *res judicata*—*Dino Nath* v. *Nuffer Chunder*, 25 C. 778: 3 C W N 590. *See* also *Ismail Solomon* v. *Mahomed Khan*, 18 C 296

Court-fee.—A party against whom an order has been made under rules 60, 61, dismissing his claim to the attached property, can bring his suit to establish his right to the property on a stamp paper of Rs. 10, under Schedule II, Article 17 of the Court Fees Act—*Dhondo Sahkaram* v. *Gobind Babaji*, 9 B. 20; *Phulkumari* v *Ghansyam*, 35 C 202, P. C.: 12 C. W. N. 169: 7 C. L. J. 86 (13 C 511, *reversed*), *Satindranath* v. *Siva*, 26 C. W. N. 126: 64 I C 713. A I R 1922 Cal 166, *Vithal Krishna* v. *Bal Krishna*, 10 B. 610, *Chunia* v. *Ram Dial*, 1 A 360; *Daya Chand* v. *Hem Chand*, 4 B. 515; *Sadasiv* v *Atmaram*, 4 B 535, *Napar* v. *Gopal*, 19 C L J 358; *Gulzari Lal* v *Jadaun Rai*, 2 A 63; *Fatima*

Begam v. *Sukh Ram*, 6 A. 341; *Nanraj Kuari* v. *Radha Prasad*, 6 A. 466; *Gobind Nath* v. *Gajaraj Mati*, 13 A. 389. But see *Ahmed Mirza* v. *Thomas*, 13 C. 162; and *Chokalingapeshana* v. *Achiar*, 1 M. 40 *See* also *Moti Sing* v. *Kaunsilla*, 16 A. 308.

Jurisdiction.—In a suit for a declaration that property is not liable to attachment and sale in execution of a decree, where the value of the property is in excess of the amount claimed in execution of the decree, the valuation of the suit for purposes of jurisdiction is not the value of the property but the decretal amount; *Khetra* v. *Mumtaz*, 38 A 72: 31 I. C 879; *Madhusudan*, v. *Rakhal*, 15 C. 104; *Anandi Kunwar* v. *Ram Niranjana*, 40 A. 505. 45 I. C. 494; *Phul Kumari* v. *Ghanasyam*, 35 C. 202: 35 I. A. 22.

Appeal and Revision.—No appeal lies from an order which properly comes under r. 60 The High Court also refused to interfere in revision —*Dayaram* v. *Gobardhan Dass*, 28 B. 458. *See*, however, *Sabhapathi* v. *Narayansami*, 25 M. 555; and also *Satkari* v. *Tirtha Narain*, 24 I. C 62 where the Calcutta High Court interfered in revision, in a case in which the lower court did not decide the question of possession (*the only* question it was *competent to* decide) and decided the question of title (the question it was not competent to decide). *See* also *Phomonsing* v. *A. J. Wellis*, 2 Bur. L. J. 134.

Where a Sub-Judge disallowed an application for the release of certain property attached before judgment. *Held* that there being a remedy by suit under this rule the High Court should not interfere with such order in revision.—*Guise* v. *Jaisraj*, 15 A. 405 (8 M. 484; and 11 A 383, *referred* to). *See* also *Sheo Prosad* v. *Kastura Kuar*, 10 A. 119.

Fraudulent Transfer by Judgment-debtor.—The attaching decree holder may, in a case by the defeated claimant to establish his title to the property, plead that the transfer is fraudulent or that it was intended to delay or defeat the creditors; *Ramasawmy* v. *Malappah*, 43 M. 760: 59 I. C. 947, F B, *Dhansukdas* v *Jhamp*, 54 I. C. 798; *Abdul Kadir* v *Ali Mia*, 15 C. L. J. 649, *Bhimraj* v. *Lakshman*, 22 Bom. L. R. 743: 57 I. C. 430.

SALE GENERALLY.

Power to order property attached to be sold and proceeds to be paid to person entitled.

64. Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same. [S. 284.]

COMMENTARY.

The words "*executing the decree*" after the words "any Court," and the words "*by it and liable to sale*" after the word "attached" have been added.

"May order."—It is however obligatory on the Court to order sale when a valid application is duly made after valid attachment by the party interested and having the right to apply.—*Kamisetti* v. *Tangatoor*, 28 I. C. 62.

When a property has been sold in execution of a decree, it cannot be sold again at the instance of another decree-holder who may have attached it before the attachment effected by the decree-holder, under whose decree it is actually sold; and when a judicial sale takes place, all previous attachments effected upon the property sold fall to the ground.—*Kashy Nath* v. *Surbanand*, 12 C. 317. *See* also *Pran Gour* v. *Himanta Kumari*, 12 C. 597, and *Moti Lal* v. *Karra Buldin*, 25 C. 179, P. C.

Where the same property is under attachment by two Courts of different grades, a sale effected by the Court of a lower grade is not a nullity, and a valid title passes to the purchaser. Sec. 63 is not intended to take the jurisdiction conferred by this rule.—*Gopi Chand* v. *Kasemunnissa*, 34 C. 836: 6 C. L. J. 130.

A Court has no jurisdiction to sell a property which has not been duly attached; *Panchanan* v. *Kunja*, 42 I. C. 259

"Such portion thereof."—It is entirely within the discretion of a Court to direct that property should be sold in portions, even though it has been attached or proclaimed as an entirety.—*Abdool Hye* v. *Macrae*, 23 W. R. 1; confirmed on review, in 23 W. R. 393. *See* also 3 C. L. J. 112-*n*.

If after the publication of the sale proclamation, one of the advertised lots is sub-divided into various lots for the purposes of the sale: *Held* that such sub-division of lots was no irregularity within r. 90.—*Sami Pillai* v. *Krishnasami Chetti*, 21 M. 417.

It is competent to the Court in executing a mortgage-decree to exercise its control in bringing the different items of the property comprised in the decree to sale in a particular order to adjust the equities of the parties before it who are interested.—*Krishna Ayyar* v. *Methu Kumaraswamiya*, 29 M. 217.

This rule applies to a certificate issued under the Public Demands Recovery Act, against all the *maliks* with direction for realisation to be made from one of the *maliks*; *Thittar Jha* v. *Ramdhari*, 3 I. C. 81.

"Shall be paid to the party."—Although there is no express provision in the Code that the purchase money may be paid to the decree-holder before the date of confirmation of sale, yet this rule and s. 73 indicate that a decree-holder may take out the purchase money before the date of confirmation of sale.—*Jogendra Nath* v. *Gobind Chunder*, 12 C. 252 (6 B. 16 *referred to*).

A successful pauper plaintiff attached and sold for her costs certain property of judgment-debtor. The sale proceeds were paid into Court. The plaintiff's solicitor applied for payment of his costs out of the sale proceeds, and the Government solicitor to have his certified Court-fees out of the sale proceeds. *Held* that the Government was entitled to precedence. The Court is bound by this rule to pay the proceeds of the attached property to the party entitled under the decree to recover the

Begam v. *Sukh Ram*, 6 A. 341; *Nanraj Kuari* v. *Radha Prasad*, 6 A. 466; *Gobind Nath* v. *Gajaraj Mati*, 13 A. 389. But see *Ahmed Mina* v. *Thomas*, 13 C. 162, and *Chokalingapeshana* v. *Achiar*, 1 M. 40. *See* also *Moti Sing* v. *Kaunsilla*, 16 A. 308.

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same, and there was no necessity for the Crown to make attachment. *Srimaty Gayanada Bala v. Butto Krishna*, 10 C. W N. 857: 33 C 10

65. Save as otherwise prescribed every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction in manner prescribed. [S. 269

Sales by whom conducted and how made.

COMMENTARY.

The words " *save as otherwise prescribed every sale*," " *such other* " and " *in this behalf* " are new.

As to sale of negotiable instrument, *see* s 78; as to agricultural produce, *see* ss 74, 75.

" Shall be conducted by an officer of the Court " etc.—It is the *Nazir's* business to complete the sale, although the Court (as well as the *Nazir*) has a discretion to decline acceptance of the highest bid when the price is extremely inadequate The Court has a quasi-revisional jurisdiction under condition 8 of the sale-proclamation and it does not require the Court itself to knock down the property. If a person bids at a sale and the property is knocked down to him, the mere fact that the Court has power to annul or confirm the *Nazir's* action does not leave it open to the bidder to withdraw his bid. The sale becomes complete; *Rajendra v. Upendra*, 19 C W. N 633, 21 C L J. 174: 27 I. C 805. Even where a sale is held by an auctioneer nominated by parties the sale is regarded as sale by Court.—*J C Galstaun v Woomesh*, 35 I. C 850

This rule clearly contemplates the employment of agents for the conduct of execution sales Receipt of purchase money by agents is equivalent to receipt of assets by Court for purposes of s 73; *Galstaun v. Woomesh*, 35 I C 850

The Court executing a decree passed an order postponing a sale, but the order failed to reach the officer conducting the sale, and the sale was subsequently held The judgment-debtor applied to set aside the sale. *Held* that the sale was illegal and void.—*Sant Lal v. Umarunnissa*, 1 A. 06 (4 A 382, 3 A 701; and 11 A. 333, *referred to*).

In sales under the direction of the Court, it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its officers. Where the conditions of the sale were read out in English which the purchasers did not understand, and a purchaser was led to believe by one of its officers that a substantial property freed and discharged from all incumbrances was being sold, though as a matter of fact the property was subject to incumbrances in amount far exceeding its value. *Held* that the sale was bad and must be set aside on the ground of misrepresentation; apart from this a Court is bound to set aside a sale induced by the misrepresentation of its accredited agent.—*Mahomed Kala Mea v Harperink*, 16 C. W. N. 249, P. C.: 9 C. L. J. 105: 36 C 323.

66. (1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

Proclamation of sales by public auction.

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

(*a*) the property to be sold;

(*b*) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;

(*c*) any incumbrance to which the property is liable;

(*d*) the amount for the recovery of which the sale is ordered; and

(*e*) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto. [S. 287.]

COMMENTARY.

Alterations.—This rule corresponds to section 287, C P Code, with several additions and alterations

In sub-rule (2) the words "*shall be drawn up after notice to the decree-holder and the judgment-debtor*" have been added A notice is now necessary for settling the terms of sale

Sub-rule (3) reproduces para 2 of section 287 of the old Code with much elaboration embodying in it the law as laid down in the case of *Sn-*

mati Girібala v. *Srimati Rani Mina Kumari*, 5 C. W. N. 497 (502) noted below. The verified petition, which under the old Code, was required to be filed at the time of attachment is under the present Code to be filed after attachment and before issue of sale proclamation.

In sub-rule (4) the words "*in the proclamation*" are new.

Para. 8 of section 287 of the old Code which empowered the High Courts to make rules under the old section, has been omitted; probably in view of sections 120 to 131 by which High Courts have been empowered to make rules consistent with the provisions of the Code. By virtue of s. 157, the rules framed under the old Code are still to be considered as law. *See* also, *Lal Mohan* v. *Nunu*, 17 C. 102.

The last para. of s. 287 has also been omitted and reproduced as a separate rule (rule 70).

"After notice."—Formerly in th[illegible] proclamation was usually drawn up without notice to [illegible] his back, so that he did not receive any [illegible] was fixed up in the Court house or was published upon the property. The judgment-debtor had therefore some excuse for not putting forward any objection; *Raja Ramessur* v *Rai Sham*, 8 C. W. N 257 (263). This defect has been remedied in the present Code, and a notice has to be served on the judgment-debtor before the sale proclamation is drawn up. Where after service of notice the judgment-debtors did not appear and object, but allowed the properties to be sold, it is not open to them to subsequently raise objections to the sale proclamation on the ground of misdescription; *Subbaraya* v. *Muthammal*, 22 I. C. 780 (12 M 19 P. C.: 21 I. C 389. 25 M L. J. 198 *folld.*); *Mahadeo Singh* v. *Dhobi Singh*, 4 Pat. L. T. 721. 74 I C. 838 Omission to issue or serve notice under this rule is a default within r. 57; *Namuna* v. *Roshan*, 15 C. W. N. 428

Notice to judgment-debtor only enables him to put his case before the Court, but if the decree-holder insists that a much smaller valuation should be inserted and the Court accepts his view, the decree-holder proceeds to sale at his risk and its validity may be subsequently challenged by the judgment-debtor; *Ram Singh* v. *Janardan*, 14 C. L. J. 541.

Omission to issue notice is an irregularity under r. 90; *Bepin Behari* v. *Kanti*, 18 I C. 715. Though a material irregularity, it must result in substantial injury before a Court sale can be set aside under Or. XXI, r. 90; *Kanhyalal* v. *Megh Raj*, A. I. R. 1927 Lah. 84.

Omission to serve a notice is more than a mere irregularity and renders the Court sale void.—*Ramaswami* v. *Ma U Tha*, 38 I. C. 98, but *see* *Krishnaji* v *Bali Ram*, 44 I. C. 252, where it has been held that notice under this rule is directory and not mandatory.

For form of Notice under sub-rule (2), *see* Appendix E, Form No 29

"Proclamation shall state time and place of sale."—The practice is to hold sales on certain fixed days of the month. These dates are known as sale dates. Sales are held on those days, and continued from day to day till finished.

The Court shall cause a proclamation of the intended sale to be made, giving the time and place of sale.—*Makendra Narain* v. *Gopal Mondul*, 17 C. 769.

When the proclamation advertised the sale to take place at the Court house, it is a material irregularity to hold the sale at the premises of some of the buildings advertised for sale.—*Duni Chand* v. *Atma Singh*, 182 P. R. 1906: 11 P. L. R. 1907.

A property advertised for sale was sold on the day fixed, but at an earlier hour than that stated in the proclamation. *Held* that there had been no sale within the meaning of the Code: proclamation of the time and place and the holding of it at such time and place, being conditions precedent to the sale being a sale under the Code.—*Basharullah* v. *Uma Churn*, 16 C. 764. *See* also, *Chedami Lal* v. *Amir Beg*, 7 A. 676; *Khodeja Bebee* v. *Ram Narain*, 12 W. R. 511; *Pokhraj Singh* v. *Gossain Munraj Pooree*, 12 W. R. 281; and *Kishen Prosunno* v. *Nurduma Dossee*, 17 W. R. 339.

Where the sale proclamation omitted to state the place of sale, and where the sale took place on a date other than that notified in the proclamation, and before the expiration of 30 days required by r. 68.—*Held* that the non-compliance with provisions was more than mere irregularity.—*Jasoda* v. *Mathura*, 9 A 511 (7 A. 289 *referred to*). *See* also, *Marug Po Tha* v. *S. R. Chettyar*, A. I R 1927 Rang. 84.

Under the Code it is intended that a sale of moveable property attached in execution of a decree should ordinarily be held in some place within the jurisdiction of the Court ordering the sale.—*Lakhmi Bai* v. *Santapa Revapa*, 13 B 23.

A sale held on a holiday is illegal; *Haro Jamadar* v. *Jadub*, 3 W. R. Mis. 24. But see *Bisram* v *Sahibunnissa*, 3 A 333.

See notes under rule 90 of this Order.

Fresh Proclamation.—Where a sale is postponed indefinitely or to a fixed date, it is necessary, in the absence of any express arrangement between all the parties that a fresh proclamation should be made, giving notice of the day to which the sale has been postponed.—*Gopee Nath* v *Roy Luchmeeput*, 3 C. 542 · 1 C. L. R 349; *Okhoy Chunder* v. *Erskine*, 8 W. R. Mis. 11; *Shoshee Mookhee* v. *Dwarka Nath*, 6 W. R Mis. 84; *Jhoomuck Chowdhry* v *Radha Pershad*, 25 W. R 328.

Where subsequent to the proclamation a portion of the property was released to a third party, a fresh proclamation must be made; *Shib Prokash* v. *Sardar*, 3 C. 544.

"Proclamtaion shall specify the property."—A judgment-debtor has the right to have the property to be sold described with reasonable accuracy.—*Raja Ramessur Prosad* v. *Rai Sham Kissen*, 8 C W N 257

In the advertisement of the sale the property was described as that of the widow, and the interest to be sold was described as that of the deceased debtor. *Held* that the purchaser at the sale acquired the property of the deceased debtor in the estate, and had a good title against the heir.—*Ishan Chunder* v. *Buksh Ali*, March 614; W R F B 119;

Nussceerun v *Ameeroodeen*, 24 W. R. 8; *Hulkhory Lall* v. *Sheo Churn*, 21 W. R. 109, *Abdul Kureem* v *Jaun Ali*, 18 W. R. 56; *Satish Chunder* v. *Nilcomul*, 11 C 15, and *Devji* v. *Sambhu*, 24 B. 135

Where a property is described at the time of an execution sale as the property of the debtors who were as mere representatives of a deceased judgment-debtor, *prima facie*, what is sold is the property of the deceased debtor.—*Lalla Seeta Ram* v *Ram Buksh*, 24 W. R. 383.

At a sale of an under-tenure for arrears of rent the growing crops passes to the purchaser, except where it has been specially excepted by the sale notification.—*Afatoolla* v. *Dwarka Nath*, 4 C 814: 4 C. L. R. 95

If there is any ambiguity in the sale proclamation; the decree should be looked into to see what was actually sold; *Piarey Lal* v *Ramchandra*, 96 I. C. 771: A. I R 1926 All 730

Where, on an execution sale, there is a discrepancy between the conditions in the notification of what is to be sold and the certificate of what has been sold, the conditions in the notification are to be taken as of superior authority in dealing with the conflicting claims of innocent third parties whose rights are affected by the variation.—*Uma Churn* v *Gorind Chunder*, 1 C. L R 460; *Gowree* v. *Surut Chunder*, 22 W. R. 408 *See* however, *Dwarka* v *Aloke*, 9 C 641.

R 66 prescribes the statements and information to be given by the proclamation of sale —*Tasadduk Rosul* v. *Ahmad Husain*, 21 C 66 P. C

Where in the sale of a certain share in a *mahal* which was described in the schedule, the share was attached and sold, but the Court issued a sale certificate in respect of a share in a different property, *held that* there was no power to sell the latter share since it was not a case of mere misdescription but of a mistake as to identity. That which is sold in a judicial sale can be nothing but the property attached, and that property is conclusively described, in and by the schedule to which the attachment refers; *Raja Thakur* v *Jiban Ram*, 40 C 590 P. C.: 18 C. W. N. 313 26 M. L. J 89: 21 I. C. 936

Duty of the Court to Settle the Sale Proclamation Itself.—It is the duty of the Court to settle the proclamation of sale itself. If it does not do it, but deputes a Commissioner to do it, the sale is invalid. The fact that the person seeking to set aside the sale was aware of the contents of the proclamation prepared by the Commissioner, is immaterial; *Appu* v. *Achutha Menon*, 49 M. 383: 91 I. C. 8: A. I. R. 1926 Mad. 735

" The revenue assessed upon the estate or part of it."—The " part of an estate " means the *aliquot* part of an estate.—*Kally Prosonna* v *Dino Nath*, 11 B. L. R. 56; 19 W. R. 434.

Where, on account of submersion of a *mahal*, it was neither attached nor advertised for sale, and the revenue assessed thereon was not referred to in the sale proceedings and the sale certificate contained no reference to it as the property sold, *held* that such a sale did not convey any right to the purchaser.—*Fida Hosain* v. *Kutub Husain*, 7 A. 38 (5 A. 66 *referred to*).

An objection to the validity of a sale of revenue-paying land, that the revenue assessed had not been stated in the sale proclamation cannot be entertained for the first time in the Court of appeal.—*Macnaghten* v. *Mahabir*, 9 C. 656, P. C. (reversing 9 C. L R. 134).

The sale proclamation should contain the statement as to the revenue assessed upon the estate and its omission is a material irregularity upon which the judgment-debtor can base an application for setting aside the sale if he could satisfy the other conditions required by the Code.—*Ball Ram* v *Seth Narsingh Das*, 75 I C. 546 P C · 45 M. L. J. 403

"Any incumbrance to which the property is liable."—Under this rule the Court will simply notify the incumbrance without deciding whether it is real or fictitious The distinction between this rule and r. 62 pointed out.—*Shib Kunwar* v. *Sheo Prasad*, 28 A. 418: 3 A. L. J. 200 As to the difference between r 66 and r. 62, *see* notes to r. 62

Where in an execution proceeding, on an application of the mortgagee of the property required to be sold, the mortgage was, without any inquiry as to its genuineness, notified and the property was purchased by the decree-holder *held*, that in a suit on that mortgage, the purchaser was not estopped from pleading that it was fictitious, unless there was on his part any declaration, act or omission debarring him from setting up the fictitiousness; *Jairaj Mal* v *Radha Kishen*, 35 A 257 · 20 I. C 182 (28 A. 418 *followed*).

Where it was merely proclaimed that a mortgage existed, the auction-purchaser cannot be obliged to discharge the incumbrance, if it appears that the document did not create any charge on the property purchased; *Ganesh Prasad* v. *Bisram*, 18 I C 461

When a party to a suit having a charge or incumbrance on the property in suit ordered to be sold, fails to have it notified in the sale proclamation, he is estopped from subsequently setting up his lien against the auction purchaser; *Manik Ram* v. *Ram Autar*, 27 I. C. 611 (22 B. 686 *referred to*).

Where the existence of certain incumbrances is notified, the purchaser is not estopped from showing the invalidity of the incumbrance; *Lala Bhagwan* v. *Chaudhuri*, 36 I C. 782.

The absence of specification of the incumbrances coupled with the fact that the property is undervalued amounts to a material irregularity.—*Moti Laul* v. *Bhawani Kumari*, 6 C. W. N. 836

It is the duty of the person applying for execution to disclose his own lien (which he must know of) in this application for sale, and the Court is to specify the same in the proclamation. A purchaser purchasing without notice of such incumbrance, purchases the property free of the mortgagee's lien.—*Ram Chandra* v *Jairam*, 22 B. 686 (7 M 107, and 12 B 678, *referred to*) *See* also, *Kasturi* v *Venkata Chalapathi*, 15 M 412 *See*, however, *Dondo* v *Raoji*, 20 B 290

Where a decree-holder stated in his application under sub-rule (3) that the property to be sold was subject to a mortgage in his favour, but no mention of the mortgage was made in the sale-proclamation, *held*

that the omission not being due to any fraud on his part, the decree-holder was not estopped from enforcing his mortgage against the auction-purchaser; *Ram Sarup* v. *Bharat Singh*, 43 A. 703: 64 I. C. 763. But if he omitted to mention his mortgage in the application, he would be estopped from enforcing the mortgage; *Kalidas* v. *Prasanna*, 47 C. 446: 58 I. C. 189.

In a proclamation of sale in execution of a mortgage decree, it is most material that it should be known whether there is any incumbrance, prior or puisne to the mortgage, on account of which the property is to be advertised for sale.—*Debendra Narain* v. *Ramtaran*, 30 C. 599, p. 606: 7 C. W. N. 766, F. B.

There is no objection to the sale in execution of a decree for sale on a mortgage "subject to the charge" of property which is liable to a charge for maintenance in favour of a particular person.—*Lalman* v. *Mohar Singh*, 29 A. 205. 3 A. L. J. 848: (1907), A. W. N. 18.

When property is sold subject to incumbrances specified in the sale proclamation under this rule the auction-purchaser purchases the property subject to those incumbrances; and if in a subsequent suit or proceeding, the specified incumbrances are declared invalid, the auction-purchaser cannot hold the property without making good the amount of the incumbrances. The decree-holder is also estopped from denying the truth of the representations made by him and must pay to the judgment-debtor the amount of the incumbrances represented by him to be subsisting.—*Inayat Singh* v. *Izzaunnissa Begam*, 27 A. 97, F. B. Reversed in *Izzatunnissa* v. *Kunwar Pertab* 31 A. 583 P. C.: 13 C. W. N. 1143: 10 C. L. J. 313 Distinguished in 28 A. 418.

Claims admitted by parties or established by a decree of a Court should be entered in the proclamation of sale as charges upon the property, though they have come to the knowledge of the Court in an enquiry under this section only, and have not been made the subject of an order under this section.—*Shantapa* v. *Subrao*, 18 B. 175.

An arrear of rent due in respect of the property sought to be sold is to be regarded as an incumbrance to which the property is liable, and the omission to notify the arrears of rent due at the date of the issue of the proclamation had the effect of destroying the lien which the decree-holder has upon the tenure.—*Giribala Debai* v. *Rani Minakumari*, 5 C. W. N. 497 (10 C. 609, and 15 M. 412, *referred to*).

If a mortgage is merely notified and the property is not sold subject to mortgage, the decree-holder or the purchaser is not estopped from questioning its validity.—*Roshan* v. *Lallu*, 44 A. 714: 68 I. C. 700. But if the decree-holder fails to notify his own mortgage on the property, he is estopped thereafter to set up the mortgage against the auction purchaser.—*Maung Kyin* v. *Ma Pwa*, 64 I. C. 953. If the mortgage turns out to be invalid, the benefit is taken by the purchaser and judgment-debtor cannot claim refund of the amount alleged to have been due on the mortgage and the purchaser is free to contest the legality or validity of the mortgage when he is attacked by the mortgagee.—*Krishnakishore* v. *Nagendrabala*, 34 C. L. J. 333.

"Every other thing which the Court considers material" etc.—The proclamation shall specify as fairly and accurately as possible the property to be sold, the revenue assessed upon it, the incumbrances and every other thing which the Court considers material for the purchaser to know in order to judge of the nature and value of the property the Court is selling and he is purchasing.—*Ghulam Shahbir* v. *Dwarka*, 18 A. 163 (165).

In ascertaining the value, only the rents realizable from the tenants and not the *abwabs* should be taken into account.—*Shosi Bhusan* v. *Ahmed Hossein*, 7 C W N. 439.

An arrear of rent due in respect of the property to be sold is to be regarded as one of the matters material for the purchaser to know.—*Giribala Debia* v. *Rani Minakumari*, 5 C. W. N. 497.

If the execution Court should have reason to believe that the property which was ordered to be sold, was an occupancy holding, it should enter the fact in the sale proclamation as warning to an intending purchaser that he might take nothing by his purchase.—*Basdeo Prasad* v. *Juthan Ram*, 27 A. 684: 2 A. L J. 401. (1905) A. W. N. 138.

Clause (c) of this section covers cases of *puisne* as well as prior incumbrances.—*Hari Kishen* v. *Gisborne & Co*, 9 C. W. N ccc (300).

Value of the Property.—The rule does not say that the sale proclamation shall specify the value of the property It lays down that it shall state every thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property. The value of the property is no doubt a material fact for the purchaser to know, and a misstatement or undervaluation may lead to serious consequences. Gross or deliberate undervaluation has been held to be material irregularity. The rule therefore in effect seem to require that the value must be stated. *See* also, proviso to r 17 of this order. It has been held that the exact value of the property to be sold must be stated in the sale proclamation as fairly and accurately as possible, inasmuch as it is a material fact for the purchaser to know and an under-statement of the value is a material irregularity, *Sadatmand Khan* v. *Phul Kuar*, 20 A 412, P. C.: 2 C. W. N 550. Followed in *Sivadurga* v *Rajmohan*, 15 C. W N. 577; *Pran Singh* v. *Janardan*, 14 C L J. 541; *Madarsah* v *Palaniappa*, 23 M. 628; and in *Sivasami* v *Ratnasami*, 23 M. 568. Relied upon in *Moti Lal* v. *Bhawani*, 6 C W. N 836; and in *Rajah Rammessur Proshad* v. *Rai Sham Krissen*, 8 C. W N 257 Distinguished in *Jashinuddin* v *Monmohini*, A I R 1922 Cal 93. These cases have been explained in *Kashi Pershad* v. *Jamuna*, 31 C 922 8 C W N. 542, holding that the law does not require a Court to make an investigation on the question of valuation. In *Surendra Mohan* v. *Hurduck Chand*, 12 C. W N. 542, it has been held that it cannot be laid down generally that in no case should any enquiry be made as to the value of the judgment-debtor's property to be sold before issuing the sale proclamation (31 C 922 8 C W N 264 *commented on;* doubted in 14 C W N. 40-*n*) The Court must make an enquiry as to the value of the property where the judgment-debtor objects; 11 C L. J. 63-*n* The enquiry under this rule is intended to be of a summary character, *Pran Singh* v *Janardan*, 14 C L J. 541 Gross or deliberate under-valuation is a material irregularity; *T[illegible]* *Krishna* v. *Moti Chand*, 40 C. 635, P. C., 17 C. W. N. 637; *Sit[illegible]*;

v. *Rajmohan*, 15 C. W. N. 577. The value of the property must be stated as fairly and accurately as possible. The Court ought not to enter in the sale proclamation a statement that the property to be sold is valued by one person at a particular sum and by another at a larger sum; *Raghunath v. Hazari*, 37 I C 872 2 Pat. L. J. 130, F. B. But see *Bejoy Singh Dudhuria v Ashutosh*, 28 C. W. N. 552, where it has been held that a Court is justified in stating the valuation given by both parties instead of attempting itself to value the property when the property was one that it was most difficult to value accurately. If there is a wide difference between the values given by the two parties, the valuation as given by the judgment-debtor should also be stated in the sale proclamation; *Basanta v. Baikuntha*, A I R. 1926 Cal. 610: 91 I C. 819.

The insertion of any valuation in the sale proclamation other than the valuation fixed by the Court is calculated to mislead intending bidders and is therefore wrong. A sale *held* under such circumstances can be set aside; *Damrupat Singh v Rameshwar Singh*, A. I. R. 1923 Pat 208

Effect of an Order under this Rule.—This rule imposes upon the Court the duty of stating as fairly and accurately as possible any *encumbrance to which the property is liable, with any other things* which it considers material for the purchasers to know in order to judge of the nature and value of the property But an order passed by the Court in the course of such an enquiry is not conclusive as between the decree-holder or purchaser on the one hand and the holder of the encumbrance on the other; *Lala Bhagwan v Chaudhuri*, 36 I. C. 732.

Sub-rule (3). Application to be Accompanied by a Verified Statement.—This rule has given effect to the practice that prevailed in the Madras Presidency and embodies the law laid down in *Srimati Giribala v Srimati Rani Mina Kumari*, 5 C W. N 497 (502).

The omission in an application in execution for attachment of immoveable property to verify the inventory of the property sought to be attached is an irregularity only and does not vitiate the application.—*Nasirunnissa v. Ghufuruddin*, 28 A 214 (1905), A W N 263 (22 A. 55 *followed*)

Sub-rule (4). Court may Summon Any Person.—On this point Prinsep, J, points out the duty of the lower Courts and gives instructions for their guidance —*Debendra Narain v. Ram Taran*, 30 C. 599 (607): 7 C W. N 766, F. B. The enquiry under this rule is intended to be of a summary character; *Pran Singh v Janardan*, 14 C L. J. 541.

A claim set up in an investigation under this rule cannot be treated as a claim under r 58 the latter having reference to claims to property under attachment.—*Bhiku Bal v Khem Chand*, 14 B. 369.

Appeal.—It has been held by the Calcutta High Court that an order under this rule determining the value of immoveable property is merely interlocutory and is not appealable as a decree; *Deoki Nandan v. Bansi*, 16 C. W. N. 124 · 14 C L. J 35 (approving *Sivagami v. Subramania*, 27 M. 259 F. B); *Panch Duar v. Mani Raut*, 16 C. W. N. 970. *Mahammad Eahasan v. Tara Prasanna*, 22 I. C. 548; *Sashikanta v Fooljan Bewa*, 96 I. C. 567: A. I. R. 1926 Cal. 1184. Though an order merely fixing the value of a property is not open to appeal but an order under r. 66 may in certain circumstances also amount to an order under

s. 47, and in such cases it is appealable; *Debendra v. Kailash*, A. I. R 1925 Cal. 318; *Basanta* v. *Baikuntha*, A. I. R. 1926 Cal. 610: 91 I. C 810; *Alimuddin* v. *Gobinda Prasad*, A. I. R. 1927 All. 208. The Madras High Court, in *Sivagami* v. *Subramania*, 27 M. 259, and in *Ramanathan* v *Venkatachelam*, 44 M. L. J. 599, has held that an order under this rule determining the value of the property to be sold, the place where the sale is to take place, the lots in which it is to be sold and the amount for the recovery of which the sale is to take place, is not a judicial but an administrative order, and it does not therefore come within s. 47 and is not appealable. The same view was also taken in *Lanka* v. *Lanka*, 46 M. L. J. 193: A. I. R 1924 Mad 527, that no appeal lies from an order directing the order in which the property should be sold. The Allahabad High Court, in *Ajudhia Prasad* v. *Gopinath*, 39 A. 415: 39 I C. 415, also held that an order under this rule determining the value of property, is not appealable under s. 47, as it is not a judicial order. The Patna High Court has also held in a recent case that an order of the Court determining any of the particulars to be stated in the sale proclamation, is not a final order, and is not therefore appealable; *Mohit Narain* v. *Thakan*, 4 Pat. 731: 88 I. C. 332: A. I. R. 1925 Pat. 500. The same High Court held in two earlier cases that an order of the Court determining the value of the property was merely interlocutory and therefore not appealable; *Deokinandan* v. *Raja Dhakeshwar*, 2 Pat L J 13; *Saurindra* v *Mritunjay*, 5 Pat L J 270: 56 I. C. 452.

An order fixing price of the property to be sold does not conclusively determine the right of parties and hence not appealable as a decree under s. 2, C. P. Code, nor is such an order an appealable one.—*Ramanathan* v. *Somasundara*, 37 I. C 897. But see *contra in Kanhaia Lal* v. *The Bank of Upper India Ld.*, 49 I C. 539, where it has been held that the order of the Court is a judicial order and hence appealable The weight of authority however is against the latter view, see *Bejoy* v. *Dhirendra* 47 I. C. 512; *Deokinandan* v. *Raja Dhakeswar*, 2 Pat L. J. 13: *Giridhari* v. *Altaf*, 46 I. C. 564; *N. C Chatterji* v *R M. K. Karpan*, 36 I. C 402; *Ajodhia Prasad* v. *Gopinath*, 39 A. 415: 39 I. C. 578, *Raja Braja Sunder* v *Sivaranjan*, 59 I. C 282; *Avudainayagappa* v. *Sundaranandan*, 76 I. C 731

Where after notice under this rule, the judgment-debtor put forward certain objections, which were summarily rejected, *held* that the decision was under s 47 and appealable; (*per* Walsh, J) *Shiam Lal* v. *Roshan*, 35 I. C. 230: 14 A. L J. 363.

Sec. 288, C P Code, 1882, which was to the effect that " *no Judge, etc., shall be answerable for error in the proclamation, unless it has been committed dishonestly* " has been omitted from the present Code. " The commmittee are opinion that, having regard to the provisions of Act XVIII of 1850, the section may safely be omitted."—*Report of the Special Committee.*

Revision.—An order under this rule can be interfered with by the High Court in Revision under s. 107 of the Government of India Act, if not under s. 115 of the C. P Code, *Raghunath* v. *Hazari*, 37 I. C 872, 2 Pat. L. J 180 F. B.

Miscellaneous Cases.—Property to which title is made out by gift is not property *inherited* within the meaning of r 5, Chap IV of the General

Rules of Practice for the Civil Courts, and such property is consequently not ancestral, *Fazal Ahmad* v. *Wesaluddin*, 38 A. 481: 14 A. L. J. 609

67. (1) Every proclamation shall be made and published, as nearly as may be, in the manner prescribed by rule 54, sub-rule (2).

Mode of making proclamation.

(2) Where the Court so directs, such proclamation shall also be published in the local official Gazette or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale. [S. 289.]

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given. [New.]

COMMENTARY.

Sub-rule 3 is new It has been framed to meet the conflicting decisions reported in 11 C. 74, 12 B. 368 and 12 C. W N. 757, noted below. In the case reported in 12 C W N 757, all the cases on the point have been referred to and discussed

"Proclamation shall be made."—*See* notes to rule 54 under the heading "Order shall be proclaimed."

Publication of a sale proclamation upon the decree-holder's property at a distance of half a mile from the judgment-debtor's property, is a material irregularity in the publication of the sale —*Jamini Mohun* v. *Chandra Kumar*, 6 C W N 44.

Where it appeared that the sale notification had not been fixed up in the Collector's office as required by this section that no affidavit as to search having been made in the Registry office with regard to incumbrances as required by r. 66, had been filed, and that sale took place on and not after the 30th day from the publication of the notice; but it also appeared that the applicant had himself been present at the sale and had purchased the property, and it was not shown that any substantial injury had resulted from the irregularities,—*held* that there was no ground for setting aside the sale.—*Bandy Ali* v *Madhub Chunder*, 8 C. 932.

A sale of revenue-paying land is not, *ipso facto*, void by reason of a copy of the sale proclamation not having been fixed up in the Collector's office as required by this section —*Nana Kumar* v. *Golam Chunder*, 18 C. 422 F. B. (8 C 932; 11 C. 74 and 658, *referred to*).

Advertisement.—It is right that the Court should permit any advertisement reasonably required which might have the effect of giving notice to all possible purchasers; *Rai Manindra* v. *Luchmeshwar*, 1 C. W. N clv. (n) If an advertisement in the Calcutta Gazette describing the property differed from that in the schedule of attachment, it could not be relied on to validate

the sale of the property which was not the property to which the attachment related; *Raja Thakur* v. *Jiban Ram*, 41 C. 590 P. C. 18 C. W. N. 313.

Sub-rule (3). Division of Property into Lots.—It was held under the old Code that when distinct properties are proclaimed for sale in one execution there should be a separate proclamation on each of them; *Tripura Sundari* v. *Durgacharan*, 17 C. 74. *See* also *Maulvi Abdul Kasem* v. *Binode*, 12 C. W. N. 757. It was held in Bombay that where property is divided into a number of small lots, as a means of obtaining a better agregate price the law does not require that separate proclamation should be made on each lot.—*Pedro* v. *Jalbhoy*, 12 B. 368. Sub-rule (3), which is new, aims at settling the difference of opinion which hitherto existed, and adopts in substance the view in 12 B 368. It should be noted however that the rule speaks of proclamation *for* and not proclamation *on*.

Time of sale.

68. Save in the case of property of the kind described in the proviso to rule 43, no sale hereunder shall, without the consent in writing of the judgment-debtor, take place until the expiration of at least thirty days in the case of immoveable property, and of at least fifteen days in the case of moveable property, calculated from the date on which the copy of the proclamation has been affixed on the court-house of the Judge ordering the sale. [S. 290.]

COMMENTARY.

The proviso to rule 43 refers to properties which are subject to speedy and natural decay and to cases where the expense of keeping them is likely to exceed its value.

Sale in Cont[illegible] [illegible] been taken that such a sale is an illegality, vitiating the sale and is something more than a material irregularity to which r 90 refers; *Bakhshi Nand* v *Malak Chand*, 7 A. 289. *See* also *Jasoda* v. *Mathura*, 9 A. 511; *Sadhusaran* v. *Panchdeo*, 14 C 1; *Ganga Prasad* v. *Jag Lal*, 11 A. 333; *Bashrutulla* v. *Uma Churn*, 16 C. 794; and *Mohendro Narain* v. *Gopal Mondul*, 17 C. 769. In another set of cases it has been held that it is a material irregularity but its effect is not to make the sale a nullity without proof of substantial injury, *Tasadduk* v. *Ahmad Husain*, 21 C. 66 P. C.; *Kokil Singh* v. *Edal*, 31 C. 385. *See* also notes to r 90

Waiver of Irregularities.—As to this, *see* notes to r 90.

Adjournment or stoppage of sale.

69. (1) The Court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment:

Provided that, where the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made without the leave of the Court.

(2) Where a sale is adjourned under sub-rule (1) for a longer period than seven days, a fresh proclamation under rule 67 shall be made, unless the judgment-debtor consents to waive it.

(3) Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale. [S. 291.

COMMENTARY.

Alterations.—This rule corresponds to s. 291, C. P. Code, 1882, with some modifications. The words "*under this chapter*" which occurred after "adjourn any sale" have been omitted. By the above omission the rule has been clearly made applicable to sales of mortgaged properties. Again the words "*thereupon the defendant's right to redeem and the security shall both be extinguished,*" which occurred at the end of s. of the T. P. Act (IV of 1882), have been omitted from rule 5 of Order XXXIV (which corresponds to s. 89), in order to make this rule applicable to all sales of immoveable property. In this connection reference may be made to the Full Bench case reported in 31 C. 163: 8 C. W. N. 69 which clearly explains the object of the omission. The words "other than a sale by the Collector," which occurred in the old section, have also been omitted on account of rule 70 which covers the exception.

"**Court.**"—In execution of a decree passed by a Sub-Judge a sale was held by the Nazir of District Judge. *Held* that the *District Judge* had no jurisdiction to pass any order under this rule.—*Nobokishore* v. *Prot Chunder*, 1 C. L. R. 534. An execution case was pending before a Sub-Judge, who postponed the sale for eight months on a letter from the District Judge. *Held* it was entirely irregular; *Kali Charan* v. *Debend* 10 C L. J 496.

Any Sale.—This rule applies to sale under mortgage decrees. See notes above under the heading, "Alterations."

Adjournment After Partial Sale.—Court may adjourn the sale after the sale of the first two lots; *Raja of Kalahasti* v. *Sri Raja Venkataramit* 1914 M W N. 873: 26 I. C. 273.

Discretion.—Where a Judge is unable to attend the Court on account of illness, he is competent to postpone the sales.—*Megh Lall* v. *Shib Pershad*, 7 C. 34: 8 C. L. R. 369.

The adjournment of sale from time to time without sufficient ground is nothing more than a mere irregularity, and does not vitiate the sale. *Venkata* v. *Sama*, 14 M 227.

Adjournment by Bailiff.—Without Court's permission is a mere irregularity; *Vaduganathan* v. *Foy*, 20 I. C. 192: 6 Bom. L. T. 65.

Sale to be Adjourned to a Specified Day and Hour.—Where property was ordered to be sold at a fixed date but no hour had been fixed and it was sold at a very inadequate price,—*held* that there had been material irregularity causing substantial injury.—*Surnomoyee* v. *Dakina Ranjan*, 24 C. 211 (21 C. 66, P. C., *explained*); *Jamini Mohan* v. *Chandra Kumar*, 6 C. W. N. 44; *Babu Ram* v. *Inamullah*, A. I. R. 1927 A. 241. In *Venkata Subbaraya* v. *Zamindar of Karvetinagar*, 20 M. 159, it has been held that, when a sale is adjourned under this rule, the provisions mentioned must be followed with exactitude. The sale should be adjourned to a specified day and hour and omission to specify the hour of sale is material irregularity.—*Mahabir Pershad* v. *Dhanukdhari*, 31 C 815: 8 C. W. N. 686. Affirmed in 34 C. 709, P C.. 11 C. W. N. 789: 6 C. L. J. 11: 17 M. L. J. 353: 9 Bom. L. R 651; *see* also *Bhikari* v. *Rani Surjamani*, 6 C. W. N. 48 (24 C. 291; 6 C. W. N. 44; 20 M 159, *refd. to*). When a sale is adjourned, but no day is specified to which it is adjourned, the sale is void, *Motahar* v *Mohammad*, 40 C. L. J. 311: 84 I. C. 700: A. I R. 1925 Cal. 201. When the sale was fixed on the 13th but was held on the 20th owing to the absence of the Judge, there was no contravention of the provisions of the rule. Even if there is any irregularity, the sale cannot be set aside without proof of substantial injury; *Thakur Ranglal* v. *Maharaja Raveneswar*, 16 C W. N. 1, P. C.: 14 C. L. J. 834; but see *Hari Sadhan* v *Shib Gopal*, where it was held that when a sale is adjourned to a certain date, but is held on a different date, the case is one of material irregularity in conducting the sale.

A sale of land was, owing to the absence of bidders on the sale day, adjourned and held on the next day —*Held*, that the sale was invalid.—*Palani* v. *Sivalinga*, 8 M. 6.

It is the practice to place all properties intended for sale on a list and to proceed with the sales from day to day, commencing on an appointed day. As each property is taken up in its turn, an adjournment of the sale of a particular property which is the consequence of such procedure in not an adjournment within this rule; *Lal Mohan* v. *Nunu*, 17 C. 152. A sale may thus be conducted from day to day for a period longer than seven days, without any illegality or irregularity; *Pir Mahamed* v. *Mayandi*, 8 I. C. 564.

Power to Adjourn Sale of Mortgaged Property.—This rule will apply to a sale *held* in virtue of an order absolute for sale, passed under s. 89, T. P. Act (now Or XXXIV, r. 5), although no power is given under that Act for postponement, *Raja Ram* v *Chuni Lal*, 19 A. 205 Followed in *Misri Lal* v. *Mithu Lal*, 28 A 28 (1905) A. W. N 168. *See* also, *Harjas Rai* v *Rameshar*, 20 A 351, where it has been held that this section must be taken to have modified 89 of Act IV of 1882, when the debt and costs are tendered to the officer conducting the sale, or when the amount of such debt and costs has been paid into Court that ordered the sale *See* also *Vallabha Vaiiya* v *Vilapuratti*, 19 M 40 F. B., p. 48, and *Bibijan* v *Sachi Bewah*, 31 C. 863, F B , 8 C. W N 684, F. B (25 M. 244; 25 B. 101; 19 A. 205, and 31 C 373 *followed*) A Court has power under this rule to adjourn the sale of mortgaged property.—

Shyam Kishen v. *Sundor Koer*, 31 C. 373; *see* 37 C. 987: *Bepin Behari* v. *Jatindra*, 14 C. W. N. 1019.

See *notes under Order XXXIV, r. 5, and the cases noted thereunder.*

Issue of Fresh Proclamation When Necessary.—Where a sale in execution is postponed, it is necessary, in the absence of express agreement between the parties, to issue a fresh proclamation.—*Gopee Nath* v. *Roy Luchmeput*, 3 C 542, 1 C. L R. 349 (3 C. 544 *followed*). Followed in 7 C. 466; and explained in 7 C. 730

Where there was adjournment of the sale, but the property was kept on hammer throughout from the 16th January to the 28th January in expectation of higher bid, and on none of these dates did the bidding start afresh from the beginning, but only an attempt was made to obtain some higher bid. *held* that it was a continuous sale and the provisions of sub-rule (2) of r 69, do not apply; *Murlidhar* v. *Nawab Saiyid*, 6 Pat. 432: A. I. R. 1927 Pat. 312.

When there is a series of short postponements of less than seven days each which, taken together in the aggregate amount to more than seven days, a fresh proclamation is necessary; *Jaminimohan* v. *Chandra*, 6 C W. N. 44 (11 C. 658: 24 C. 291 *referred to*).

When the stay of proceedings is removed, a fresh proclamation ought to be issued If not issued again, the judgment-debtor's remedy is to object to the confirmation of the sale and not to impeach the sale by a regular suit.—*Gujrajmati* v. *Saiyid Akbar*, 11 C. W. N. 393, P. C.. 5 C. L. J. 138. 29 A. 196: 17 M. L. J. 112: 9 Bom. L. R. 83.

Omission to issue fresh sale proclamation after adjournment amounts to material irregularity; *Bagal Chander* v. *Rameshur*, 18 C. 496; *Bhaiya Mati* v. *Bhaiya Pirthipal*, 25 I. C. 17.

Waiver.—As to waiver, *see* notes to r. 90.

"Debts and costs."—These words in cl. (3) could not be interpreted to mean the balance of the decree debt and costs, which would remain, if by a legal fiction the sales of previous lots (not yet completed by the payment of the whole purchase money) were taken as completed by treating the whole of the purchase-money as actually paid up, *Raja of Kalahasti* v *Sri Raja Venkataramiah*, (1914) M. W. N. 873.

Tender.—An auction-purchaser of the properties, is a representative of the judgment-debtor and he can tender the decretal amount, when the property is going to be sold in execution of a mortgage-decree.—*Radha Kishen* v. *Hem Chandra*, 11 C. W. N. 495 (27 C. 966: 4 C. W. N. 317 *followed*).

Petition for Postponement.—Petition for time to pay the decretal amount, signed by the judgment-debtor's pleader, constitutes sufficient acknowledgment of debt.—*Ram Coomar* v. *Jakur Ali*, 8 C. 716 (3 A 247 *followed*). Followed in *Taree Mahomed* v. *Mabood*, 9 C 730 *See also*, *Norendro Nath* v. *Bhupendra Narain*, 23 C. 874; and *Trimbak* v. *Kashi Nath*, 22 B 722.

Withdrawal of Bid.—It is competent to a bidder at a Court sale to withdraw his bid. An offer to buy or sell may be retracted at any time before it is unconditionally and completely accepted by words or conduct; and a bidding at an aucton is a mere offer which may be retracted before the hammer is down; *Agra Bank* v. *Hamlin*, 14 M. 235.

A sale is complete when it is knocked down to the bidder by the *Nazir*; *Rajendra* v. *Upendra*, 19 C. W N 633: 21 C. L. J. 174.

Saving of certain sales.

70. Nothing in rules 66 to 69 shall be deemed to apply to any case in which the execution of a decree has been transferred to the Collector. [S. 287, last para.]

COMMENTARY.

As to execution of decrees by Collector, *see* ss. 68 to 73, Schedule III, and notes.

The Revenue Courts are Courts of civil jurisdiction within the meaning of the C. P. Code, in that their decrees when transferred in the regular course are to be treated in all respects as if they were passed by a Court of civil jurisdiction.—*Ram Lochan* v. *Kumar Newaz*, 9 C. L. J. 125 (16 A. 496 *dissented from*; 9 C. 295, P. C., and 5 A. 406 *referred to*).

Defaulting purchaser answerable for loss on re-sale.

71. Any deficiency of price which may happen on a re-sale by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court or to the Collector or subordinate of the Collector, as the case may be, by the officer or other person holding the sale, and shall, at the instance of either the decree-holder or the judgment-debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money. [S. 293.]

COMMENTARY.

The words "*or to the Collector or subordinate of the Collector as the case may be*" have been added.

Application of the Rule.—The provisions of this rule, extend to all sales, whether of moveable or of immoveable property, and also to re-sales made under rr. 81, 85 and 86 —*Ram Dhani* v *Rajrani*, 7 C. 337; 9 C. L. R. 23 Relied on in *Rajendra* v *Ram Charan*, 2 C. W. N. 411.

But the re-sale should only cover the property sold at the prior sale, and any substantial difference of description at the sale and re-sale in any of the matters required by r. 66 will not entitle the decree-holder to recover the deficiency of price under this rule; *Baijnath* v *Moheep*, 16 C 535; *Ganga Das* v *Bai Suraj*, 36 B 329 "The reasonable construction to place on r. 71 is that the re-sale should be within a reasonable time after the first sale, and the property re-sold should be substantially

the same, and that any difference will not matter if the difference in the condition of the property or the title thereto is one which would occur in the ordinary course of things, having regard either to the nature of the property, or the transactions in respect thereof having legal force at the date of sale, or was brought about by the first purchaser's default."—*Venkatachelamayya* v *Nilakanta*, 41 M. 474: 43 I. C. 685; affirmed on appeal to P C. in *Nilkantagiriji* v. *Venkatachallam*, 48 M. L J. 835: 86 I. C. 873: A. I R 1925 P. C. 61.

Defaulting Purchaser Liable for Deficiency of Price.—A purchaser failing to pay the deposit of 25 per cent. as directed by r. 84 is a defaulting purchaser and liable to make good any deficiency of price which may happen on a re-sale and all expenses attending the same.—*Javherbhai* v *Haribhai*, 5 B. 575, *Sitaram* v. *Jankiram*, 44 A. 276: 65 I. C. 813. So also is a decree-holder purchaser when he fails to pay the poundage fee as laid down in High Court Rules and Circular Orders.—*Madhusudan* v. *Purna*, 9 C. L. J. 115.

Before the defaulting purchaser can be made liable it must appear that the property which is the subject of the two sales is the same in every respect, and any substantial difference of description of a sale and re-sale will disentitle the decree-holder to recover the deficiency of price —*Baijnath Sahai* v. *Moheep*, 16 C. 535. *See* also, *Kalikishore* v. *Guru Prosad*, 25 C. 99. 2 C. W. N. 408.

Where the first sale was irregular and void, the decree-holder is not entitled to claim against the first purchaser, compensation for the loss on the second sale.—*Amir Begam* v *The Bank of Upper India*, 30 A. 273: 5 A. L. J. 336 (5 A. 316 *followed*). Where on a re-sale, on failure to deposit the balance of purchase money there was a large deficiency, and it was found that the descriptions in both proclamations were inaccurate, the defaulting purchaser is not liable: *Gangadas* v. *Bai Suraj*, 14 Bom L R 250: 14 I. C. 777.

A party purchasing in the character of an agent cannot be made liable for the deficiency, and in such a case, proceedings must be taken upon the contract against the principal.—*Huree Ram* v. *Hur Pershad*, 20 W. R 80. But see *Gangabatulla* v. *Manchiraju*, 46 M. L. J. 134, where it has been held that a person who bids at a Court auction without informing the Court or its officer conducting the sale that he does so only as the agent of a principal, makes himself personally liable for the deficit caused by his action in not completing the sale by depositing 25 per cent of the purchase-money.

The decree-holder having purchased property through his agent repudiated the bid, and did not pay the deposit, and the property was re-sold on the following day. *Held* that the judgment-debtor was entitled to recover deficiency of price from decree-holder.—*Vallavan* v. *Panganni*, 12 M. 454.

Sale of property by Receiver in insolvency—Failure of deposit of one fourth of price—Re-sale—Deficiency of price—Purchaser ordered to make good the deficiency: *Chedalal* v. *Luchman*, 39 A. 267: 15 A. L. J. 233 (36 A. 9 *folld*).

Though this sale does not provide for the issue of notice to the defaulting purchaser, it is the duty of the Court to give notice to him and hear his objections; *Venkattachellam* v. *Nilkanta* 41 M. 474: 43 I. C. 685.

"Shall be certified."—Absence of certificate is no bar to the recovery of the deficiency from the defaulter; *Tapesri* v. *Deoki*, 19 A. 22.

Interest on Deficiency.—A defaulting purchaser is liable to pay interest on the deficiency from the date on which an order is made against him under this rule and not from the date of sale; *Kanthamma* v. *Manchiraju*, 46 M L J 134 · 78 I. C. 296 A. I R. 1924 Mad. 476.

"At the instance of either the decree-holder or the judgment-debtor."—Where the purchaser had defaulted in paying, the remedy of the judgment-creditor is not limited to a suit against the defaulting purchaser. He is entitled to recover the balance of his debt from his judgment-debtor, who might perhaps have his remedy against the defaulting purchaser.—*Anandrav Bapuji* v *Shekh Baba*, 2 B. 562.

A portion of the judgment-debtor's property was sold. The purchaser having defaulted, the property was again put up for sale, and the portion previously sold was purchased by the decree-holder at a price less than the amount bid for it in the former sale. *Held* that the decree-holder was not debarred from proceeding to satisfy his decree by sale of other portions of the attached property than that originally sold.—*Kheroda Moyi* v. *Golam Abardari*, 13 B. L R 114: 21 W. R. 149. Followed in *Gour Chunder* v. *Chunder Coomar*, 8 C. 291; 10 C. L. R. 236; and distinguished in *Joy Chunder* v. *Kali Kishore*, 8 C. L. R. 41.

The judgment-debtor can instead of proceeding under this rule apply to have the sale set aside on the ground of irregularity; *Bepin Chandra* v. *Modhoo*, 12 C. L. R. 316

Suit Lies.—A suit will lie to set aside an order passed under this rule.—*Topesri Lal* v. *Deoki Nandan*, 19 A. 22.

A suit to recover the deficiency for which the defaulting purchaser is made answerable under sec. 9 of Reg. VIII of 1819, is maintainable.—*Raghu Ram* v. *Mohesh Chandra*, 7 C. W. N. 111.

Appeal.—An appeal and second appeal will lie from an order passed under this rule making a defaulting purchaser liable; *Kalikishore* v. *Guru Prasad*, 25 C. 99: 2 C. W. N. 408; *Nagappa* v. *Balkishandas*, 23 N. L. R. 14: A. I. R. 1927 Nag. 112 (7 N. L. R. 134 overruled), *Sitaram* v. *Jankiram*, 44 A. 266: 65 I. C. 813: A. I. R. 1922 All. 200 (
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72. (1) No holder of a

Decree-holder not to bid for or buy property without permission.

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be taken that the Court gave permission to the decree-holder to bid; *Murlidhar* v. *Nawab Saiyed*, 6 Pat. 432: A. I. R. 1927 Pat. 312.

"Where a decree-holder purchases with permission."—When permission is given to a decree-holder to bid, he is bound to exercise the most scrupulous fairness; and if he or his agent dissuades others from purchasing, that of itself is a sufficient ground why the purchase should be set aside. Where a decree-holder was joint in family with the manager of an infant defendant and the defendant's property was to be sold in execution of the decree. *Held* that the decree-holder ought not to be granted leave to purchase at the sale.—*Woopendro Nath* v. *Brojendra Nath*, 7 C. 346; 9 C. L. R. 263. Disapproved in 23 M. 227, P. C.: 4 C. W. N. 228.

Leave to bid puts the decree-holder in the same position as any other purchaser; *Mohomed Mira* v. *Sarvasi*, 4 C. W. N. 228.

Where the leave to bid is obtained by the decree-holder by misrepresentation, the Court may refuse to confirm the sale; *Musst. Janakbati* v. *Maharajadhiraj*, 1 Pat. 235: 69 I. C. 872: A. I. R. 1922 A. P. 511.

A mortgagee who has obtained a mortgage decree, and after obtaining permission to bid became the purchaser, does not stand in a fiduciary position towards his mortgagor; therefore he is at liberty to take out further execution of any balance of the decree, and is not bound to credit the judgment-debtor with the real value of the property to be ascertained by the Court.—*Sheo Nath Dass* v. *Janke Prasad*, 16 C. 132 (11 C. 718 *distinguished*). *See* also *Mahabir Persad* v *Macnaghten*, 16 C. 682, P. C. *Dakshina Mohan* v. *Basumati*, 4 C. W. N 474, *Krishnasami Ayyar* v. *Janakiammal*, 18 M. 153; and *Gunga Persad* v *Jawahir Singh*, 19 C. 4, where it has been held that the position of mortgagee who has purchased the mortgaged property after obtaining leave to bid is like that of an independent purchaser, and he is only bound to give credit to the mortgagor for the actual amount of his bid

In granting permission, the Court may attach conditons, and if the decree-holder purchases without fulfilling the conditions *in toto*, the Court has power to refuse to confirm the sale.—*Mt Janakbati* v *Rameswar*, 62 I. C 872.

The Amounts may be Set Off, subject to Section 73.—If decree-holder gets the permission without any qualification then the amount due on the mortgage may be set off But it may be one of the terms on which the permission to bid is granted, that there should not be the right of set-off.—*Hazarimal* v *Namdev*, 32 B 379 · 10 Bom. L R. 296

This rule must be taken as subject to the provision of s. 73, so that the decree-holder, who has ben permitted to purchase the property in execution of his own decree, must share the proceeds of the sale rateably with the other competing decree-holder, and will not be allowed to set off the purchase-money against the amount due to him on his decree.—*Shrinibas* v. *Radhabai*, 6 B. 570

This rule must be read with s 73, and to give effect to both, the receipt to be given by the decree-holder, who has obtained leave to bid

and has purchased the property, can only be accepted for so much of the judgment-debt as the assets applicable to its discharge may suffice to satisfy.—*Viraragava* v *Varada*, 5 M. 123

Permission given to a judgment-creditor to set-off the amount of purchase-money against the debt due under his decree must be taken to be granted subject to the provisions of s. 73 and he may be compelled to refund the rateable amount by process in execution.—*Madden* v. *Chappani*, 11 M. 856.

Held that the fact of the set-off being allowed in exercise of the power given in this section instead of actual payment into Court did not alter the substantial nature of the transaction, so as to render the purchase-money less applicable to the satisfaction of the debts of other attaching creditors.—*Toponidi Hardanund* v. *Mathura Lal*, 12 C. 499.

" By himself or through another person."—A purchase by the decree-holder's undivided son is presumably with joint funds and as such is the purchase of the decree-holder.—*Narayan* v. *Anaji*, 5 B. 130.

" The Court may, if it thinks fit, set aside the sale."—A sale at which the decree-holder himself, or some other person for him, without the permission of the Court first obtained, becomes the purchaser, is not *ipso facto* void; it is a good sale, unless and until set aside by the Court under the provisions of this rule.—*Jasherbai* v. *Haribhai*, 5 B 575. *Ganesh* v. *Gopal*, 41 B 357 39 I C. 3; *Param Siva* v. *Krishna*, 14 M 498; *Narayan* v. *Anaji*, 5 B 130 In *Rai Radhakishna* v. *Bisheshar*, 49 I. A. 312: 1 Pat 733 27 C. W N. 294. A. I. R. 1922 P. C. 336, their Lordships of the Judicial Committee observed: " Upon the construction of this section it is evident that a purchase by a decree-holder is not void nor a nullity, but is only to be avoided on the application of the judgment-debtor or some other person interested. It would be injurious to those interested in the sale if a decree-holder, who had been forced up in the bidding to give a large sum of money, could escape from fulfilling his contract by getting the sale declared a nullity, and it would make all titles under such sales insecure if at later periods they were liable to be treated as nullities A sale is to be set aside upon application and upon cause being shown." Even if the decree-holder purchases after refusal by the Court to grant permission, the sale is not a nullity nor void, but can be avoided by appropriate proceedings. Where a decree-holder purchases *benami* without the permission of the Court, it can be set aside even after confirmation of sale under rule 92; *Thathu* v. *Kandu*, 32 M. 242: 1 I. C. 221 *Chintamanrao* v. *Vithabai*, 11 B. 568; *Gopal* v. *Ram Lal*, 21 C. 554

It is discretionary with the High Court to set aside an execution sale at which the decree-holder has bid and purchased without first obtaining permission; and the Court will not interfere with the sale unless it can be shown that the judgment-debtor has suffered substantial injury arising from such irregularity.—*Mathura Das* v. *Nathuni Lal*, 11 C. 731 Referred to in *Gopal Chunder* v. *Ram Lal*, 21 C. 554.

A decree-holder asked for, but was refused, leave to bid at the sale, but notwithstanding such refusal, purchased the property in the name of a third person. Possession under the sale was opposed, and the decree-holder, as purchaser, brought a suit for possession of the property

Held that the plaintiff had been guilty of an abuse of the process of the Court in buying the property *benami*, and that the sale therefore ought not to be enforced.—*Mahomed Gazee* v. *Ram Lal*, 10 C. 757. *Referred to* in *Sarat Kumari* v. *Nai Charan*, 5 C. W. N. 265.

Decree-holder purchasing without permission makes the sale void-able not void.—*Rishi* v. *Ramdayal*, 1 I. C. 645.

Suit to Set Aside a Purchase made Without Permission is Barred by Section 47.—A suit by the judgment-debtor against the decree-holder to have the sale set aside, on the ground that the purchase was made by him without leave of the Court, is barred by s. 244, C. P. Code, 1882 (s. 47)—*Genu* v. *Sakharam*, 22 B. 271. Nor will a suit lie even where the sale was procured by fraud, and purchased by a person who was not a party.—*Sakharam* v. *Damodar*, 9 B. 468; likewise, when the sale was brought about secretly and the purchasers were benamidars of the decree-holder.—*Durga* v. *Balwant Singh*, 23 A. 478. *See* also, *Viraraghava* v. *Venkata*, 16 M. 287.

Appeal.—No appeal lies from an order passed under this section refusing permission to a decree-holder to bid at a sale in execution of his decree —*Jodoonath* v. *Brojo Mohun*, 13 C. 174; *Ko Tha Hnyin* v. *Ma Hnin*, 15 C. W. N. 862, P. C.: 38 C. 717: 14 C. L. J. 241: 38 I. A. 126. But under Or. XLIII, r. 1 (j), an appeal lies from an order seting aside or refusing to set aside a sale under this rule.

There is no special appeal from an order refusing to set aside a sale, unless such order is made under ss. 294, 312 or 313 C. P. Code, 1882.—*Durga Sundari* v. *Govinda Chandra*, 10 C. 868. In *Bhagbut Lall* v. *Narku Roy*, 21 C. 789, it has been held that no second appeal lies from an order made by a District Judge, on appeal setting aside a sale under this section.

Limitation and Step-in-aid of Execution.—An application by the decree-holder for leave to bid at the sale in execution of his decree "is a step-in-aid of execution" within the meaning of Art. 182 of the Limitation Act.—*Vinayakrao Gopal* v. *Vinayak Krishna*, 21 B. 331; *Bansi* v. *Sikree Mal*, 13 A. 211 and *Dalel Singh* v. *Umrao Singh*, 22 A. 339. *Contra in Raghunundun* v. *Kally Dut*, 23 C. 690, and *Ananda Mohan* v. *Hara Sundari*, 23 C. 106.

Restriction on bidding or purchase by officers.

73. No officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold.

[S. 292.]

COMMENTARY.

This rule corresponds to section 292, C. P. Code, 1882, with some verbal alterations. The words "*or other person*" have been added after the word "officer"; and the words "at such sale" which occurred in the last sentence of the old section, after the words "the property sold," have been omitted, as unnecessary.

and has purchased the property, can only be accepted for so m judgment-debt as the assets applicable to its discharge may satisfy.—*Viraragava* v *Varada*, 5 M 123

Permission given to a judgment-creditor to set-off the purchase-money against the debt due under his decree must to be granted subject to the provisions of s. 73 and he may be to refund the rateable amount by process in execution.—*Madden pani*, 11 M. 856.

Held that the fact of the set-off being allowed in exerci power given in this section instead of actual payment into Court ter the substantial nature of the transaction, so as to render the money less applicable to the satisfaction of the debts of other creditors —*Toponidi Hardanund* v. *Mathura Lal*, 12 C. 490

" By himself or through another person."—A purchase by th holder's undivided son is presumably with joint funds and as the purchase of the decree-holder —*Narayan* v. *Anaji*, 5 B. 130

" The Court may, if it thinks fit, set aside the sale."—A sale the decree-holder himself, or some other person for him, witl permission of the Court first obtained, becomes the purchaser *ipso facto* void, it is a good sale, unless and until set aside by t under the provisions of this rule —*Jasherbai* v. *Haribhai*, 5 *Ganesh* v. *Gopal*, 41 B 357. 39 I C. 3, *Param Siva* v. *Krishn* 498; *Narayan* v *Anaji*, 5 B. 130 In *Rai Radhakishna* v. *Bishe* I. A. 312: 1 Pat. 733: 27 C. W N 294: A. I. R. 1922 P. C. 3 Lordships of the Judicial Committee observed: " Upon the con of this section it is evident that a purchase by a decree-holde void nor a nullity, but is only to be avoided on the application judgment-debtor or some other person interested. It would be i to those interested in the sale if a decree-holder, who had been up in the bidding to give a large sum of money, could escape fr filling his contract by getting the sale declared a nullity, and it make all titles under such sales insecure if at later periods the liable to be treated as nullities. A sale is to be set aside upon tion and upon cause being shown." Even if the decree-holder pu after refusal by the Court to grant permission, the sale is not a nor void, but can be avoided by appropriate proceedings. Where a holder purchases *benami* without the permission of the Court, it set aside even after confirmation of sale under rule 92; *Thathu* v. 32 M. 242: 1 I. C. 221 *Chintamanrav* v. *Vithabai*, 11 B. 588; v. *Ram Lal*, 21 C 554.

It is discretionary with the High Court to set aside an exe sale at which the decree-holder has bid and purchased without fi taining permission; and the Court will not interfere with the sale it can be shown that the judgment-debtor has suffered substantial arising from such irregularity.—*Mathura Das* v. *Nathuni Lal*, 11 C Referred to in *Gopal Chunder* v. *Ram Lal*, 21 C. 554

A decree-holder asked for, but was refused, leave to bid a sale, but notwithstanding such refusal, purchased the property u name of a third person. Possession under the sale was opposed, an decree-holder, as purchaser, brought a suit for possession of the pro

Special provisions relating to growing crops.

75. (1) Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been stored, the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing.

(2) Where the crop from its nature does not admit of being stored, it may be sold before it is cut and gathered, and the purchaser shall be entitled to enter on the land, and to do all that is necessary for the purpose of tending and cutting or gathering it. [New.]

COMMENTARY.

This rule is new; but its provisions are somewhat similar to sections 129 and 131 of the Bengal Tenancy Act (VIII of 1885)

The definition of the term " growing crops " is given in s 2 (13) — *See* notes under that section. Under the old Code growing crops were held to be immoveable property.—*See* notes under s 16.

Negotiable instruments and shares in corporations.

76. Where the property to be sold is a negotiable instrument or a share in a corporation, the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker. [S. 296.]

COMMENTARY.

This rule corresponds to section 296, C P Code, with some verbal changes. The word " *company* " which occurred in the old Code before the word " corporation " has been omitted.

This rule comes within the exception mentioned in the beginning of rule 65 of this Order

The sale of Government promissory notes through a broker is permissive under this section, and not obligatory.—*Luchmeput* v *Lekrj*, 8 W. R. 415

Sale by public auction.

77. (1) Where moveable property is sold by public auction the price of each lot shall be paid at the time of sale or as soon after as the officer or other person holding the sale directs, and in default of payment the property shall forthwith be re-sold.

(2) On payment of the purchase-money, the officer or oth[er] person holding the sale shall grant a receipt for the same, and t[he] sale shall become absolute. [S. 297

(3) Where the moveable property to be sold is a share [of] goods belonging to the judgment-debtor and a co-owner, and t[wo] or more persons, of whom one is such co-owner, respectively b[id] the same sum for such property or for any lot, the bidding shall [be] deemed to be the bidding of the co-owner. [New

COMMENTARY.

Sub-rules 1 and 2 correspond to section 297, C. P. Code, 1882, wi[th] some verbal changes. The word "*re-sold*" had been substituted for th[e] word "sold" which occurred in the old Code.

Sub-rule (3) is new It gives a right of pre-emption to the co-owne[r]. It is similar to rule 88 of this Order —*See* notes under rule 88.

"On payment of the purchase-money."—The provisions of this rul[e] give the officer conducting a sale of moveable property a discretion to allow the purchase-money to be paid at a reasonable time after the sale ha[s] been made —*Fareed Alum* v. *Sheo Charun*, 4 N. W. P. H. C. R 37.

The provisions of Or XXI, r 71, making a defaulting purchaser at a sal[e] liable for any deficiency on a re-sale, apply to a re-sale held under th[is] rule.—*Ramdhani* v *Rajrani Kooer*, 7 C. 337; C. L. R. 23.

In the case of moveable property, the sale on payment of the pur[-] chase-money becomes absolute at once, but the sale can be set aside b[y] a regular suit —*Framji Besanji* v *Hormasji*, 2 B. 258 (266).

Irregularity not to vitiate sale, but any person injured may sue.

78. No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation, or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery. [S. 298]

COMMENTARY.

This section exactly corresponds to s. 298, C. P. Code, 1882

Moveable Property.—A money-decree is not moveable property with[in] the meaning of this rule; *Maung Lun Bue* v. *Maung Po Nyun*, 1 Ran[g]. 360 76 I. C. 679: A. I. R 1924 Rang. 21.

Irregularity.—There is no provision in the Code that sales of move[-] able properties shall in no case be set aside; but this section only provid[es]

that no irregularity in the sale of moveable property under an execution shall vitiate the sale.—*Framji Besanji v. Hormasji*, 2 B. 258 (p. 266).

This section prohibits the setting aside of a sale of moveable property on the ground of irregularity in the publishing or conducting of it.—*Baijnath v. Benoyendro Nath*, 6 C. W. N. 5.

A Judge is not required by law to give notice, at the time of the sale, of the amount of the decree to be sold, and his omission to do so does not constitute an irregularity in the sale entitling the plaintiff to claim damages under this section.—*Kassee Nath v. Hullodhur*, 2 W. R. 60.

The law does not make any provision for the service of notification of sale on the judgment-debtor in person, or in the village in which he lives, and omission to do so is not an irregularity in affixing sale notification.—*Romesh Chunder v. Jadub Chunder*, 6 W. R. Civ. Ref. 14.

Overstating the amount really due is not an irregularity and will not vitiate sale.—*Chuttersing v. Dhurrum*, 1 N. W. P. 1. But if the sale proclamation warrants a title, the injured person may sue to set aside the sale.—*Framji Bosanji v. Hormasji*, 2 B. 259.

A debt due to the judgment-debtor by a third party was attached, but the judgment-debtor died after issue of proclamation and before sale. In an application to set aside the sale, *held* that the sale was vitiated by the omission to bring the legal representative of the judgment-debtor on the record and should be set aside.—*Groves v. Administrator-General of Madras*, 22 M. 119.

A sale in execution of a decree transfers to the purchaser nothing more than the rights and interests of the judgment-debtor at the time of attachment and sale, therefore, the sale of the moveable property belonging to a third party in execution of a decree, is not a mere irregularity within the meaning of this section, and the owner of the property so sold is entitled to sue for its restoration or damages.—*Sham Sunder v Raheem Buksh*, 6 N. W. P. H. C R 252; *Mohanund v. Ahail Mehaldar*, 9 W R. 118.

In a sale of moveable property in execution of a decree, there is no warranty of title whatsoever; all that is sold is the right, title and interest of the judgment-debtor, and the real owner, if not the judgment-debtor, can bring a suit, to recover the moveable property or its value, against the debtor.—*Maung Pa v. Abdul Ganni*, 4 Rang 202: A. I. R. 1926 Rang. 214: 97 I. C. 1029.

Delivery of moveable property, debts and shares.

79. (1) Where the property sold is moveable property of which actual seizure has been made, it shall be delivered to the purchaser. [S. 299.]

(2) Where the property sold is moveable property in the possession of some person other than the judgment-debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser. [S. 300.]

(3) Where the property sold is a debt not secured by a negotiable instrument, or is a share in a corporation, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser.
[S. 301.]

COMMENTARY.

This rule embodies the provisions contained in ss. 299, 300 and 301 of the C. P. Code, 1882 with some modifications.

In sub-rule (2), the words "*in the possession of some person other than the judgment-debtors,*" have been substituted for the words "to which the judgment-debtor is entitled, subject to the possession of some other person," which occurred in section 300 of the old Code.

Sub-rule (3) is almost similar to section 301 of the C. P. Code, 1882, with some verbal changes only.

Forms.—For Forms of Notices under this rule, *see* Appendix E, Forms 32, 33 and 34.

Delivery shall be made by Written Order.—In *Debendrakumar Mardel v. Ruplal Das*, 12 C 546, it was held that no question having been raised as to the service of the order required by clause (3) the presumption is that this order was served.

80. (1) Where the execution of a document or the endorsement of the party in whose name a negotiable instrument or a share in a corporation is standing, is required to transfer such negotiable instrument or share, the Judge or such officer as he may appoint in this behalf may execute such document or make such endorsement as may be necessary, and such execution or endorsement shall have the same effect as an execution or endorsement by the party.

Transfer of negotiable instruments and shares

(2) Such execution or endorsement may be in the following form, namely:—

"A. B. by C. D., Judge of the Court of (or as the case may be), in a suit by E. F. against A. B."

(3) Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon and to sign a receipt for the same; and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself. [S. 302.]

COMMENTARY.

This rule corresponds to section 302 of the C. P. Code, 1882, with some additions and alterations.

The important alterations are the additions of the word "*or such officer as he may appoint in this behalf*"; and of the words "*such execution or endorsement shall have the same effect as an execution or endorsement by the party,*" in sub-rule (1) The other changes introduced in this rule are of a verbal character.

As to execution of deed of transfer of shares by Court to the purchaser, see *Toolsee Dass* v. *E. I. Ry. Co.*, 2 Ind. Jur. N. S. 133.

Vesting order in case of other property.

81. In the case of any moveable property not hereinbefore provided for, the Court may make an order vesting such property in the purchaser or as he may direct; and such property shall vest accordingly. [S. 303.]

This rule exactly corresponds to section 303 of the C. P. Code, 1882.

Under the Civil Procedure Code it is intended that the sale of moveable property attached in execution of a decree should ordinarily be held in some place within the jurisdiction of the Court ordering the sale. Good and sufficient reasons must be shown for directing otherwise —*Lakshmibai* v. *Santapa Revapa*, 13 B. 22.

SALE OF IMMOVEABLE PROPERTY.

What Courts may order sales.

82. Sales of immoveable property in execution of decrees may be ordered by any Court other than a Court of Small Causes. [S. 304.]

COMMENTARY.

This rule exactly corresponds to s 304, C. P Code, 1882.

For the meaning of the words "*immoveable property,*" *see* notes under sec. 16.

Court of Small Causes.—Where a Court of Small Causes sells immoveable property, the purchaser acquires no title.—*Nattoo Meah* v. *Nundu Ranee*, 17 W. R. 309.

Postponement of sale to enable judgment-debtor to raise amount of decree.

83. (1) Where an order for the sale of immoveable property has been made, if the judgment-debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property, or some part thereof, or of any other immoveable property of the judgment-debtor, the Court may, on his application, postpone the sale of the property comprised in the order for sale on such terms and for such period as it thinks proper, to enable him to raise the amount.

(2) In such case the Court shall grant a certificate to the judgment-debtor authorising him within a period to be mentioned therein, and notwithstanding anything contained in section 64, to make the proposed mortgage, lease or sale :

Provided that all monies payable under such mortgage, lease or sale shall be paid, not to the judgment-debtor, but, save in so far as a decree-holder is entitled to set off such money under the provisions of rule 72, into Court :

Provided also that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the Court

(3) Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage of, or charge on, such property. [S. 305.]

COMMENTARY.

This rule corresponds to section 305, C. P. Code, 1882, with some important additions and alterations.

In sub-rule (1), the words " *on such terms* " have been added after the words " order for sale."

In the first proviso, the words " *but save in so far as a decree-holder is entitled to set off such money under the provisions of rule 72,* " have been added.

Clause (3) is new. It has been added adopting the principles laid down in 3 C. 335 : 1 C. L. R. 205 and 31 C. 373. On this point there was a difference of opinion between the Calcutta and Bombay High Courts, the latter holding that Or. XXI, r. 83 was applicable to all sales of immoveable property including sales under the T. P. Act (IV of 1882). *See* 25 B. 104 and 26 B. 379. This sub-rule (3) has set at rest the above conflicting rulings by adopting the principle laid down in the above Calcutta case and it has overridden the Bombay rulings which are noted below.

Scope of the Rule.—Or. XXI, r 83 contemplates a mortgage or lease or private sale only where "the amount of the decree can be thus provided for." A Court executing a decree can neither grant a certificate under this section nor confirm a mortgage or other alienation of property, unless it appears that by such alienation the decree will be satisfied in full.—*Gurusami* v. *Venkatsami*, 14 Mad. 277. There should be a reasonable probability of the debt being discharged by the profits of the estate within a reasonably short period —*Suhuj Narain* v *Ram Pershad*, 21 W. R. 146.

Sale of Immoveable Property.—This section does not apply to a decree on a mortgage when the decree declares that a certain property is to be sold in satisfaction of the mortgage debt.—*Womda Khanum* v. *Rajroop Koer*, 3 C. 335; 1 C L. R 295. *See* also, *Shyam Kishen* v. *Sundar Koer*, 31 C. 373 ; *Kora Lal* v. *Punjab National Bank*, 5 Lah. L. J. 67 But in *Krishnaji* v. *Mahadev*, 25 B. 104, it was held that this rule applied to all sales of immoveable property including sales held under the Transfer of Property Act (IV of 1882) *See* also *Danappa* v. *Yamnappa*, 26 B. 379

But properties directed to be sold in execution of a decree for the enforcement of a mortgage or charge have now been excluded from the operation of this rule by clause (3) of this rule which has adopted the principle laid down in the above Calcutta cases.

"**The amount of the decree may be raised.**"—No sale should be postponed and no certificate should be granted under sub-rule (2) unless the whole amount due on the decree can be raised by mortgage, lease or sale ; *Venkatasami* v *Chanbasappa*, 14 M .277.

"**May postpone the sale.**"—Postponement is a matter of discretion for the Court—*Bishenmun* v *Land Mortgage Bank*, 11 C. 244, 12 L. R. I. A. 10. It should exercise a reasonable discretion and should not postpone the sale unless a fair case is made out by the judgment-debtor—*Kishen Coomaree* v. *Golab Coomaree*, 15 W R. 477.

A judge is not bound to allow a judgment-debtor a year's time to pay his decree, without the debtor assigning some good or sufficient reason for the delay, *e g*, that the money due to the judgment-creditor could be raised equally well in some other way than by immediate sale, and that the creditor would not by that arrangement be put to loss.—*Ram Ruttan* v. *Land Mortgage Bank*, 17 W R 193

A Court can postpone the sale for a reasonable period, if by sale, mortgage, or otherwise, the debt can be cleared off in six months.—*Mohini Mohun* v *Ram Kant*, 15 W R 322 *See* also *Rednum* v *Mahomed Amin*, 5 M. H C 272 , *Suhuj Narain* v *Ram Pershad*, 21 W. R 146 , *Fyazudin* v. *Giraudh Singh*, 2 N W P I

Where an application under this rule was refused and the sale took place, an application to set aside the sale is maintainable under s 47 and r. 90—*Enamuddin* v *Abdul*, 5 I C 489

"**Authorizing him.**"—In authorizing a private sale under this rule, a Court cannot empower a judgment-debtor to transfer any higher interest

than he has and bind the interest of others in the property.—*Danappa* v. *Yamanappa*, 26 B. 379: 4 Bom. L. R. 61.

" Notwithstanding anything contained in S. 64."—This is an enabling rule and qualifies the provisions contained in s. 64; on compliance with the conditions of this rule, a private alienation, notwithstanding s. 64, becomes absolute, not only against the claim of the decree-holder but against all claims enforceable under the attachment.—*Shivlingappa* v. *Chanbasappa*, 30 B 337

Confirmation of Sale.—Decree of different Courts against same judgment-debtor—Leave given by both Courts to judgment-debtor to raise amount by private sale under this rule. Confirmation of such sale by one Court. *Held* that as both the Courts had concurrent jurisdiction to confirm the sale, the confirmation by one Court was sufficient for the validity of the sale, and that application to another Court for confirmation was superfluous.—*Andanapa* v. *Bhimrao Annaji*, 19 B. 530.

A private sale, by a judgment-debtor with the permission of the Court obtained under this rule but which had not been confirmed by the Court, did not convey to the vendor such title in the property as to entitle him to maintain a suit for possession of property against another vendee.—*Srilal* v. *Ballabh Shankar*, A. W. N. 1882, 213.

Alienation by Guardian of Minor.—A mortgage by a minor's certificated guardian with the sanction of the Subordinate Judge under this rule, without the previous sanction of the District Court under sections 29 and 30 of the Guardian and Wards Act (VIII of 1890), is invalid.—*Dattaram* v. *Gangaram*, 23 B 287.

A permission under this rule is not sufficient for a guardian who must have the sanction of the District Judge in spite of such permission.—*Sarju* v. *District Judge of Benares*, 31 A. 378: 6 A. L. J. 491: 2 I. C. 356 *See* also *Dijendra* v. *Monorama*, 36 C. L J. 320: 49 C. 911: A. I. R 1922 Cal. 150.

Appeal.—No appeal lies against an order refusing to postpone a sale under this rule, but the party aggrieved may apply for revision of the order under s. 115, and the High Court may in a proper case quash the order; *N. K. R. R. M. Chetty* v. *Subraya*, 3 Rang. 132: 89 I. C. 300. A. I. R. 1925 Rang. 271.

84. (1) On every sale of immoveable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. on the amount of his purchase-money to the officer or other person conducting the sale, and, in default of such deposit, the property shall forthwith be re-sold. [S. 306.]

Deposit by purchaser and re-sale on default.

(2) Where the decree-holder is the purchaser and is entitled to set off the purchase-money under rule 72, the Court may dispense with the requirements of this rule. [New.]

COMMENTARY.

Alterations.—Sub-rule (1) of this rule corresponds to section 306, C. P. Code, 1882, with some modifications.

The words " under this chapter " which occurred in the old section after the words " immoveable property " have been omitted ; the words " *or other person* " have been added after the words " to the officer ;" and the word " *re-sold* " has been substituted for the words " be put up again and sold " which occurred in the old section.

Sub-rule (2) is new, and it has been added to meet the case of *Gopal Singh* v. *Roy Bunwari Lal*, 5 C. L. R. 181, where it was held that a decree-holder buying with permission and desiring to set off his purchase-money against the amount of the decree is not exempt from the necessity of making a deposit of 25 per cent Under this sub-rule (2), the Court may dispense with the requirements of sub-rule (1), where the decree-holder obtains permission to bid under rule 72.

" In rules 77 and 84 express reference has been made to a *re-sale* so as to make it clear that the default mentioned in those rules will attract the consequence indicated in rule 71 In this connection reference may be made to I. L. R. 7 C. 337."—*See the Report of the Special Committee.*

" Declared to be the purchaser."—An execution sale is not complete until the presiding officer has accepted the bid and declared the purchaser. —*Jai Bahadur* v *Matukdhari*, 2 Pat. 549 · 76 I C. 113 A. I. R 1923 Pat. 525

" In default of such deposit."—The officer conducting the sale cannot insist upon a deposit being made before acceptance of a bidding , but if it appears that persons without means have been put forward to make sham biddings and fraudulently frustrate the sale, he would be justified in inquiring into the trustworthiness of the bidder before accepting his bid—*Rajah Mohesh Narain* v. *Kishanund*, 9 M I A 328

Failure to Deposit, Whether a " material irregularity."—It was held by the Allahabad High Court in *Intizam Ali* v *Narain Singh*, 5 A. 316 that if the deposit of 25 per cent. is not made immediately the sale is altogether void. This was followed in *Amir Begum* v *The Bank of Upper India*, 30 A. 273, but these decisions have been overruled by the Full Bench Case of *Sita Ram* v. *Janki Ram*, 44 A 266 · 65 I. C 813: A. I. R. 1922 All. 200 F. B. On the other hand it has been held by the High Courts of Calcutta and Madras that failure on the part of the person declared to be the purchaser at a sale in execution of a decree to make the deposit of 25 per cent immediately under this rule, constitutes only a " material irregularity " in conducting the sale, which would render the sale viodable if substantial injury has been caused by reason of such irregularity.—*Bhim Singh* v. *Sarwan Singh*, 16 C. 33. In *Venkata* v *Sama*, 14 M. 227, it has been held that any delay in making the deposit under rule 84 is not more than a mere irregularity and does not vitiate the sale. *See* also *Raman Chetty* v. *Olagappa Chetty*, 3 L. B. R 225. But if the balance of the purchase money is not paid, there is no sale under this rule.—*Munshi Mahomed Ali* v. *Kibria*, 15 C. W. N. 850.

Sale When Complete.—The function of a *Nazir* or other officer appointed to conduct an auction sale is of a ministerial character. If he conducts it in the presence of the presiding officer, and the latter forthwith declares under Or XXI, r. 64 who the purchaser is and signs the formal order, the sale is complete If it is not held in his presence, it can be completed only by his order closing the bid or an order accepting the bid under Or. XXI, r 84 Where in anticipation of sanction, the *Nazir* accepts the deposit required from the highest bidder there is only in law an offer and it is open to the Court to resume the auction ; *Jaibadhar Jha* v *Matukdhari Jha*, 2 Pat 548 4 Pat. L T. 498.

The mere making of the last bid does not conclude the sale ; it is necessary for the conclusion of the sale that the officer conducting it should accept the final bid, make a declaration as to who is the purchaser and also order him to pay the deposit under this rule.—*Munshi Lal* v. *Ram Narain*, 35 A. 65.

" **Where the decree-holder is the purchaser.**"—Sub-rule (2) is new It empowers the Court to dispense with the 25 per cent. deposit when the decree-holder is the auction-purchaser

" **In default of such deposit.**"—A decree-holder or other person who purchases property at a court-sale and fails to pay the deposit (25 per cent) directed to be paid under this rule is a defaulting purchaser within the meaning of rule 71 and liable, as such, to make good any deficiency of price happening on a re-sale and all expenses attending the same.—*Javerbhai* v *Haribhai*, 5 B 575 *See* also *Valavhan* v. *Pangunni*, 12 M. 454

The provisions of Or XXI, r 71 for making a defaulting purchaser liable for any deficiency on a re-sale, extend to all sales, whether of moveable or immoveable property, and also to re-sales held under Or. XXI, r. 77, r. 84 and r 86.—*Ramdhani* v. *Rajrani*, 7 C. 337: 9 C. L. R 23. *See* also, *Rajendro Nath* v. *Ram Charan*, 2 C. W. N. 411, where it has also been held that Or. XXI, r. 87 does not apply to a case in which the property is put up again and sold forthwith under this rule.

In case of any irregularity or misrepresentation by auctioneer in conducting the sale, the officer conducting the sale instead of proceeding under this rule should refer the matter to the Court, when it appears to him that the bidder has been misled by such misrepresentation.—*Mohomed Kala Mea* v *A V Harpernk*, 9 C L. J. 165, P. C. : 13 C. W. N. 249: 36 C. 323

Where a decree-holder, having bid for the property, failed to pay the poundage fee in the manner required by the High Court rules, and the property was again put up for sale *Held* that r. 71 applied, and not rr. 84 and 86 —*Madhu Sudan* v *Purna Chandra*, 9 C. L. J. 115.

In the absence of proof of substantial injury to the judgment-debtor, an auction purchaser's omission to deposit the 25 per cent. in Court is a mere irregularity and does not vitiate the sale.—*Inaitulla* v. *The Punjab National Bank Ltd.*, 67 I. C. 427. It is not open to the Court to extend time for payment, but still when the Court extends time and the sale is confirmed it cannot be set aside merely on the ground of the irregularity.—*Varanakkot* v. *Vykunda*, 69 I. C. 1001.

"Forthwith."—The word "forthwith" shows that the re-sale is a continuation of the original sale and no adjournment is therefore allowable. —*Bhim Singh* v. *Sarwan Singh*, 16 C. 33, 38. But see, *Vallabhan* v. *Pangunni* 12 M. 454, where it was held it is a re-sale for the purposes of r. 71.

An officer conducting a second sale under this rule is not bound to commence from the next highest bid below that made by the defaulter. He may do so if the next higher bidder is willing to abide by his bid, otherwise he should commence the sale *de novo*—*Gour Mookh* v. *Lalla Gour*, 1 W. R. Mis, 11.

An offer to buy or sell may be retracted at any time before it is unconditionally and completely accepted, by words and conduct and a bidding at an auction is a mere offer which may be retracted before the hammer is down—*Agra Bank* v. *Hamlin*, 14 M 235.

Time of payment in full of purchase-money.

85. The full amount of purchase-money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property: [S. 307.]

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 72. [New.]

COMMENTARY.

Alteration.—The first para of this rule corresponds to section 307, C. P. Code, 1882, with some alterations and omissions The words "*exclusive of such day, or if the fifteenth day be a Sunday or other holiday, then on the first office day after the fifteenth day*" which occurred in the old section, have been omitted, and the word "*from*" has been substituted for the word "after" which occurred in the old Code. The object of substituting the word "*from*" for the word "after" will be clearly understood on reference to section 9 of the General Clauses Act X of 1887

The reason for the omission of the words "exclusive .....fifteeth day," which occurred in the old Code, is that there is already a codified law on this point, in sec 10 of the General Clauses Act X of 1897. The omission has been made adopting the law as laid down in *Surendra Narain* v. *Sauravini*, 10 C. W. N. 535· 3 C. L J. 339, in which all the cases on the point have been referred to and followed.

"Shall be paid."—The provisions of this rule are imperative, and must be given effect to On default by the purchaser to deposit the purchase-money within 15 days of the sale, the deposit of 25 per cent. must be forfeited, notwithstanding that the decree-holder and the judgment-debtor do not ask for a re-sale but content with the original sale being allowed to stand—*Sambasiva Iyyar* v *Lydinadasami*, 25 M. 535. *See* also, *Mathura* v *Gauri Shankar*, 32 A 380. The defaulting purchaser is answerable for any loss occasioned by re-sale—*Jacherbai* v *Haribhai*, 5 B. 575; *Ramdhani* v. *Rajrani*, 7 C. 387, *Vallabhan* v. *Rangum*, 12 M. 454

Time-limit for the Payment of the Purchase-money.—In order to satisfy the requirements of this rule it is necessary that the money should reach the Court within the time allowed, *viz.*, before the closing of the Court on the 15th day.

Under the rules of the High Court, dated 21st June, 1882, payment into the Government Treasury is equivalent to payment into Court for the purposes of this section.—*Srinivas* v. *Malayacha*, 7 M. 211. But payment by purchaser in the Post Office within time is not payment, because the Post Office is not the agent of the Court.—*Ram Chandra* v. *Belya*, 22 B. 415.

When an order has been made for payment of money in a suit on a certain date, and the Court was closed on that date, a payment made on the following day would be a good payment for the purposes of the order.—*Aravamudu* v. *Samiyappa*, 21 M. 383; *Dabee Ranoot* v. *Hemmun*, 18 C. 231, *Peary Mohun* v. *Annoda Charan*, 18 C. 631 and *Surendra Mohan* v. *Sourarini*, 3 C. L. J. 339, 10 C. W. N. 535. In *Motiram* v. *Bhivraj*, 20 B. 745, it has been held that the time during which a Court is closed for the vacation, is not a holiday within the meaning of this rule. Days on which the office is open and the purchase-money for property bought at a Court-sale could have been paid are office days.

Where the purchaser at a Registrar's sale is out of time, in paying the balance of the purchase-money into Court, the practice of the original side of the Calcutta High Court is that payment of interest follows as a matter of course.—*Kanylall* v. *Shama Churn*, 21 C. 566.

Time for Paying Balance of Purchase-money may be Extended with the Consent of the Parties Concerned.—Time can be extended for payment of the balance of the purchase-money with the consent of the parties concerned; *Radha Kishan* v. *Hari Singh*, 100 I. C. 800: A. I. R. 1927 Lah. 337. If it be extended without their consent, the case is one of "material irregularity" within the meaning of Or. XXI, r. 90; *Subramaniyam* v. *Vykunda*, 43 M. L. J. 477, 69 I. C. 1001: A. I. R. 1923 Mad. 48.

Proviso.—The proviso is new.

86. In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold. [S. 308.]

Procedure in default of payment.

COMMENTARY.

Alterations.—This rule corresponds to section 308, C. P. Code, 1882 with an important alteration.

"May be forfeited to Government."—The words "*may, if the Court thinks fit*" have been substituted for the word "*shall*" which occurred

in the old section. The above change has been introduced to override the case in 25 M. 535, in which it was held that the provisions of this section as regards forfeiture were imperative. But by the present rule the Court according to the circumstances of each case, can exercise its discretion with regard to forfeiture.

"The committee have altered this rule in order to prevent its being obligatory on the Court to forfeit the deposit in every case. The rule as it stands at present has caused great hardship in certain circumstances, *vide* the case of *Sambasiva Ayyar* v. *Vydinada Sami* (25 M. 535)."—*See the Report of the Special Committee.*

On default of payment within the period mentioned in r. 85, the Court is not bound to order the property to be re-sold. It has a discretion to do so or not, the expression "may, if the Court thinks fit," being substituted in place of the old word "shall."—*Basawan* v. *Anpurna*, A. I. R. 1926 All. 509.

"The defaulting purchaser shall forfeit all claim to the property."—When A and B both apply to purchase a property at an auction sale in a certain proportion agreeing to pay the price also in that proportion and do actually deposit the 25 per cent. of the purchase-money in proportion to their share, but at the time of paying the balance of the purchase-money, A is unable or unwilling to pay and B pays the whole balance amount, but immediately after the sale certificate is issued, A comes forward and claims to purchase his share of the property, payment by B must be decreed under r. 85 to be also on behalf of A, and A is entitled to purchase his share; *Bhabataran* v. *Durgeshnandini*, A. I. R. 1926 Cal. 719.

Appeal.—An appeal lay from an order passed upon an application under this rule to make a defaulting purchaser liable for the loss sustained by a re-sale.—*Ram Dial* v. *Ram Das*, 1 A. 181; *Kali Kishore* v. *Guru Prasad*, 2 C. W. N. 408; *Baij Nath Sahai* v. *Moheep Narain*, 16 C. 535; and *Rajendra Nath* v. *Ram Charan*, 2 C. W. N. 411. But see *Deoki Nandan* v. *Tapesri Lal*, 14 A. 201; and *Ilahi Bakhsh* v. *Baij Nath*, 13 A. 569.

Notification on re-sale.

87. Every re-sale of immoveable property, in default of payment of purchase-money within the period, allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale. [S. 308.]

COMMENTARY.

This rule corresponds to section 309, C. P. Code, 1882, with this modification only that the word "*proclamation*" has been substituted for the word "*notification*" which occured in the old section.

Fresh Proclamation.—A fresh proclamation is only necessary where a re-sale takes place in default of payment of full amount of the purchase-money within the time-limit prescribed by r. 85.

This rule does not apply to a case in which the property is put up again and sold forthwith under r 84 for default of payment of 25 per cent deposit.—*Rajendra Nath* v *Ram Charan*, 2 C W. N. 411; *Vallabhan* v *Pangunni*, 12 M. 454.

88. Where the property sold is a share of undivided immoveable property and two or more persons, of whom one is a co-sharer, respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharer. [S. 310.]

Bid of co-sharer to have prefernce.

COMMENTARY.

Alteration.—This rule corresponds to section 310, C. P. Code, 1882, with some alterations. The words "*respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharer,*" have been substituted for the words "respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the co-sharer," which occurred in the old section. No other change has been made This rule is similar to sub-rule (8) of rule 77, which relates to sale of moveable property.

Share of Undivided Immoveable Property.—The provisions of s 310, C. P. Code, 1882 (Or XXI, r. 88) are not applicable in a case where the property sold is not a share of undivided immoveable property, but the rights and interests of a mortgagee in such a share.—*Jairam Das* v. *Beni Prasad*, 3 A 15

Co-sharer.—The requirements of this rule are not satisfied by the co sharer preferring his claim to the right of pre-emption before the property is knocked down, and offering to pay a sum equal to that bid by the highest bidder It contemplates a distinct bid by the co-sharer in the ordinary manner of offering bids —*Hira* v. *Unas Ali*, 3 A. 827 (2 A 850 *followed*). *See* also, *Sri Kishen* v. *Debi Ram*, (1888) A. W. N 208

A co-sharer whose bid was not accepted and the sale was confirmed in favour of another bidder has no *locus standi* under Or. XXI, r. 90, to have the sale set aside —*Bisheshar Kuar* v. *Hari Singh*, 5 A. 42.

Where a co-sharer asserted his right of pre-emption in a sale of a share of an undivided immoveable property by offering the same amount as the person preceding him did bid, there was sufficient compliance with the requirements of Or. XXI, r. 88.—*Iqbal Hasian* v. *Ejaz Husain*, 50 I. C 654 (2 A. 850; 3 A. 827 1881 A. W. N. 86 *referred to*).

A title to share in undivided immoveable property sold in execution of a decree which is still defeasible at the date of the sale in execution is not sufficient to support a claim for pre-emption under this rule.—*Abdul Ghafur* v. *Ghulam Husain*, 35 A. 296.

Appeal.—Or. XLIII, r 1 provides for no appeal against an order passed under this rule.

A share of an undivided immoveable property was put up for sale in execution and was knocked down to a stranger. Before it was knocked

down to him, the decree-holder who was co-sharer of such share, after obtaining permission to bid, bid the same sum as that for which it was knocked down to the stranger claiming the right of pre-emption. The Court confirmed the sale in favour of the decree-holder. *Held* that an appeal would not lie against the order confirming the sale.—*Munuruddin Khan* v. *Abdool Rahim*, 3 A. 374.

No appeal lies from an order refusing to restore an application under *this rule which had been dismissed for default in appearance.*—*Ghaseti Bibi* v. *Abdul Samad*, 29 A. 596

Application to set aside sale on deposit.

89. (1) Where immoveable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court—

(*a*) for payment to the purchaser, a sum equal to five per cent. of the purchase-money, and

(*b*) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under rule 90 to set aside the sale of his immoveable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale. [S. 310-A.]

COMMENTARY.

Alteration.—This rule corresponds to section 310-A of the old Code, but several additions and alterations have been made in it to meet several conflicting rulings

"Words have been added so as to make it clear that a purchaser acquiring a title before the sale in execution, can claim the benefit of the rule. In other respects the committee consider it advisable to adhere to the wording of the section The proposal that the sale should be set aside on payment of the purchase-money instead of the amount specified in the proclamation is, in our opinion, fraught with danger it would be obviously useless, unless subsequent protection were given to the property, and such protection might lead to collusion, which would be most prejudicial to the decree-holder."—*See the Report of the Special Committee.*

The omission of the word "*under this chapter*" which occurred in the old section, has set at rest the diversity of judicial opinion which hitherto existed regarding the applicability of s. 310-A to sales held under mortgage-decrees. The above change seems to have been made to meet the Full Bench case reported in 25 C. 703: 2 C. W. N. 353, in which it was held that the provisions of section 310-A of the old Code were not applicable to sales held in execution of mortgage-decrees. By the omission above referred to by the insertion of rules 4 and 5 in Order XXXIV (which correspond with ss 88 and 89 of the T. P. Act, IV of 1882), in the amended form, and also by the introduction of rules relating to mortgage-decrees, in the said Order XXXIV, the Calcutta Full Bench case has been overridden The conflicting rulings of the several High Courts have been noted below, and it would appear from those rulings that in framing this rule the Legislature has adopted the views expressed by the Allahabad, Bombay and the Madras High Courts.

The words "*any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale*," have been substituted for the words "any person whose immoveable property has been sold," which occurred in the old section, as the wording of the old section gave rise to several conflicting rulings. The wording of the present rule will not only include the owner of the property sold, but also include any person who holds any sort of interest in the said property by virtue of a title acquired before the sale Thus the present rule includes, a prior private purchaser, donee, mortgagee, a prior auction-purchaser, a mokurraridar, a tenant, a beneficial owner, and *benamidar*, as in some cases the beneficial owner may be barred by the act and conduct of his *benamidar*, etc., etc The conflicting rulings are noted below, for the purpose of a clear understanding of the change introduced in this rule.

Clause (*a*) is similar to cl. (*a*) of the old section. Clause (*b*) is also similar to cl (*b*) of the old section.

Sub-rule (2) corresponds to the proviso to the old section, with some modifications The words "*unless he withdraws his application*" have been added after the words "he shall not." The above addition has been made for the benefit of the applicant, who under the old section had no right at all to take the benefit of this rule, if he had previously filed an application under s 311, C P. Code 1882. The words "*or prosecute*" have also been added after the words "to make." The above addition has been made to prevent an applicant to prosecute his application, if in order to evade the provisions of sub-rule (2), he simultaneously files applications under this rule and also under rule 90, or if he first applies under this rule and then applies under rule 90 to set aside the sale.

The period of limitation (30 days), and the Court's order for setting aside the sale, which were mentioned in the old section, have been omitted from this rule and reproduced in sub-rule (2) of rule 92. Notice of application under this rule must be given to the decree-holder and auction-purchaser (*Vide* the proviso to rule 92). The old section was silent on this point.

Object of Enacting the Present Rule.—The main object of enacting section 310-A of the old Civil Procedure Code was to enable the judgment

debtor to prevent his property from being sold below the market value Difficulties were, however, experienced in actual practice, and it was holding even a lesser interest than that of an owner, as for example, a co-heir, a simple mortgagee, a member of the Mitakshara joint family, a lessee, a person in reversion, and so on. Some Courts up-held their right, while others did not. Different views thus prevailed. In *Pares Nath* v *Nabagopal*, 2 I. C. 1 5 C W N 821 F B., the words "any person whose immoveable property has been sold" in section 310-A of the old Code were considered sufficiently elastic to admit a wider construction being put on them so as to include "every person who has an interest in the property in question, whether qualified, partial or absolute" The necessity of giving the power of making a deposit to a wider circle and to put a stop to the conflict of decisions was recognized by the Legislature, and the law appeared in the form of rule 89 of the new Code in place of section 310-A of the old Code.

"Any person either owning such property or holding an interest therein by virtue of a title acquired before such sale."—A judgment-debtor whose immoveable property has been sold, may apply under this rule as "a person owning such property" But if the judgment-debtor has transferred his interest in the property after the Court sale, the question arises whether he or his transferee is entitled to apply for setting aside the sale under this rule The Allahabad High Court, in *Isher Das* v. *Asaf Ali*, 44 A 155, has held that in such a case neither the judgment-debtor nor his transferee after the Court-sale is entitled to apply under this rule. In a recent case the same High Court has held that the judgment-debtor was entitled to apply, but not the transferee, *Fatima-ul-Hasna* v. *Baldeo*, 48 A. 188 F B 93 I C 24 A I R 1926 All 204 The Bombay High Court, in *Pandurang* v. *Govind*, 40 B 557, has held that the judgment-debtor is entitled to apply, but not the subsequent purchaser The Patna High Court followed the Bombay decision in *Dhanwanti* v. *Sheoshankar*, 4 Pat L. J 340 The Calcutta High Court, in *Saroda* v *Hemendra*, 49 C 454, has held that the subsequent purchaser is not entitled to apply.

The words "owning such property" and "holding an interest therein" should not be read independently of the expression "by virtue of a title acquired before such sale" It has been held by the Bombay High Court in *Pandarang Laxman* v *Govind Dada*, 40 B 557 37 I C. 211, that there is no reason to limit the words "by virtue of a title acquired before such sale" to the words "holding an interest therein" so as to read the first clause "owning such property" as if it stood by itself The Madras and the Patna High Courts have taken the same view in *Sundaram* v *Mamsa*, 41 M 554 63 I C 973, and *Mt. Dhanwanti* v. *Sheoshankar*, 4 Pat L J 340 51 I. C 873. It is clear, therefore, that the applicant under Or XXI, r 89 must be a person who can, even at the date of his application, be proved to be a person, either *owning* the property or *holding* an interest therein by virtue of a title, and further that, that title must have been a pre-existing title, that is to say, a title acquired before the auction sale The use of the words "owning" and "holding" in the rule indicates a present subsisting ownership or interest in the applicant at the date of the application, *Onkar* v *Dhan Sing*, 21 N. L R 102: A. I R 1926 Nag 10: 90 I C 963

Who may Apply.—In execution of a decree against a judgment debtor, his property was sold by auction Prior to the execution sale, he effected a private sale to another person. Subsequently the judgment-debtor applied under this rule to set aside the execution-sale. *Held* that, notwithstanding the private sale, the judgment-debtor could apply under this rule to set aside the sale.—*Magan Lal Mulji* v. *Doshi Mulji*, 25 B. 631 ; *Mussammat Dhanwanti* v *Sheoshankar Lal*, 4 Pat. L. J. 340: 51 I. C. 873

A judgment-debtor, whose property has been sold at a Court sale, has a right to apply to have the sale set aside as a person "*owning*" the property, although he has transferred or attempted to transfer his interest in the property to a third party after the Court sale.—*Pandurang Lakshman* v. *Govind Dada*, 40 B. 557 A. I. R 18 Bom. L R. 571; *Dhanwanti* v *Sheo Sanker*, A. I. R 1921 Pat 364; *Sundaram* v *Mamsa*, 44 M. 554; 63 I. C. 937, F. B

A beneficial owner can apply under this section, when the property was sold in execution of a decree against the *benamidar*—*Baboo Ram* v. *Ram Sahai*, 1 C. L. J 29-n

A co-sharer may apply under this rule.—*Tuhiram* v. *Izzat Ali*, 30 A. 192.

A co-heir may apply under this rule—*Abdul* v. *Matiyar*, 30 C 423 A legatee under a will may apply, 44 M L. J. 325: 72 I. C. 325

A revisioner is a person "interested" and can apply—*Pankhabati* v *Nami*, 19 C. L J. 72.

A purchaser who purchased the property after attachment but before sale can apply—*Gosta* v *Sankar*, 26 C. L. J. 127.

A *benamidar* of a person whose immoveable property is sold, has a right to apply to have the sale set aside under this rule.—*Basi Poddar* v *Ram Krishna*, 1 C W. N. 135. A beneficial owner is also entitled to set aside a sale under this section—*Baburam* v *Ramsahai*, 8 C. L. J 345 (1 C W N 135 *followed*)

A *mortgagee of a tenure or holding* sold in execution of a decree for arrears of rent due in respect of it is entitled to make an application under this rule—*Pareshnath* v. *Nabagopal*, 29 C. 1 F. B. : 5 C. W. N. 821 F B. (5 C W N 63 *overruled*). *See* also *Srinivasa* v. *Ayyathorai*, 21 M 416 and *Safar Ali* v. *Raj Mohun*, 1 C. L J. 454, even though the property is sold subject to his mortgage, *Kandaswami* v *Swarnavelu*, 53 I. C 934 A mortgagee who has purchased the equity of redemption in one portion of the mortgaged property, can apply under r. 89 to set aside the sale held under his own decree, *Aulad Ali* v. *Abdul Hamid*, 2 Pat. 715. 74 I C. 102. An under-tenant can come in and apply to have the sale of the holding set aside under this section—*Chandra Kumar* v. *Kamini Kumar*, 11 C. W. N. 742 (29 C. 459· 6 C. W. N. 175-n, *dissented from*), see *Bepin Behari* v. *Kalidas*, 6 C. W. N. 336. After the sale of a *mokurari* tenure, a *durmokararidar* has a right to come in and make a deposit under this section.—*Narain Mandal* v *Sourindra Mohun*, 32 C. 107 (29 C. 459 not followed) A purchaser of a share of an occupancy holding has locus standi to apply under this section.—*Benodini Dassi* v. *Peary Mohan*, 8 C. W. N. 75 ; *Kunja Behari* v *Sambhu Chandra*, 8 C. W. N. 232 ; ...

Ali v. *Asabuddin Kazi*, 9 C. W. N. 134 ; *Omar Ali* v. *Moonshi Basiruddin*, 7 C. L. J. 282: 12 C W. N. 64-*n*. It has been held in a recent case (following *Omar Ali* v. *Basiruddin*, 7 C. L. J. 282) that the purchaser of a non-transferable occupancy holding is entitled to make a deposit under this rule to have the execution sale set aside The fact that the landlord himself is the auction-purchaser makes no difference; *Re Fazoo Mia* v. *Sultan Ahmed Chowdhury*, 31 C. W. N. 1050.

Where the provision of the E. B. and Assam Tenancy (Amendment) Act applies, a permanent under-tenure holder has a *locus standi* to apply under this rule for setting aside the sale of a taluk in execution of a rent decree.—*Sarat Chandra* v *Matilal*, 23 C. W. N 597: 52 I. C. 237.

The purchaser of a share of an occupancy holding transferable by custom can apply—*Benodini* v. *Peary Mohan*, 8 C. W. N 55, *Kunja Behary* v. *Sambhu Chandra*, 8 C. W. N. 232 In *Denonath* v. *Kalikumar*, 29 I. C. 916, it has, however, been held that a mortgagee of a non-transferable occupancy holding cannot apply under this rule when the holding has been sold under a rent decree and purchased by the decree-holder. *See* also *Abdul Aziz* v. *Tafizuddin*, 19 C. W N. 326. The Patna High Court has held that a purchase of a portion of non-transferable occupancy holding cannot apply, 1917 Pat. 167 F B. 19 C. W. N. 176-*n*.

A purchaser subsequent to attachment and prior to sale can apply — *Mulchand* v. *Govind*, 30 B. 575

Who Cannot Apply under this Rule.—A person whose interests were not affected by the sale could not, under s. 310-A, apply to set aside the sale ; *Ramchandra* v *Rakhmabai*, 23 B. 450 *See* also 30 C. 425 A person who has merely contracted to purchase land cannot apply, because such a contract does not of itself create any interest in the property.—*Mahadev* v. *Vasudev*, 23 B 181 ; *Ammalla* v *Vasireddi*, 17 L. W. 680: 1923 M. 659

A person whose claim under Or. XXI, r 58 and a suit under Or. XXI, r. 63 have been dismissed, cannot apply under this rule ; *Onkar* v *Dhan Singh*, 21 N L R. 102· A. I. R 1926 Nag 10 90 I. C 963.

A judgment-debtor who had sold his immoveable property while it was under attachment in execution of the decree against him is not entitled to apply.—*Maganlal* v. *Doshi*, 25 B 631

A person to whom the judgment-debtor sells or mortgages the property after the sale in execution is not entitled to apply —*Hazariram* v *Badai Ram*, 1 C W. N. 279, because no title was acquired by him, before the sale (Dissented from in *Appaya Shetti* v. *Kunhati*, 30 M 214 17 M L J 127). *See* also *Manickka* v. *Rajagopala*, 30 M. 507 *Saradakripa* v. *Harendra*, 26 C. W N 119 ; *Sundaram* v. *Mamsa*, 44 M 554 63 I C. 937 F. B. A person who acquires a mortgage in trust from the judgment-debtor of the properties sold in execution sale after the Court sale, is not entitled to apply.—*Gopala* v *Viravanatha*, 58 I C 856 F B But *see Gantasola* v *Thatarathi*, 54 I C 753 *contra*

A judgment-debtor who after the sale of his property in execution sells it to a third person, is not entitled to apply —*Ishardas* v *Asaf Ali*, 44 A. 155, 186 ; *Subbarayudu* v *Lakshminarasamma* 38 M 775.

A purchaser in execution of a mortgage decree of an entire untransferable occupancy holding cannot apply.—*Abdur Rahman* v. *Promde*, 22 C. L. J. 108. 20 C. W. N. 40

The purchaser under a money decree of a non-transferable occupancy holding has no *locus standi* to pay in the money under Or. XXI, r. 89, C. P. Code, *Bishun Dayal* v. *Jagdish Narayan*, 2 Pat, L. R. 12

A mortgagee decree-holder cannot apply under this rule when he himself sold a part of the property in execution of another decree.—*Muhammad* v. *Ahmad Said*, 33 A. 481.

A donee of the property sold when the gift was made before attachment cannot apply.—*Erode Manikkoth* v. *Putheedeth*, 26 M. 365

A second mortgagee who was not a party to the suit of the first mortgagee, and whose interest has not passed under the sale, cannot apply. *Mallikarajunadu* v. *Lingamurti*, 26 M. 232

An attaching creditor cannot apply.—*Kedarnath* v. *Uma Charan*, 6 C. W. N. 57, but see *Dhirendra* v. *Kamini*, 28 C. W. N. 899.

Persons who claim a title to the mortgaged property adverse to the mortgagee cannot apply.—*Ram Singh* v. *Salig Sing*, 28 A. 84: 2 A. L. J. 77. (1905) A. W. N. 193

An *interim* receiver, appointed under s. 20 of the Provincial Insolvency Act of 1920 after the sale of insolvent's properties, has no power, unless he is expressly authorized to that effect, to apply under this rule to have the sale of the insolvent's properties set aside, as he cannot be said to be "a person owning such property".—*Ram Chandra* v. *Sankara Aiyar*, 51 M. L. J. 239. 93 I. C. 271. A. I. R. 1926 Mad. 357.

"A sum equal to five per cent."—This 5 per cent. is intended as a compensation to the purchaser for the trouble and disappointment caused to him.—*Trimbak* v. *Ram Chandra*, 23 B. 723. It must be paid even if the decree-holder is the purchaser.—*Chundi Charan* v. *Banke Behary Lal*, 26 C. 449, 451-52, *Tirumal* v. *Syed Dastaghiri Miyah*, 22 M. 286

"On his depositing."—The sale will be set aside unless the applicant deposits the whole amount mentioned in sub-rule (1) within the prescribed period *viz.*, 30 days from the date of the sale. In *Chundi Charan* v. *Banke Behary*, 26 C. 449, F. B. : 3 C. W. N. 283 F. B., it has been held that when there is nothing to show that there was any mistake of the Court by which the judgment-debtor was induced to deposit an insufficient amount, the sale ought not to be set aside (25 C. 609 *distinguished*). In *Muthu Ayyar* v. *Ramasami Sastrial*, 20. M. 158, it has been held that a judgment-debtor is entitled to have the sale set aside under this section, if he deposits 5 per cent. of the purchase-money, including that deducted by the Court for poundage, and fulfils the requirements of clause (b) even though something more on account of poundage was recoverable from him under the head of costs.

When the amount payable by the judgment-debtor under this rule has been calculated by an officer of the Court, and has been deposited, an order setting aside the sale must be made by the Court as a matter of right. *Makbool Ahmad* v. *Bazle Sazhan*, 25 C. 609. In *Ugrah Lal* v. *L*

Pershad, 18 C. 255, it has been held that when the amount payable by the judgment-debtor has been calculated and settled by an officer of a Court, and when the amount has been paid into Court, an order setting aside a sale must be made as a matter or right, although it was subsequently discovered that the amount was short by a small sum *See* also *Sheik Fakir* v. *Biraj Mohini*, 11 C. W. N 116.

A deposit under this rule must not be conditional.—*Dulhin Mathura* v. *Bansidhar*, 16 C. W. N. 904, 15 C. L. J. 83.

The judgment-debtor deposited the decretal amount with the extra percentage under Or. XXI, r 89, but in his application he prayed that it may not be paid to the decree-holder pending disposal of an appeal Subsequently on the objection of the decree-holder, he withdrew the prayer aforesaid. *Held*, that the object of the deposit was to set aside the sale, and though there was no specific prayer to that effect, the objection to the payment of the decretal amount having been withdrawn, the Court was bound to set aside the sale ; *Ram Sivendra Narayan* v *Awadh Bihary*, 4 Pat L T. 295: 71 I. C 332

A new application without any actual deposit is not sufficient compliance with the law.—*Mahomed Akbar* v. *Sukhdeo*, 13 C L. J. 467.

Under this rule the essential upon which the action of the Court is to depend is the deposit within 30 days, and not the fact of the application being made within that period —*Mathuji* v *Kondoji*, 7 Bom. L. R 263

An application under this rule need not be in writing, but the application whether oral or written must be in time Deposit of money alone is not sufficient. *Held*, therefore, that a tender by a person who was neither an attorney, nor a Vakil nor a Mukhtear, for the owner of the property sold, does not comply with the provisions of this rule and is consequently invalid.—*Sarvi Begum* v *Haidar Shah*, 9 A L J. 12, *Parat* v *Ambalal*, 32 I. C. 45 ; *Ram Sivendra* v *Awadh Bihary*, 71 I C. 332. But see *Thimmarazu Venkata* v. *Venkatappa*, 46 M L. J 119: 1924 M W. N 137, where it was *held* that the fact that the required deposit was made by the pleader's clerk instead of by the pleader himself does not vitiate the application

Where Deposit is Made Within Thirty Days.—If the Court be closed on or before the last day of the period limited, the judgment-debtor may deposit the amount of the debt into Court on the first day the Court reopens.—*Soshee Bhusan* v. *Gobind Chunder*, 18 C 331 ; *Peary Mohun* v *Ananda Churn*, 18 C. 631. *See* also *Aravamudu Ayyangar* v. *Samiyappa Nandan*, 21 M. 358, and *Sambasiva Chari* v *Ramasami Reddi*, 22 M 179 ; and s. 10 of the General Clauses Act (X of 1897).

Deposit of decretal amount with costs within 30 days—Deposit of 5 per centum of the purchase-money after the rejection of the special appeal *Held* that the application was barred and the judgment-debtor was not entitled to exclude the period during which the special appeal was pending. —*Choudhury Keshry Sahoy* v *Gaini Roy*, 29 C 626 6 C W. N 776

An act of the Court cannot prejudice any party Therefore where on the last day of making a deposit under this rule, the deposit could not be made owing to the presiding officers leaving the Court earlier than usual

and the deposit was made the next day ; *held* that the deposit was valid and in time —*Dulhin Mathura Koer* v. *Bansidhar Singh*, 10 I. C. 8.., *Gholam* v *Manindra*, 22 I. C. 842.

Extension of Time.—Court has no jurisdiction to extend time prescribed by this rule but extension may be granted with the consent of parties, *Rameswar* v *Sureswar*, 39 I C. 664.

Nature of Deposit.—A deposit must be of such a nature as to be at once payable to the parties, and a Court has no power to set aside a sale unless the judgment-debtor has strictly complied with the law. The deposit of Government promissory note is not sufficient.—*Rahim Bux* v. *Nundo Lal*, 14 C. 321 *See* also *Musst. Shakoti* v. *Jotindra Mohun*, 1 C W N 132.

Where after deposit under this section the judgment-debtor prayed that the money deposited might be retained in Court pending the hearing of an application under sec 108, C. P. Code, 1882. *Held* that the sale ought to have been set aside—*Hanooman Singh* v *Luchman*, 8 C. W. N. 355

A mere payment of the sale-proceeds into Court is not a sufficient compliance with the requirements of this section Actual receipt of sale-proceeds by decree-holder is necessary to set aside a sale—*Trimbak Narayan* v. *Ram Chandra*, 23 B 723

Where properties was sold in separate lots, and the judgment-debtor applied under this rule to set aside the sale of one of the properties by tendering the balance due under the decree after deducting the amounts bid by the decree-holder for some of the properties, and the amount deposited by the other purchaser *Held* that there was no deposit within the terms of the section —*Kripa Nath* v *Ram Lakshmi* 1 C W. N. 703.

" For payment to the decree-holder."—The word " decree-holder " in sub-rule (1) (*b*) refers to that person alone in satisfaction of whose decree the sale took place It does not refer to the other decree-holders who claim rateable distribution of the sale proceeds under s 73 —*Ganesh* v *Ishi..*, 37 B 387. It was held in *Harai* v. *Faizlur*, 40 C. 619, that when a judgment-debtor deposits such amount as is sufficient to satisfy the claim of the person in satisfaction of whose decree the sale was ordered, the other decree-holders cannot come in for rateable distribution under s 73 See also *Hari Sundari* v *Sashi Bala*, 1 C. W. N. 105 ; *Beharilal* v. *Gopal*, 1 C W. N. 695. Followed in *Roshanlall* v. *Ramlall*, 30 C. 262; 7 C. W. N 841 As to the proper amount to be deposited. See *Karmokar* v *Krishna*, 39 M 429

" Less any amount received by the decree-holder."—It is not necessary that the payment to the decree-holder should be in cash—it is enough if he is any how satisfied as to the whole amount due to him.—*Lakshmi Ammal* v *Sankaran Nair*, 24 M L. J. 205; *Vedala Lakshminara* v. *Pa.. Lakshmi*, (1912) M. W. N. 756 But a judgment-debtor cannot take advantage of the amount paid by his co-judgment-debtors and deposit the balance, *Karunakara* v. *Krishna*, 27 I. C. 952.

" Received " means actual receipt by the decree-holder. A mere payment into court of the sale proceeds does not satisfy the requirements of this rule.—*Trimak* v. *Ram Chandra*, 23 B. 723. (followed in *Teta Ba..*

v. *Chhoturam*, 25 Bom. L R. 446: 73 I. C 454; *Karunakara* v. *Krishna*, 28 M. L. J. 262; 39 M. 429; 73 I. C .454; A. I. R 1923 Bom. 299.

Sub-rule (2). "He shall not be entitled to make or prosecute an application."—In a case where, after an application to set aside a sale was made by the judgment-debtor under this rule another application was made under r. 90, the applicant was not entitled to have the benefit of the former section —*Rajendranath* v. *Nilratan*, 23 C. 958. But the Court should in such a case put the judgment-debtor to his election whether he would withdraw the application under r. 90, and if he refuses to do so, it should dismiss the application made under this rule; *Sarvi Begam* v. *Ram Chandra*, 47 A. 850· 88 I C 500: A I. R. 1925 All. 778. But the provisions of this sub-rule do not apply where an application, though purporting to be made under r. 90, is really one under s 47; *Harihar* v *Rama Pandu*, 33 B 698. 4 I C. 253.

After the rejection of an application under this rule judgment-debtors, other than the applicant, made an application under rule 90. *Held*, that the present application was not barred by sub-rule (2).—*Ashruf Ali* v. *Net Lal*, 23 C 682 *See* also *Sital* v. *Nand Lal*, 13 C W N. 591

Where in an application to set aside a sale there are joint prayers under rules 89 and 90 without any actual deposit of purchase-money, such an application cannot be entertained under sub-rule (2), rule 90 —*Narayan* v. *Rasul Khan*, 23 B 531 (535).

A judgment-debtor having applied under this section to set aside an execution-sale, his application was rejected and the sale was confirmed under Or. XXI, r. 92 Subsequently he brought a suit to set aside the sale. *Held* that the suit was barred by sub rule (3) of rule 92 —*Damodar Bhaushet* v *Vinayak Trimbak*, 26 B 40.

A judgment-debtor who makes an application under Or. XXI, r. 90, which is dismissed for default, is thereby disqualified from subsequently applying for getting back his property under r 89 —*Murlidhar* v *Baldeo*, 20 O. C. 329.

Necessary Parties.—It is clear from the provisions of the proviso to r. 92, sub-rule (2), that both the decree-holder and the auction purchaser are necessary parties to an application under this rule; *Musst. Bibi* v *Parasnath*, 2 Pat 800 75 I. C 130· A. I. R 1923 Pat. 37

Notice.—What is necessary is that notice should be given to decree-holder and auction-purchaser and rule 92 does not require them to be formally made parties Notice may be issued after 30 days, but it is the duty of the party to apply for issue of notice and Court is not bound to issue notice without application. *Bibi Zainal* v *Paras Nath*, 71 I. C. 557; *Raj Chandra* v *Kali Kanta* A I R 1923 Cal 394 *See*, Or XXI, r 92.

Confirmation of Sale.—Confirmation of sale under r 92 is no bar to the applicability of this rule, and a sale may be set aside even after such confirmation —*Pita* v *Chunilal*, 31 B. 207, 217

Applicability of this Section to Sales under Rent Act.—This rule does not apply to the sale of a tenure or holding sold in execution of a decree for its own arrears, inasmuch as section 51 of the B T Amendment Act

(I of 1907, B C) has expressly laid down that this rule would not apply to such sales.—*Asiruddi* v *Mokhodamoyee*, 12 C. W. N. 434: 32 C 58 But this case does not apply to East Bengal and Assam as the Amending Act of that province (Act I of 1908), has not made this rule inapplicable to that province so the rulings under the old Code, in which it has been held that section 310 A of the C P Code, 1882, applies to the sale of a tenure or holding in execution of a decree for its own arrears are still good law, so far as that province is concerned See *Ali Miah* v. *Ramir* 13 C W N 224

This section applies to the sale of the tenure in execution of a decree for its own arrears An auction-purchaser is entitled to a notice before an order is made under this section —*Janardhan* v. *Kali Kristo*, 23 C 3 and 396-*note* Followed in *Bunshidhar* v *Kedar Nath*, 1 C. W N. 111 *See* also *Nitya Nanda* v *Hira Lal*, 5 C W. N 63 (p. 64, col. 2)

This section does not apply to sales under Act X of 1859, as the Code of Civil Procedure applies up to the sale and does not apply after it—*Harish Chandra* v *Ananta Charan*, 2 C. W. N 127.

Rule If Applies to Sales on the Original Side of the High Court under Mortgage Decree.—This rule applies to sales held in execution of mortgage decrees on the Original Side of the High Court —*Virjaban Das* v *Bissessuar Lal*, 48 C 69 24 C W N. 1032 But see *contra*, in *Surendra* v *Gurupada* 24 C W. N 536, where it has been held that though this rule applies to sales under mortgage decrees in mofussil, it does not apply to such sales held on the Original Side of the High Court

Appeal Against Order under this Rule.—Under the old Code, an order setting aside or refusing to set aside a sale passed on an application under s 310-A, was not appealable because it was not included under s 588 (Or XLIII, r 1) in the list of appealable orders It was however appealable as a decree, if the question as to whether the sale should be set aside or not arose " between the parties to the suit or their representatives " in the course of the execution proceedings and as such came within the purview of s 47 —*Pita* v *Chunnilal*, 31 B 207; *Maganlal* v. *Mulji*, 25 B 631, *Murlidhar* v *Anandaram*, 25 B 418. 3 Bom. L. R 100; *Pandurang Govind* v. *Krishnabai*, 1 Bom L R. 74; *Phul Chand* v. *Nurshing*, 28 C 73. Followed in *Imtiazi Begam* v *Dhuman Begum*, 29 A. 275; *Maruthi* v *Rajagopala*, 17 M L J 291, *Harihar* v. *Rama Pandu*, 33 B. 698 But under the present Code, and order *setting aside or refusing to set aside a sale* (under r 92) with reference to an application under this rule (r 89) is appealable as an *order* being included in the list of appealable orders given in Or XLIII, r 1 An auction-purchaser also can now appeal from an order under this rule, *Kachu* v *Trimbak*, 44 B. 472; *Gadigappa* v. *Shidappa* 48 B 638 88 I. C 155 A I R 1921 Bom. 405.

The true nature of the order must be examined before and the character of the parties affected by it must be ascertained before deciding whether the order is one under s 47.—*Mahomed Akbar* v. *Sukhdeo*, 13 C. L J 47

An order on an application to set aside a sale under this rule does not come within the definition of " decree " in sec. 2.—*Ismuddi* v *Pran*, 17 C. W. N. 814.

Revision.—Where a Court refuses to entertain an application under Or. XXI, r. 89, on the ground that the petitioner has no *locus standi*, it is a case where the Court fails to exercise a jurisdiction vested in it by law within the meaning of s. 115 of the Civil Procedure Code, and so the High Court will interfere in revision in such a case; *Sundaram* v. *Mausa*, 44 M. 554: 40 M. L. J. 497: 63 I. C. 937 F. B; *Dhanwanti* v. *Sheoshankar*, 4 Pat. L. J. 340: 51 I. C. 873, *Aulad Ali* v. *Abdul*, 2 Pat. 715: A. I. R. 1923 Pat. 490: 74 I. C. 102. But it has been held by the Allahabad High Court, in *Yad Ram* v. *Sundar Singh*, 45 A. 425: A. I. R. 1923 All 392 F. B: 74 I. C. 778, that no revision lies in such a case.

Dismissal of Application for Default in Appearance.—No appeal lies where an application under this rule is dismissed for default in appearance and the Court refuses to restore it to file.—*Ghasiti Bibi* v. *Abdul Samad*, 29 A. 596.

Date of Sale.—The "date of the sale" is the date on which the sale takes place and the highest bid is accepted and the deposit paid, and not the date when the Court confirms the sale and directs the remainder of the purchase-money to be collected, *Vana* v. *Ratilal*, 28 Bom. L. R. 510: 95 I. C. 549: A. I. R. 1926 Bom. 335.

Limitation.—Under Art. 166, Sch. I of the Limitation Act, 1908, an application under this rule to set aside the sale, must be made within 30 days from the date of the sale. But where the final bid remains unaccepted by the officer conducting the sale for some days, this period of limitation does not begin to run till the acceptance of the bid.—*Munshilal* v. *Ram Naraint*, 35 A. 65.

A judgment-debtor may obtain reversal of sale by deposit of money in Court but the Limitation Act provides that such deposit must be within 30 days of the sale. The Court has no jurisdiction except under the provisions of the Limitation Act to extend the time nor has the Court jurisdiction to set aside a sale by allowing the judgment-debtor to deposit the decretal amount after the period of limitation has expired. The Court can only give time with the consent of the parties.—*Chaudhry Rameshwar* v. *Chaudhry Sureshwar*, 2 Pat. L. J. 161.

It is not enough to make the application within 30 days; *Mahomed Akbar* v. *Sukhdeo*, 13 C. L. J. 467; *Munna Lal* v. *Radha Kishan*, 37 A. 591: 30 I. C. 186. Both the application and the deposit must be made within 30 days from the date of the sale. A sale in execution cannot be set aside under Or. XXI, r. 89 without an application (oral or written) within 30 days from the date of sale.—*Venkata Narasimma* v. *Lakshmi Narasimham*, 32 I. C. 783.

Applicability of this Rule to Sales under Mortgage-decrees.—It was held by the Calcutta High Court that s. 310-A did not apply to a sale of mortgaged property under a decree made in accordance with the provisions of the Transfer of Property Act (IV of 1882).—*Kedar Nath* v. *Kally Churn*, 25 C. 703 F. B: 2 C. W. N. 353 F. B (23 C. 682 *overruled*). This Full Bench decision was explained in *Dakshina Mohun* v. *Saimati Basumati*, 4 C. W. N. 174, where it was held that section 104 of the Transfer of Property Act (IV of 1882) is an enabling section, and the rules made by the High Court (Circular Order No. 13, dated 27th April 1882), under sec-

tion 104 of the T P Act, (IV of 1882), did not limit the applicability of the provisions of the Civil Procedure Code as regards sales held in execution of mortgage-decrees; and distinguished in *Shyam Kishen* v. *Sunder Koer*, 31 C. 373 The Allahabad, Bombay and the Madras High Courts held, on the other hand, that this rule applies where a sale of immoveable property has taken place under a mortgage-decree —*Raja Ram* v. *Chuni Lal*, 19 A. 205; *Srinivasa Ayyangar* v. *Ayyathorai Pillai*, 21 M. 416; *Tirumal Rao* v. *Syed Dastaghiri*, 22 M. 286, *Krishnaji* v. *Mahadev*, 25 B. 104; *Mallikarjunadu Setti* v *Lingamurti*, 25 M 244 F. B.

The Calcutta decisions are no longer law. The transfer, into Or XXXIV of the present Code, of the sections of the Transfer of the Property Act relating to decrees in mortgage suits, makes it clear that rule 89 applies to sales under mortgage decrees also A mortgagor whose immoveable property has been sold in execution of a decree for the sale of the mortgaged property passed under Or. XXXIV, r. 5, may therefore apply under this rule to set aside the sale; *Virjiban Das* v. *Biseswar Lal*, 48 C 69. 60 I. C 406

Order IX does not apply to proceedings under this rule.—An application to set aside a sale under this rule is a proceeding in execution and not an original proceeding, and hence the provisions of Or. IX do not apply to it —*Bhagwan* v *Dattatraya*, 50 B 457; 96 I. C. 411. A. I. R 1926 Bom 377.

Application to set aside sale on ground of irregularity or fraud.

90. (1) Where any immoveable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it:

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud. [S. 311.]

COMMENTARY.

This rule corresponds to section 311, C P. Code, 1882, with some important additions and alterations S 311 ran thus:—"*The decree-holder, or any person whose immoveable property has been sold under this Chapter, may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it; but no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity.*"

"The Committee have struck out the provision as to irregularity in *attaching the property*, as such irregularity obviously cannot affect the price. They have introduced the words 'rateable distribution of assets' to clear up a doubt which has been the subject of discussion in several

cases. They have altered the language of the proviso in order to meet the doubts which have been raised as to the evidence upon which the Court can act (*Tasadduk Rasul Khan v. Ahmad Husain*, 21 C 66)."—*Report of the Special Committee.*

Alterations in the Rule.—(1) The words "*Any person entitled to share in a rate whose immoveable property has been sold*" in the old Code, were the subject of discussion in several cases and the High Courts were not unanimous in the interpretation of these words, as will appear from the several conflicting rulings quoted below. The Legislature, in order to set at rest the conflicting rulings, has framed the present rule to clear up the doubts which hitherto existed. The present rule is much more comprehensive than the old section. The words "*or any person entitled to share in a rateable distribution of assets*" have been inserted in the present rule adopting the principles laid down in 10 M. 57; 16 B. 91; 15 A 318 and 29 C. 548 The rulings in which contrary views have been expressed have been overridden by the present rule

(2) "*Any person whose interests are affected by the sale.*"—The words "*whose interests are affected by the sale*" have been added to the present rule in order to render the scope of the present rule wider than that of the old section The wording of the old section was not clear enough to include the cases of persons *whose interests were affected by the sale* and hence there was diversity of judicial opinion on the point, as will appear from the several rulings noted below The scope of the present rule has been enlarged by the addition of the above words. But persons whose interests are not affected by the sale cannot apply under this rule to set it aside A person claiming a title adverse to that of the judgment-debtor or by title paramount to the judgment-debtor is not within the meaning of these words, inasmuch as his title to the property is not affected by the sale whether the sale is regular, or irregular. The above change has been introduced in accordance with the view expressed in 15 C. 488, F B and 16 M 476.

(3) "*Fraud in publishing or conducting the sale.*"—The words "or fraud" have been added after the word "irregularity" "We think that the existing law, as contained in s 311 of the present Code, is defective, the omission in the section to refer to fraud as a ground for setting aside a sale having led some Courts to hold that an order on an application setting up fraud as a ground for relief is, unlike an order made on an application under section 311, a decree open to second appeal. This result which often involves a considerable prolongation of these proceedings is in our opinion undesirable. We think that applications for the setting aside of sales should, so far as the procedure applicable to them is concerned, stand on the same footing whether they are based on the ground of irregularity or on the ground of fraud"—*Report of the Select Committee*

Another important change made in the present law is the insertion of the word "*fraud.*" Under the old Code it was held by all the High Courts that an application to set aside a sale on the ground of "*fraud*" in publishing or conducting it did not fall within section 311 but such application falls within s 244 (s 47) of the C P Code, 1882, and the period of limitation in such cases was 3 years and not 30 days. But under the present Code, all applications to set aside a sale whether on the ground of irregu-

larity or *fraud* in publishing or conducting it, are to be determined under this rule. The object of the change has been clearly explained in the report of the *Select Committee* quoted above. The effect of the change is that the period of limitation for such an application has been shortened, and the right of second appeal has been curtailed. Under the old law an application to set aside a sale on the ground of fraud of any kind fell within s. 244, C P Code, 1882 (s 47), and hence the period of limitation was three years, and there was a second appeal. (*Vide* 26 C. 530; 3 C W. N 403, 31 C. 385 and 6 C L J. 102) Under the present rule, however, fraud in publishing or conducting the sale, has been excluded from the operation of s 47 But where the sale is vitiated by any other kind of fraud (except the fraud in publishing or conducting the sale), the case must fall within s 47, as before *It is only the particular kind of fraud that has been excluded from the operation of s. 47.* There are and may be innumerable and inconceivable kinds of fraud and it is impossible to give any exact definition of the word

Again under the present law, an application to set aside a sale, may be made either on the ground of *irregularity* or on the ground of *fraud in publishing or conducting it* But irregularity in attaching the property is no longer any ground for setting aside a sale, as will appear from the Report of the Special Committee, quoted above. The words "*publishing or conducting*" refer respectively to s 287, C P. Code, 1882 (r. 66), and to the action of the officer by whom the sale is held (32 B 572)

(4) "*Unless upon the facts proved, the Court is satisfied*"—The language of the proviso has been altered in order to meet the doubts which have been raised as to the evidence upon which the Court can act In the proviso, the words "*unless upon the facts proved the Court is satisfied*" have been substituted for the words "unless the applicant proves to the satisfaction of the Court" The above alteration has been made adopting the principle laid down in 21 C 66 P. C., where it has been held that in an application to set aside a sale it is necessary for the applicant to show not only that there has been a material irregularity, but also that substantial injury has been sustained in consequence of such material irregularity, and in the absence of evidence it is not to be presumed that the irregularity was the cause of the substantial injury

In the Full Bench case of *Lala Mobarak Lal v. Secretary of State*, 11 C 200, and in 7 C. 466, 3 C. 542, 9 C 656, 20 C. 590, 24 C 295, 30 C. I 6 C. W N 688, 6 C W. N 836, 20 M 159, it was held that where property has been sold at an inadequate price and if it is also proved that there has been a material irregularity in publishing or conducting the sale, the fair inference to draw in the case is that the irregularity was the cause of the inadequacy of the price, until proof is given to the contrary In order to meet these conflicting rulings, the language of the proviso has been altered and under the present law it must be satisfactorily proved that irregularity was the cause of the substantial injury. No inference can now be drawn that irregularity was the cause of the substantial injury The rulings in which a view contrary to the present law were expressed have been overridden by the present law. The word "irregularity" does not include "illegality"; *see* 12 A. 96, 32 C. 1101, 9 C. L J 27, 16 C W. N. 193, 20 A. 412, P. C., 2 C. W. N. 550.

Scope of the Rule.—Under this rule a sale can be set aside only (1) if there is a material irregularity or fraud, (2) if the material irregularity or fraud is in respect of publishing or conducting the sale, (3) if the applicant sustains substantial injury, (4) if such injury is caused by such material irregularity or fraud and antecedent fraud or irregularity does not properly come within the purview of the rule except for collateral purposes. Suppression of processes and inadequacy of price are quite enough to bring the cases within the rule; *Kusam Kumari* v *Kutiswan*, 93 I. C 870: A. I. R. 1926 Cal 577.

Who may Apply under this Rule.—(1) " *Decree-holder or any person entitled to share in a rateable distribution of assets* "—The term " decree-holder " in this rule is not limited to the decree-holder who instituted the execution proceedings, but may include a decree-holder who is entitled to come in and share in the proceeds under section 73.—*Pragji Kala* v *Assa Jalal*, 35 I. C. 530, *Lakshmi* v. *Kuthenni*, 10 M 57, *Chakrapani* v *Dhanji*, 24 M. 311; *Bijoy Singh* v. *Hukum Chand*, 29 C 548 *See* also, *Ajudhia Prasad* v. *Nand Lal*, 15 A 318, *Athappa Chetti* v *Rama Krishna*, 21 M. 51 *See* also, *Chattrapat Singh* v *Jadukul Prasad*, 20 C. 673; and *Sarabji Edulji* v. *Gobind Ramji*, 16 B. 91. The two latter cases have been dissented from in *Matungini Dassi* v. *Monmotho Nath*, 4 C. W. N. 542.

The expression " rateable distribution " in Or. XXI, r. 90, is not wide enough to cover the distribution of dividends under the Prov. Insolvency Act. That rule is a rule framed under the C P. Code and it has application only to rateable distribution under s. 73, C P Code, and has no application to distribution of dividend under the Prov. Insolvency Act — *Sullemanji* v *Pragji Kala*, 39 I C 932: 10 S L R. 189

A person whose application for execution has been dismissed for default is entitled to a share in a rateable distribution of the assets and as such can apply under this rule.—*Bymokesh* v. *Jatindra*, 18 C. W N 1311.

An application by a [illegible] e a sale under this rule is maintainable, thou [illegible] r judgment-debtors have proved infructuous, [illegible] 93 I C 870: A. I. R. 1926 Cal 820, *Jadoonath* v. *Aswini*, 16 C L J. 98 16 I C 974.

(2) " *Any person whose interests are affected by this sale* "—The expression " any person whose interests are affected by the sale " has been substituted for the expression " any person whose immoveable property has been sold," which occurred in the old section 311. In the Full Bench case of *Asmutunnissa* v *Ashruff Ali*, 15 C 488 F. B , this expression was held to mean " any person whose interests are affected by the sale." and the above change in wording has been introduced in the present rule in accordance with the view expressed in 15 C 588 In *Asmutunnissa Begum* v. *Ashruf Ali*, 15 C 488 F B it was held that a person, who claims to be a purchaser from a judgment-debtor prior to the attachment, is not entitled to come in under rule 90 and object to the sale of the judgment-debtor's property, because the sale being prior to the attachment his interest cannot be legally affected by the sale This Full Bench Case has been followed in *Ram Chandra* v *Rukhma Bai*, 23 B 450 and dissented from by Mahomood, J , in *Sheo Prasad* v *Hira Lal*, 12 A 410, following 14 C 210. In *Matungini Dassi* v *Monmotha Nath* 4 C W. N. 542, it has been held that an attaching creditor is not a " person

whose immoveable property is sold," nor does he come within the words "*the decree-holder*" But in the case of *Dhirendra* v. *Kamini*, 29 C W N 899, it has been held that attaching creditor who has attached the property in execution of his decree is a person "whose interests are affected by the sale" and can apply under this rule. A distinction, however, has been made between the person attaching the property in execution of his decree and the person attaching the same before judgment. A plaintiff attaching the property before judgment has no *locus standi* to apply under the rule *Jogendra* v *Manmotha*, 16 C. L J. 566: 17 C. W. N 80, *Badiar* v *Sarada*, 42 C L. J.37 89 I. C. 688: A. I R 1925 Cal. 1103 The term "the decree-holder" in s. 311 means the decree-holder who brings the property to sale and not any decree-holder (15 C 488 F. B *referred to*) In *Ibhaya Dasi* v *Pudmo Lochun*, 22 C. 892, it has been held that a purchaser of a tenure prior to attachment from a judgment-debtor whose interest in the tenure has been sold in execution of a decree for its own arrears of rent is entitled to apply under rule 90, to set aside the sale (15 C 488 *distinguished*). An unregistered transferee of a portion of occupancy holding before decree can apply to set aside a sale held in execution of a decree obtained against the recorded tenant, as a person whose immoveable property has been sold within the meaning of Or. XXI, r 90 —*Azgar Ali* v *Asaboddin Kazi*, 9 C. W. N. 134 An auction-purchaser of the interests of an unregistered transferee of an occupancy holding as well as the unregistered trasnferee himself may apply under this rule to set aside a sale —*Haradhan* v. *Girish Chadara*, 13 C W. N 98 (9 C W. N 134, 10 C W. N. 240, *followed*) A person to whom a transferable occupancy holding was mortgaged before its sale in execution of a rent decree, may apply to set aside a sale.—*Nissa Bibi* v. *Radha Kishore*, 11 C W N 312 (9 C. W. N. 134 *followed*). But a person who claims to have purchased the holding from the tenant, cannot apply as the representative of the judgment-debtor, to set aside a sale, if the holding be not transferable by custom or usage.—*Prosunno Kumar* v. *Bamacharn*, 13 C W N 652 (11 C W N. 312 *followed*).

The judgment-debtor sold his properties to another before the date of the execution sale But at the time of the execution sale the properties were sold as belonging to him *Held* that the judgment-debtor was a person whose interests were "affected by the sale" within the meaning of this rule.—*Mahomed Mohideen* v. *Ramanadhan*, 22 L. W. 872: 92 I. C 597 A. I. R 1926 Mad 217

The words in r 90 "whose interests are affected by the sale" refer to existing interests in the property sold The phrase cannot be extended to the claims of creditors, for that would involve (1) proof of claim in the execution proceedings and (2) a construction which would make the words "the decree-holder or any person entitled to a share in a rateable distribution of assets" redundant —*Pragjilala* v. *Jalal*, 35 I. C. 530. But see *Abdul Aziz* v *Tafazuddin*, 19 C W. N 326.

It was held under the old Code that an auction-purchaser was not entitled to apply under s 311 to set aside a sale held in execution of a decree, as he was not "a person whose immoveable property was sold within the meaning of that section"—*Brij Mohan* v. *Rai Uma Nath*, 20 C 8 P. C. Followed in *Ram Narain* v. *Dwarka Nath*, 4 C. W. N 13, referred to in *Khetter Nath* v *Tazuddin Ali*, 21 C. 682. The Madras

High Court has held that an auction-purchaser is entitled to apply under this rule, because his interests are affected by the sale; *Gopalakrishnayya* v. *Sanjeeva*, 38 M. L. J. 228: 55 I. C. 333. The Patna High Court has held that an auction-purchaser is not entitled to apply under this rule, because " interests affected by the sale " mean interests in the property existing before the sale; *Khetro Mohon* v. *Sheikh*, 3 Pat. L. J. 516: 46 I. C. 614; *Kartik* v. *Nagendra*, 74 I. C. 760: A. I. R. 1924 Pat. 349. The Allahabad High Court has taken a different view from the Patna decisions and has held that an auction-purchaser is entitled to apply under this rule on the ground that the word " interests " is a term which covers " every sort of interests recognized by law, such as, in the case of an auction-purchaser, the liability to pay the money, liability to complete and take a transfer of the property, and, from his own point of view, the necessity of finding the necessary funds, and also the necessity of carrying through to fruition the provisional contract in which he has entered "; *Ravidnandan* v. *Jagannath*, 47 A. 479: 87 I. C. 278: A. I. R. 1925 All. 459.

Where, in execution of a decree obtained against a Hindu widow, certain properties were sold, and the presumptive reversioner sought to set aside the sale on the ground of irregularity in the proclamation and the conduct of sale, *held* that he is a person " whose interests are affected by the sale " within the meaning of this rule, and so the application is maintainable; *Adanamoli Chetti* v. *Chinnaswami*, (1926) M. W. N. 631: 97 I. C. 574: A. I. R. 1926 Mad. 959. A reversioner to a Hindu widow's estate is entitled to apply under Or. XXI, r. 90, to set aside a sale of immoveable property.—*Brijkishore* v. *Pratap Narain*, 4 Pat. L. J. 360: 51 I. C. 350.

A person alleging himself to be the undivided brother, and, as such, legal representative of a deceased judgment-debtor, applied to have a sale of certain joint family property, which had taken place in execution of the decree set aside. *Held* that the applicant's proper remedy was a regular suit, and not a proceeding under this section.—*Subbarayodu* v. *Pedda*, 16 M. 476.

Where immoveable property has been sold in execution of a decree against the ostensible owner as his property, a person claiming to be the beneficial owner is entitled to come in under this rule and object to the sale.—*Abdul Gani* v. *Dunne*, 20 C. 418 (15 C. 488 *followed*). *See also*, *Timmanna Banta* v. *Mahabata Khatta*, 19 M. 167.

Where immoveable property has been sold in execution of a decree against the ostensible owner, the real owner cannot apply under this rule.—*Hardwari* v. *Salamatullah*, 38 A. 358.

A person claiming to be a co-sharer in certain undivided property, a share of which had been sold in execution of a decree, objected to the confirmation of the sale in favour of the person recorded as the auction-purchaser, and prayed that it might be confirmed in his favour with reference to the provisions of s. 310, C. P. Code, 1882 (Or. XXI, r. 88). *Held* that he had no *locus standi* to make an application under this rule.—*Bukhtawar Kuar* v. *Hari Singh*, 5 A. 42. But where a property is sold in execution of a rent decree obtained in a suit framed under s. 148 A of the B. T. Act

by some co-sharer landlords, the other co-sharers may apply under the rule —*Khagendra* v *Jatindra*, 23 C. W. N. 619: 50 I. C. 329.

An objection made by one whose property was attached and sold in execution of a money-decree for the performance of which he had become a surety, that he was no party to the decree and that his property was not liable to be attached and sold, and therefore the sale was invalid, cannot be entertained under this section.—*Hub Lal* v. *Kanhia Lal*, 7 A 363

A mortgagee after obtaining a foreclosure decree under section 86 of the T P Act (IV of 1882), is entitled to apply under this section to set aside a sale on the ground of irregularity.—*Rakhal Chunder* v. *Dwarka Nath*, 13 C 346 But see *Bhugabati Churn* v. *Biseshwar*, 8 C. 367. A simple mortgagee of property sold in execution of a rent decree is competent to apply under this section —*Safar Ali* v. *Raj Mohun*, 1 C L J 454

A mortgagee purchaser in execution of a mortgage decree of an entire non-transferable occupancy holding is a person " whose interests are affected by the sale," and as such is competent to apply for setting aside a subsequent execution sale held in execution of a rent-decree —*Sailabala* v *Nitya Gopal*, 31 I C 859, 22 C W N 143.

A person claiming adversely to judgment-debtor cannot apply, *Maung Kum* v *Ma Nan*, 1 Bur L J 234 70 I C. 900

Strangers can Not Challenge Sale on the ground of Irregularity.—It is not open to third parties to raise the question of irregularity in the sale in execution of a decree. The only person who can raise the question is either the decree-holder or a person whose interest is affected by the sale, and these persons can only raise the question under the provisions of Or XXI, r 90; *Kunjo Lal* v *Idurah*, 97 I. C. 757

What Does and what does not amount to Material Irregularity :—

(*a*) **Absence of Attachment.**—A regularly perfected attachment is an essential preliminary to sales in execution of simple money-decrees, and where there has been no such attachment, any sale that may have taken place is not simply voidable, but *de facto* void.—*Mahadeo Dubey* v. *Bhola Nath*, 5 A. 86. *See* also, *Fida Husain*, v. *Kutub Husain*, 7 A. 39, *Ram Chand* v *Pitam Mal*, 10 A 506 (540) and *Luchmeeput* v. *Lekraj Ray*, 8 W. R 415. It was held by the Calcutta High Court in *Panchanan* v *Kunja*, 42 I C. 259, that the Court had no jurisdiction to sell property which had not been duly attached and that omission to attach rendered the sale void, *ipso facto* But see *Kishory Mohun* v. *Mahomed Mujaffar*, 18 C. 188, where it has been held that after a sale has been confirmed and sale certificate granted to the purchaser, the sale is not to be considered as nullity, merely by reason of the absence of any attachment (8 W R 9 *followed*, 5 A 86 *dissented from*) Followed in *Hari Charan* v *Chandra Kumar* 31 C 787 In *Sheo Dhyan* v. *Bholanath*, 21 A 311 it has been held that the absence of an attachment, prior to the sale of immoveable property in execution of a decree, amounts to no more than a material irregularity, but is not sufficient, unless substantial injury is caused thereby to vitiate the sale The Patna High Court, in *Raja Hari* v. *Bhikari*, 2 Pat. 207· A. I. R 1923 Pat. 45, took the same view as the Calcutta High Court took in *Kishory* v. *Mahomed*, 18 C. 188, though in the Patna case the application to set aside the sale was made [illegible]

the confirmation of sale. The Rangoon High Court has held that though the absence of attachment is an irregularity, it does not render the sale absolutely void, but only voidable; *Ma Pwa* v. *Mahomed*, 1 R. 533: 77 I. C. 368: A. I. R. 1924 Rang. 124. *See* also, *Shankar* v. *Manik Rao*, 68 I. C. 643; *Taruknath* v. *Syamacharan*, 36 I. C. 292; *Panaru* v. *Buldeo*, 21 I. C. 46.

The omission to cause an attachment to be made in execution of a decree, for the realization of a mortgage-debt does not affect the validity of a sale of the mortgaged property in execution of such a decree.—*Tincouri Debya* v. *Shib Chandra*, 21 C. 639; *Muniappa* v. *Subramania*, 18, M. 437.

Where there was a subsisting attachment which was followed by an order for sale made in the life-time of the judgment-debtor, the decree-holder was entitled to proceed with the sale and realize his decree.—*Peary Lal* v. *Anukul Chandra*, 11 C. W. N. 163: 5 C. L. J. 80.

(*b*) **Irregular Attachment.**—Under the present law irregularity in attaching the property is no ground for setting aside the sale.—*See the Report of the Special Committee.*

(*c*) **Omission to Issue Notice.**—Omission to give notice to the party against whom execution is proceeding as provided by Or. XXI, r. 22 invalidates a sale in execution of the decree.—*Ramessuri Dasee* v. *Doorgadas*, 6 C. 103: 7 C. L. R. 85; *Imamunnissa Bibi* v. *Liakat Husain*, 3 A. 424; *Vuppu Sitaramayya* v. *Gopala Krishnamma*, 43 M. 57: 37 M. L. J. 216: 53 I. C. 257; *Sahdeo Pandey* v. *Ghasiram*, 21 C. 19. *See* also, *GopalChunder* v. *Gunamani*, 20 C. 370, and *Erava* v. *Sidramappa*, 21 B. 424. But see *Paresh Ram* v. *Balmukund*, 32 B. 572; and *Ramjas* v. *Sheo Prasad*, 28 A. 193.

The mere absence of a notice to a judgment-debtor of the intended sale of his property is not a material irregularity in publishing the sale, sufficient to justify by itself the setting aside of the sale.—*Mahpal Bahadur* v. *Rambahadur*, 52 I. C. 16.

Omission to issue notice under Or. XXI, r. 66, is an irregularity.—*Jagannath* v. *Daud*, 75 I. C. 103: 4 Lah. 243.

Omission to issue notice under Or. XXI, r. 22 renders the sale void but irregularity in service of notice is only an irregularity.—*Babu Das* v. *Mir Mahomed*, 61 I. C. 822. But where every process prescribed by the legislature had been suppressed, the case comes within the provisions of s. 47, C. P. Code. An omission to serve a notice under Or. XXI, r. 22 is by itself sufficient to render the sale void for want of jurisdiction, for the notice is the very foundation of jurisdiction.—*Ram Kinker* v. *Sthitha Ram*, 27 C. L. J. 528.

The Court has discretion to issue process in execution without issuing notice. *See* Or. XXI, r. 22, *sub-rule* (2).

(*d*) **Omission to State in the Sale Proclamation the Amount of Rent or Revenue Payable in respect of the Property to be Sold.**—Omission to state in the sale-proclamation the amount of rent payable in respect of a tenure is not a material irregularity within the meaning of this section.—*Mahendra Coomar* v. *Heera Mohun*, 7 C. 723.

Where a revenue-paying land is advertised for sale, non-statement of the revenue assessed upon it, as required by the provisions of Or. XXI, rr. 68, 70 is an irregularity; but a sale cannot be set aside on account of such irregularity without proof of substantial damage.—*Macnaghten* v. *Mahabir pershad*, 9 C 656, P C : 11 C. L. R. 494 (*reversing* 9 C L R. 134)

Although inadequacy of price is no ground for refusing to confirm a sale yet any error in the sale notification in specifying the amount of Government revenue of the property sold is an irregularity, for which, on proof of substantial injury, a sale is liable to be set aside —*Giridhari Singh* v *Hurdeo Narain*, 20 W. R 44 P C L. R. 3 I. A. 230 (affirming 19 W. R 227) *See* also, *Madarsah* v *Palaniappa*, 23 M. 628; *Bali Ram* v. *Seth Narasindas*, 75 I. C 546 P. C . A. I. R. 1923 P. C. 93

(*e*) **Other Errors, Omissions and Mis-statements in the Sale Proclamation.**—An omission to state in the sale-proclamation the precise amount of claims received from other decree-holders, subsequently to the order directing the sale, can scarcely be called an irregularity at all.—*Muhammad Ali* v *Mahabir Prasad*, 35 I C 411.

The mistake in the dimensions of the property as stated in the sale-proclamation is a material irregularity, but this by itself is not sufficient to set aside the sale It must be held further that there has been substantial injury to the judgment-debtor by reason of this irregularity; *Kishandas* v *Narain Dutt*, 96 I C 196: A I R. 1926 Lah. 587.

It is not for every omission that a sale is liable to be set aside. To render a sale liable to be set aside, it must be shown that the omission was a material one.—*Promotha* v *Bejoy Madhab*, 53 I. C. 148

In a sale of immoveable property the sale-proclamation notified that the decree-holder held two charges on the property, aggregating about Rs. 1,000 There was, in fact, one charge only amounting to Rs 800 *Held* that the error in the sale-proclamation amounted to such an irregularity in publishing the sale as must have materially affected the price, and that the sale must therefore be set aside —*Kanji Mal* v. *Sado*, 8 A. 116

A misdescription of property in the sale-proclamation brings a case for setting aside a sale held under the Public Demands Recovery Act within the rule laid down in 14 C. 9 —*Ram Taruk* v. *Mosahebar Khan*, 6 C W N 246 *See* also *Ram Taruk* v. *Dilwar Ali*, 5 C. W. N. 521, F B

The omission in a sale-proclamation to mention particulars as to the numbers, value, etc , of Government Promissory notes under attachment for sale, is not such an irregularity as would vitiate the sale.—*Luchmeeput* v. *Lekraj Roy*, 8 W. R 415

(*f*) **Mis-statement of the Value of the Property in the Sale-proclamation.**—The absence from the sale-proclamation of a valuation of the property to be sold, if it had not a different effect on the mind of intending or possible bidders, is not a material irregularity.—*Mohammand Ali* v *Mohabir Prasad*, 35 I. C 411.

A mis-statement of the approximate value of the property in a sale-proclamation is a material irregularity which renders a sale liable to be set aside.—*Paresh Nath* v. *Hari Charan*, 52 I. C. 23.

The exact value of the property to be sold must be stated in the sale-proclamation. An under-statement of the value of property in the sale-proclamation is a material irregularity in publishing or conducting the sale. —*Saadatmand Khan* v. *Phul Kuar*, 20 A. 412, P. C.: 2 C. W. N. 550, P. C. Relied upon in *Raja Ramessur Prosad* v. *Rai Sham Krissen*, 8 C. W. N. 257. Distinguished in *Kashi Pershad* v. *Jamuna Pershad*, 31 C. 922: 8 C. W. N. 264. Followed in *Siva Sami Naicker* v. *Ratnasami Naicker*, 23 M. 568; and *Madarsha Maracayar* v. *Palaniappa Chetti*, 23 M. 628. (*See* also, *Balram* v. *Seth Narsing Das*, 45 M. L. J. 403: 75 I. C. 546: A. I. R. 1923 P. C. 93) The absence of specification in the sale-proclamation of the incumbrances to which the property advertised for sale is subject, coupled with the mis-statement of its value, amounts to material irregularity within the meaning of this section.—*Motilal* v. *Bhawani Kumari*, 6 C. W. N. 836 (2 C. W. N. 550. 20 A. 412 *relied on*). The statement of the value of property which proves to be inadequate is an irregulraity, but not a material irregualrity.—*Abdul Kashem* v. *Benode Lal*, 12 C. W. N. 757.

It is essential for a judgment-debtor, in order to succeed in an application under this rule to show that the inadequacy of the prices stated in the sale-proclamation was caused in consequence of the irregularity. It is not an irregularity to have stated two separate valuations in the proclamation, the decree-holder's valuation and the judgment-debtor's valuation.—*Nand Kishwar* v. *Kedar Nath*, 40 I. C. 849 (2 Pat. L. J. 180 *distinguished*).

A sale is liable to be set aside on the ground of material irregularity when the price realised is very inadequate and the sale-proclamation understated the value of the property and omitted to state the amount due under a mortgage thereon.—*Mahendra Nath* v. *Bipin Behary*, 33 I. C. 946.

In ascertaining the value of the property, only the rents realizable from the tenants and not the *abwabs* that used to be realized from them should be taken into account.—*Shosi Bhushan* v. *Ahmed Hossein*, 7 C. W. N. 439.

Gross under-valuation of the property in sale-proclamaiton coupled with insufficient description and insufficient proclamation of the property constitute material irregularity which vitiates sale.—*Chatterpat Singh* v. *Surendra Nath*, 1918 Pat. 33. 44 I. C. 412.

(g) Omission to Make an Order Absolute.—An omission to make an order absolute for sale under section 89 of the Transfer of Property Act (IV of 1882) is not a material irregularity for setting aside a sale held in execution of a mortgage-decree.—*Phul Chand* v. *Nursingh Pershad*, 28 C. 73 (18 C. 139 and 22 C. 931 *referred to*).

A sale held in contravention of s. 99 of the T. P. Act (IV of 1882) is not a nullity, but an irregular and voidable sale. It can be avoided under s. 244, C. P. Code, 1882 (s. 47), before or after confirmation. But if the application is made after confirmation, the applicant must prove that owing to fraud or other reasons he was kept in ignorance of the

sale.—*Ashutosh* v *Behary Lal*, 11 C. W. N. 1011 F. B.: 6. C. L. J 320. *See* also, *Muthu* v. *Karuppan*, 30 M. 313: 17 M. L. J. 161 and *Venkayya* v. *Surayya*, 30 M. 362: 17 M. L. J. 325.

(h) Omission to Beat Drum.—Omission to have a drum beaten as required by Or. XXI, rr. 54 and 57, was held to be a material irregularity so as to render a sale held in execution of a decree liable to be set aside— *Trimbak Ranji* v. *Nana*, 10 B 504; *Nan Lal* v. *Tola Ram*, 67 I. C 752, *Gopi Chand* v. *Benani*, 1 Lah. L J. 197.

(i) Postponement of Sale and Issue of Fresh Proclamation.—Where a sale is postponed, whether definitely or to a fixed date, it is necessary in the absence of an express arrangement between all the parties, that a fresh proclamation should be made, giving notice of the day to which the sale has been postponed, Omission to do so is a material irregularity; *Gopee Nath* v *Roy Luchmeeput*, 3 C. 542; 1 C. L. R 349; unless the proclamation has been waived; *Bipin* v *Jatindra*, 37 C. 897: 6 I. C 817

Where there is a series of short postponements less than seven days which taken together in the aggregate, amount to more than seven days a fresh proclamation of sale is necessary.—*Jamini Mohan* v. *Charles Kumar*, 6 C W N. 44

The property of a judgment-debtor was advertised for sale on a certain day. The proclamation set out particulars of the property, but subsequent to such proclamation a portion of the property was released to a third party Notwithstanding this fact no fresh proclamation was made, and the sale took place on the day originally fixed *Held* that the omission to issue a fresh proclamation was a material irregularity.—*Shib Prokash* v *Sardar Dayal*, 3 C. 544 2 C L. R 260.

When a sale does not take place on the day fixed, an indefinite postponement cannot be regarded as an adjournment from day to day, and a fresh notice should fix another date for the sale; and where, in consequence of an indefinite postponement, as estate has been purchased at an inadequate price and specially by the judgment-creditor, the irregularity is one that has occasioned substantial injury, and justifies a setting aside of the sale —*Jhoomuck Chowdhury* v. *Radha Pershad*, 25 W. R. 32

When the sale is postponed *sine die*, the omission to issue fresh proclamation is a material irregularity; *Kirpal* v. *Kedarnath*, 41 I. C. 6

An execution-sale which had been fixed for a certain date was put off to the corresponding day in the following month, on the application of the judgment-debtor, who consented that he would not object to any irregularities affecting the sale. A notification was also issued and was proclaimed only in a public place, After the sale, the judgment-debtor contended that he was entitled to have a fresh proclamation issued on the spot where the properties were situated. *Held* that he could not now object to it —*Het Narain* v *Gossain Luchmee Narain*, 23 W. R 2

Where a sale was at first proclaimed for a certain date, but was twice postponed on the application of the judgment-debtor, who consented to waive the making of a fresh proclamation: *Held* that a waiver by the judgment-debtor of a fresh proclamation does not necessarily prevent another attaching decree-holder from objecting to the sale on the g

of irregularity. Refusal by the Court to issue a fresh proclamation, if applied for would constitute a ground on which the irregularity of the sale might be impeached.—*Chakrapani* v. *Dhanji Sethu*, 24 M. 311.

(j) Effect of Irregularity in Publishing or Conducting Sale.—The words "publishing or conducting" the sale explained, *see* 32 B. 572: 10 Bom L. R. 752.

Where property not covered by the decree has been proclaimed and sold, the case is one of "material irregularity in publishing or conducting the sale" within the meaning of this rule.—*Imtiazunnissa* v. *Chuttan Lal*, 84 I. C. 746: A. I. R. 1925 All. 236. But see *Gangaram* v. *Ram Prasad*, 23 A. L. J 588: 88 I. C 393. A I. R. 1925 All. 551. So also is an irregular preparation of the proclamation of sale; *Jagannath* v *Daud*, 4 L. 243: 75 I. C. 103: A. I. R. 1923 Lah. 592.

The expression "conducting the sale" refers only to the action of the officer who makes the sale. Anything done antecedent to the order of sale has nothing to do with conducting the sale; *Ramchaibar* v. *Bechu*, 7 A. 641, 645.

The omission to affix sale-proclamation on a conspicuous part of the Court house, is a material irregularity which vitiates sale.—*Laxmi* v. *Purnabai*, 48 I. C 411.

When distinct properties are proclaimed for sale in one execution, the omission to affix a copy of the proclamation in each of such properties amounts to an irregularity in the publication of the sale.—*Tripura Sundari* v. *Durga Charan*, 11 C. 74. Followed in *Abdul Kashem* v. *Benode Lal*, 12 C. W. N. 757. *See*, however, *De Penha* v. *Jalbhoy Ardeshir*, 12 B. 868, where it has been held that a mere breaking up of a property into a number of lots as a means of obtaining a better aggregate price, does not necessarily make it several properties for the purposes of a proclamation of attachment or sale *See* also, *Sami Pillai* v. *Krishna Sami*, 21 M. 417.

Under Or. XXI, rr 54 and 67, it is necessary that a copy of the sale-proclamation should be affixed to some conspicuous place of the property attached; and the omission to do so is a material irregularity within the meaning of this rule.—*Kalytara* v. *Ram Coomar*, 7 C. 466: 9 C. L. R. 114.

Where a sale proclamation *as framed* by the court was not published, *held* that the sale was a nullity.—*Jaya Ram* v *Vrindhagir*, 59 I C. 167. 44 M. 35.

A sale of revenue-paying land is not *ipso facto* void by reason of a copy of the sale-proclamation not having been fixed up in the Collector's office as required by section 289, C P Code, 1882 (Or XXI r 67) An omission to fix up such notice is an irregularity, the remedy for which can only be by an application under this section.—*Nana Kumar* v *Golam Chunder*, 18 C 422, F. B

Where it appeared that the Court had accepted the report of the *Nazir* and the Court peon as evidence of the publication of the sale-proclamation and had refused to allow the judgment-debtor to give

evidence of its insufficiency. *Held* that court was bound to hear the evidence tendered by the judgment-debtor.—*Mohunt Megh Lall* v. *Shib Pershad*, 7 C. 34 8 C. L. R. 369.

Upon an application to set aside a sale, on the ground of material irregularity, it appeared that the sale notification had not been fixed up in the Collector's office as required by s 289, C. P. Code 1882 (Or XXI, r. 67), and that the sale took place on and not after the 30th day from the publication of notice; but it also appeared that the applicant had himself been present at the sale, and had purchased the property and it was not shown that any substantial injury had resulted from the irregularities *Held* that there was no ground for setting aside the sale —*Bandy Ali* v. *Madhub Chunder*, 8 C. 932.

(k) Sale of Immoveable Property in Execution Before Expiry of Days.—It is a material irregularity for the proclamation to be published less than 30 days prior to a sale in execution of a decree, and where damage has resulted the sale may be set aside.—*Abdul Nassia* v. *Dool Dass*, 11 C L R 303, *Megh Lall* v. *Shib Pershad*, 7 C. 34: 8 C. L. R. 369. *Contra* in *Ram Chunder* v *Kamta Prasad*, 4 A. 300; *Venkata* v *Sama*, 14 M 227, *Luxminarain* v *Purna Bai*, 48 I. C 611.

Holding a sale of immoveable property before the expiration of 30 days from the date of fixing up the copy of proclamation under r. 68, is an irregularity in publishing a sale, and is something more than a material irregularity in publishing a sale to which this refers —*Bakshinand* v. *Malak Chand*, 7 A 289; *Jasoda* v. *Mathura*, 9 A. 511; *Sadhu Saram* v *Panchdeo*, 14 C 1, *Ganga Prasad* v *Jaglat*, 11 A 33; *Basharutulla* v *Uma Churn*, 16 C 791; *Tasadduk* v *Ahmad Husain*, 21 C. 66, P. C; *Raja Wazir* v. *Bhikari Ram*, 2 Pat 207· 68 I C. 363: A. I R. 1923 Pat. 45

An application made on the day of sale by the judgment-debtor, that a part only of his property may be sold instead of the entirety, cannot be considered such a "consent," as, by virtue of Or. XXI, r. 68, would do away with the necessity of a proclamation for sale being issued thirty days before the day fixed for sale —*Harbuns Sahai* v. *Bhairo Pershad*, 5 C 259. 4 C. L. R 23, and *Bhekraj Kooeri* v. *Gendh Lall*, 5 C. 873

As to the effect of misrepresentation by the auctioneer while conducting the sale, see *Mohomed Kala Mea* v *Harperink*, 13 C. W. N 219 9 C L J 165, P C 36 C 323

(l) Effect of Omission to Hold Sales at the Stated Time and Place.—A sale by public auction in execution of a decree which is conducted at a time and place other than those properly notified, is not a sale at all within the meaning of the C P Code. The time to be notified for a sale must be the time of the commencement of the sale, in order that all intending purchasers may be enabled to be present during the whole of the proceedings —*Chedami Lal* v. *Amir Beg*, 7 A. 676; *Khodeja Bibi* v. *Ram Narain*, 12 W R 511, *Pokhraj Singh* v. *Gossain Munraj Pooree*, 12 W. R. 281

A property advertised for sale under r 66 was sold on the day fixed but at an earlier hour than that stated in the proclamation. *Held* that there had been no sale within th

time and place of sale and the holding of sale at such time and place, being conditions precedent to the sale being a sale under the Code.—*Basharatulla* v. *Uma Churn*, 16 C. 794.

Where a sale is adjourned under s. 291, C. P. Code, 1882 (Or. XXI, r. 69), it is necessary to mention the hour of sale and its non-specification is a material irregularity within the meaning of this rule.—*Bhikari Mina* v. *Rani Surjamoni*, 6 C. W. N. 48. *See* also, *Mahabir Pershad* v. *Dhanukdhari*, 31 C. 815 (818) 8 C W. N. 686 Affirmed in 34 C. 709, P. C.: 11 C. W. N. 739.

Where a sale was held neither on the day originally advertised nor on the day to which it had been adjourned but on a third day, *held*, it was a material irregularity in the conduct of sale.—*Hari Sadhon* v *Shiv Gopal*, 35 C. L. J. 140.

Where property was sold at an inadequate price owing to the hour of sale not being fixed as required by r. 69,—*held* that there had been a material irregularity causing substantial injury to the judgment-debtor —*Surnomoyee* v. *Dakhina Ranjan*, 24 C. 291. Followed in *Jamini Mohan* v. *Chandra Kumar*, 6 C. W. N. 44

It is the practice of the Courts under the rules of the High Court, to place all properties intended for sale on a list and to proceed with the sales from day to day, commencing on an appointed day. As each property is taken up in its turn, an adjournment of the sale of a particular property, which is the consequence of such procedure, is not an adjournment within the meaning of section 291, C P Code, 1882 (Or XXI, r. 69).—*Lal Mohun* v. *Nunu Mohamed*, 17 C 152

Where a sale is held at a place different from that specified in the proclamation, the case is not merely one of material irregularity but the sale is void altogether, *Jayrama* v *Vridhagiri*, 44 M 35 59 I. C 167.

(m) Effect of Purchase by Decree-holder Without Permission under Order XXI, Rule 72.—A sale at which the decree holder himself, or some other person for him, without the permission of the Court first obtained, becomes the purchaser, is not *ipso facto* void, it is a good sale unless and until set aside by the Court under the provisions of s 292, C. P Code, 1882 (Or. XXI, r 73)—*Javherbai* v *Haribhai*, 5 B 575, followed in *Chintamanrav* v *Vithabai*, 11 B 588 *See* also *In the matter of Veerapah Chetty*, 6 B. L R Ap 37 11 W R 405 But in *Rukhinee Bullabh* v. *Brojo Nath*, 5 C 308, it has been held that a decree-holder is absolutely bound to have express permission from the Court before he can purchase the property; and whether this objection is taken and pressed or otherwise, a sale to him is invalid

When liberty is given to a decree holder to bid at the sale of the judgment-debtor's property, he is bound to exercise the most unscrupulous fairness in purchasing the property, and if he or his agent dissuades others from purchasing at the sale, that of itself is a sufficient ground why the purchase should be set aside —*Roopendranath* v *Brojendra Nath*, 7 C. 316: 9 C L R 263 Disapproved in *Mahomed Mira Ravuthar* v. *Savarasi Vijaya*, 23 M 227, P C 4 C W N 228 P C, where it has been held that any dissuasion by a bidder at a judicial sale of other persons

from bidding does not of itself amount to a charge of fraud and will not invalidate the sale.

Under the terms of s 294 C P Code, 1882 (Or. XXI, r. 72), it is discretionary with the High Court to set aside a sale at which a decree-holder had bid and purchased without permission of the Court; and in dealing with such a case, the Court, although considering the matter as an irregularity in the conduct of the sale, will not interfere with the sale, unless, it can be shown that the judgment-debtor has suffered some substantial injury arising from such irregularity.—*Mathura Das v. Nathu Lall*, 11 C. 731.

A mortgagee decree-holder was refused leave to bid at the sale in execution of his mortgage decree, but notwithstanding such refusal, he purchased the property in the name of a third person. Possession under the sale was opposed, and the decree-holder as purchaser brought a suit for possession. *Held* that the plaintiff had been guilty of an abuse of the process of the Court in bidding at the sale and buying the property *benami*, and that the sale, therefore, ought not to be enforced.—*Mahomed Gazee v. Ram Lall*, 10 C 757.

A purchase by the son of a decree-holder, undivided in interest from his father, is a purchase by the decree-holder within the meaning of section 294, C P Code, 1882 (Or XXI, r 72), and is absolutely void if the purchase were made with funds which were joint-property of the father and son.—*Narayan Deshpande v Anant Deshpande*, 5 B. 130.

An assignee of decree under an oral agreement has no *locus standi* to apply for execution of the decree, and it is not necessary for him to obtain leave to bid at the sale in execution of a decree. Therefore purchase by such an assignee without leave under s. 294, C. P. Code, 1882 (Or XXI, r 72) is not a material irregularity within the meaning of this section —*Dakhina Mohan v Srimati Basumati*, 4 C. W. N. 471.

A person declared to be the purchaser of property put up for sale did not, as required by Or XXI, r 84, pay a deposit of 25 per cent, immediately after such declaration, but on a date subsequent to the date on which the property was put up for sale *Held* that there was no sale at all of the property —*Intiazam Ali v. Narain Singh*, 5 A. 316; *Amir Begam v Bank of Upper India*, 30, A. 273 · 5 A. L. J. 336; *Ahmad Baksh v. Lalta Prasad*, 28 A 238

(n) Default in Making the Deposit of 25 per cent. under Order XXI, Rule 84.—When a deposit is not duly made, the sale is liable to be set aside, but when a question arises as to whether a deposit was duly made or not, the Court is bound to inquire into and decide the question—*Kuppayyan v Ramasami Ayyan*, 6 M 197.

At a sale in execution the property was knocked down to a bidder at Rs 260, and on account of his inability to make a deposit, the property was re-sold for Rs. 50 *Held* that the judgment-debtor has sustained such substantial injury as would justify the Court in setting aside the sale, notwithstanding that the judgment-debtor might have recovered the deficiency of the price under section 293, C. P. Code, 1882 (Or XXI, r. 71) —*Bepin Chunder v Puresh Nath*, 9 C. 98: 12 C. L. R. 316.

Failure of the auction-purchaser to make, and of the officer conducting the sale to receive, the deposit of 25 per cent, as required by Or. XXI, r. 84, constitutes a material irregularity in conducting the sale.—*Bhim Singh v. Sarwan Singh*, 16 C. 33 (5 A. 316 *dissented from*). In *Venkata v. Sama*, 14 M. 217, it has been held that any delay in making the deposit required by section 306, is not more than a mere irregularity and does not vitiate the sale.

(o) Effect of mere Inadequacy of Price.—Inadequacy of price is not a sufficient ground for setting aside a sale, unless it be the effect of an irregularity in the sale-proceedings.—*Reet Bhunjun v. Mitturjeet*, 6 W. R. Mis. 31: *Nuddea Kishore v. Bungshee Mohun*, 17 W. R. 210; *Hubeedool Doss v. Allender*, 14 W. R. 44; *Ahmoddy v. Chunder Nath*, 24 W. R. 227; *Khodeja Bibee v. Johad Roheem*, 14 W. R. 320.

An execution sale cannot be set aside on the ground of material irregularity under Or. XXI, r. 90, if there is nothing to warrant the necessary or at least reasonable inference that the inadequacy of the price was the result of the irregularity.—*Tamuddi Bepari v. Lakpat Bepari*, 45 I. C. 212.

The sale of immoveable property to the highest bidder for a price which subsequently appears to be too low, is not a material irregularity in publishing or conducting the sale, and a sale cannot be set aside on that ground.—*Lakhmi v. Krishnabhat*, 8 B. 424.

Although inadequacy of price is no ground for refusing to confirm a sale, yet an error in the same notification, in specifying the amount of the Government revenue of the property sold, is an irregularity for which, on proof of substantial injury, a sale is liable to be set aside.—*Girdhari Singh v. Hurdeo Narain*, 26 W. R. 44, P. C.; L. R. 3 I. A. 230 (affirming 19 W. R. 227).

Where a material irregularity is proved and it is also shown that the price realized was much below the true value, it may ordinarily be inferred that low price was in consequence of irregularity.—*Venkata Subbarayya v. Zemindar of Kareetnagar*, 20 M. 159.

(p) Proof of Material Irregularity and Substantial Injury.**—*If it is*** proved that the price obtained for property sold is greatly inadequate, and if it is also proved that there has been a material irregularity in publishing or conducting the sale, the Court will presume that the irregularity was the cause of the inadequacy of price, until proof is given to the contrary.—*Kalytara v. Ram Coomar*, 7 C. 166: 9 C. L. R. 114 (3 C. 542 *approved*). In *Gur Baksh Lall v. Jawahir Singh*, 20 C. 599, *it has been held that the* relative cause and effect between a proved material irregularity and inadequacy of price may either be established by direct evidence, or be inferred, when such inference is reasonable from the nature of irregularity and the extent of inadequacy of price (9 C. 656, and 11 C. 292 *referred to*). Followed in *Sheo Ratan v. Net Lal*, 6 C. W. N. 688: 30 C. 1 and in *Moti Lal v. Bhawani Kumari*, 6 C. W. N. 836. In *Surnomoyee v. Dakhina Ranjan*, 24 C. 291, it has been held that where there has been material irregularity causing substantial injury to the debtor it is sufficient under s. 311, C. P. Code, 1882 (Or. XXI, r. 90), if the evidence, though not "direct evidence" shows that the injury was a necessary result of the

irregularity complained of (21 C. 66, P. C. *explained*) In *Venkata Subbaraya* v *Zemindar of Karvetinagar*, 20 M. 159, it has been held that where a material irregularity is proved, and it is also proved that the price realized is inadequate, it may ordinarily be inferred that the low price was a consequence of the irregularity even though the manner in which the irregularity produced the low price be not definity made out. In *Gopee Nath Dobey* v. *Roy Luchmeeput*, 8 C. 542, it has been held that where property has been sold at an inadequate price, the fair inference to draw in the case is that the inadequacy of the price was the result of the irregularity. In *Lala Mobaruk Lal* v. *The Secretary of State*, 11 C. 200, F. B it has been held that no positive rule can be laid down, permitting an inference to be drawn in all cases, that the inadequacy of the price is due to the irregularity of the sale proceedings. But in the following cases it has been held that in an application under s 311, C. P. Code, 1882 (Or. XXI, r. 90), to set aside a sale in execution of a decree, it is necessary for the applicant to show not only that there has been a material irregularity, but also that substantial injury had been sustained in consequence of such material irregularity; and in the absence of evidence it is not to be presumed from the proved existence of irregularity and injury that the latter occurred by reason of the former —*Tasadduk Rasul* v *Ahmed Husain*, 21 C. 66 P. C, *Satish Chunder* v *Thomas*, 11 C 658 (9 C. 656; 11 C. 200, *discussed*), *Bonomali* v *Woomesh Chunder*, 7 C 730 ; 9 C. L. R 311 (8 C. 542 *considered*) ; *Jagan Nath* v. *Mokund Prasad*, 18 A. 37 (21 C. 66 *referred to*) ; *Shirin Begum* v *Agha Ali*, 18 A 141 (12 M. 19, 24 C 66 *referred to*) ; *Arunachellam* v. *Arunachellam*, 12 M. 19 , *Macnaghten* v. *Mahabir Pershad*, 9 C 656, P C 11 C. L R 494, P. C. (*reversing* 9 C L. R. 134) ; *Harbans Lal* v *Kundan Lal*, 21 A. 140. *See* also *Mahabir Pershad* v *Dhanukdhari*, 31 C. 815 8 C. W. N. 686. Even under the old Code, that is under section 256 of Act VIII of 1859, which corresponded with s 311, C P. Code, 1882 (Or XXI, r 90), it was held that where material irregularity had occurred as from non-issue of sale-proclamation, the party applying to set aside a sale on that ground was bound to prove that he had sustained substantial injury thereby. See, *Joytara* v. *Mahomed Hussain*, 2 W R Mis 2, *Nilmonee* v. *Ram Churn*, 2 W. R. Mis. 45, *Abdool Mahomed* v. *Shib Doolaree*, 11 W. R 114 ; *Leak Ram* v. *Mohesh Doss*, 12 W R 488 ; *Nujmooddeem Ahmed* v. *Abdool Azeez*, 15 W. R 95 , *Chunder Shekhur* v. *Jadub Chunder*, 19 W. R. 78 ; *Sammul Singh* v *Makhan Pandey*, 2 N. W. P. 143 ; and *Sheo Prokash* v. *Hurdai Narain* 22 W R 550 The leading case on the point is the Privy Council case of *Tasaduk Rasul* v *Ahmed Hussain*, 21 C 66 P. C.

The failure to give a direction for advertisement of the sale in the gazette does not amount to material irregularity in the conduct of the sale within Or. XXI, r. 90 A judgment-debtor applying to set aside a sale must show not only that there has been material irregularity in the conduct of the sale but also that such irregularity has resulted in substantial injury to him.—*Gopi Chand* v. *Benarasi Das*, 53 I. C. 791

(q) Omission to Make the Legal Representatives of a Deceased Judgment-debtor or Decree-holder Parties to the Sale-proceedings.— Where subsequent to the attachment of immoveable property in execution of a money-decree, the judgment-debtor died, and the property was then sold without making the legal representatives of the judgment-debtor parties to the sale-proceedings —*Held*, that the sale was regular and valid

notwithstanding such omission.—*Sheo Prasad* v. *Hira Lal*, 12 A. 440, F. B. (6 M. 180 *dissented from*). *See* also *Net Lall* v. *Kareem Bux*, 23 C. 686 ; *Aba* v. *Dhondu Rai*, 19 B. 276 ; and *Erava* v. *Sidramappa*, 21 B. 424. (This case has been reversed in 25 B. 337 P. C. : 5 C. W. N. 10 P. C.) ; *Abdur Rahaman* v. *Shankar Dat*, 17 A. 162 ; *Stowell* v. *Ajudhia Nath*, 6 A. 255 ; *Dulari* v. *Mohan Singh*, 3 A. 759, and *Janardan* v. *Ram Chandra*, 26 B. 317 But see *Ramasami Ayyangar* v. *Bhagirath*, 6 M. 180 ; *Krishnayya* v *Unissa Begum*, 15 M. 399 ; and *Groves* v. *Administrator-General of Madras*, 22 M. 119. It would thus appear that all the other three High Courts differ from the Madras High Court on this point. In *Jagadis* v. *Bamasundari*, 23 C. W N. 608, this omission to bring the legal representative on record was held to be a mere irregularity which might lay the sale open to attack

As to the effect of omission to make the legal representatives of a deceased judgment-debtor or decree-holder parties to the sale proceedings.—*See* notes under section 50.

Where subsequent to a decree and prior to sale the judgment-debtor was declared insane under Act XXXV of 1858, and an application was made to set aside the sale. *Held* that these facts only amounted to a material irregularity within Or XXI, r 90, and that substantial injury must be proved —*Narayana Kothan* v *Kaliana Sundaram*, 19 M. 219.

Non-representation of Minor.—An application to set aside a sale on the ground that there was no guardian *ad litem* of a minor in the execution proceedings comes under this rule and the alleged defect is a mere irregularity.—*Fani Bhusan* v. *Surendra*, 35 C. L. J. 9: 64 I C. 25.

(r) Effect of Sale After the Order of Postponement.—When a Court executing a decree passes an order postponing a sale, but the sale takes place before such order reaches the officer conducting the sale: *Held* that the defect in the sale amounted to an illegality and not merely an irregularity within the meaning of this section.—*Sant Lal* v. *Umrounissa*, 12 A. 96 (4 A. 701, and 11 A. 33 *referred to*). *See* also, *Maijha Singh* v. *Jhow Lal*, 6 N. W. P. 354 ; *Mainjan* v. *Man Singh*, 2 A. 686 ; and *Nonidh Singh* v. *Sohun Koor*, 4 N. W. P. 135. *See*, however, *Bissesswari* v. *Hurro Sundar*, 1 C. W. N. 226, where it has been held that if a property is sold before the order of an Appellate Court under s 545, C. P. Code, 1882 (Or. XLI, r. 5), staying execution of decree, is communicated to the Court holding the sale, such a sale is not void and cannot be treated as a nullity (4 N. W. P. 398, 6 N. W. P. 354, and 2 A. 686 *distinguished*).

Where a sale in execution took place under an order obtained notwithstanding a consent, on the part of the decree-holder's pleader, to a petition by the judgment-debtor for postponement, the petition of postponement having been by mistake filed in the wrong Court. *Held* that the judgment-debtor was entitled to have the sale set aside.—*Ganga Pershad* v. *Gopal Singh*, 11 C. 136 P. C.

A sale held inspite of an issue of an injunction to stay the sale is invalid and ought to be set aside.—*Ramanathan* v. *Arunachellam* 22 I. C. 99: 38 M. 766.

(s) Effect of Sale After Attachment under Order XXI, Rule 53.—Where a Court in which an application for execution was pending received

an order from another Court under s. 273, C. P. Code, 1882 (r. 53) attaching the decree and returned the order with an intimation that i not contain information as to the amount of the decree and subsequ held the sale. *Held* that the sale was invalid and was accordingl aside ; that it was not a mere irregularity as the Court had no jurisdi to hold the sale.—*Manik Lal* v. *Bonomali*, 32 C. 1104 : 3 C L J. 10 C W N. 193.

Fraud in Publishing or Conducting Sale.—The present Code altered the law in an important aspect in as much as an application l on fraud in publishing or conducting a sale comes within the purvie Or. XXI, r 90 and not under s 47.—*Sheo Prosad Singh* v. *Mussam. Premna Kuar*, 40 A 122 15 A L. J 920: 43 I. C. 522.

The words " or fraud " have been added in the new Code after the " irregularity " The effect of adding the words " or fraud " into the sent rule is to transfer applications setting up fraud in publishing or cond ing the sale from s 47 to the present rule The result is that no se *appeal* will now lie from an order made on such application, whether order be one setting aside the sale of refusing to set aside the sale, fo order has no longer the force of a decree, not being one under s 47 but under r. 92, and only one appeal lies from an order made under r. 92 XLIII, r. 1 (j) and s. 104, sub-section (2)].—*Sheo Prasad* v. *Pr Kunwar*, 40 A 122 43 I C 522, *Jagannath* v *Daud*, 4 L. 213: I C. 103 A I R 1923 Lah 392 , *Maula Bux* v. *Raghubar*, 3 Pat J 645 48 I C 560 In the absence of the words " or fraud " u the old Code, it was held by all the High Courts that an application t aside a sale on the ground of fraud in publishing or conducting it, fell w the purview of s 244 (now s. 47) The result was that under the Code a second appeal lay from an order made on such application, bec an order made under s. 47 has the force of a decree, and all decree open second appeal, subject to the provisions of ss. 100-102 ; *Nemai C* v. *Denonath*, 2 C W N 691 ; *Bhuban* v. *Nundalal*, 26 C 324. It se therefore, that the object of the Legislature, in requiring applicatio set aside a sale on the ground of *fraud* in publishing or conducting the to be made under the present rule instead of under s. 47, is to exclude right of second appeal with a view to bring proceedings on such applica to a speedy termination

The question as to how far an innocent purchaser for value wit notice of fraud, irregularities or infirmities in the proceedings or d would be affected, has been elaborately discussed by *Mookerjee J.* in case of *Bireswar* v *Panch Cowri*, 37 C L. J. 145, where it has been that judicial sales fraudulently procured will not give a good title to a chaser even in a case in which he may not be guilty of fraud. *See* *Mahabir Ram* v *Ram Bahadur*, 72 I. C. 625.

When circumstances affecting the validity of an execution sale l been brought about by the fraud of one of the parties to the suit, and rise to a question between those parties such as, apart from fraud, w be within the provisions of s 244, C. P. Code, 1882 (s 47) a suit will lie to impeach the validity of the sale on the ground of such fraud —*U dra Narain* v *Gopal Mondul*, 17 C. 769, F. B. (11 C. 376, 5 M. 217, 113, and 9 B. 469, *approved* ; 11 C. 679 *dissented from in part*). Fell

certified but nevertheless he proceeded with execution, applied for and obtained leave to bid at the Court sale, and himself purchased the property. The judgment-debtor applied to set aside the sale. *Held* that the ... prove the adjustment and to have the sale ... 21 M. 356.

The purchase of a property at an execution-sale by the decree-holder in the name of another person, at a price less than that at which the decree-holder obtained permission to bid for the said property, constitutes fraud which would vitiate the sale.—*Srimati Sarat Kumari* v. *Nemai Charan*, 5 C W N. 265 (10 C 757 *referred to*).

In a suit to set aside a sale in execution of decree, it appeared that the property was purchased by the decree holder's pleader himself, although he obtained permission of the Court to bid for his client, and that he acted in an underhand manner towards his client. *Held* that the transaction was tainted with fraud and that the sale must be set aside.—*Subbarayudu* v. *Kotayya*, 15 M. 389.

What Amounts to Waiver of Irregularity by the Judgment-debtor.—An application by a judgment-debtor for an adjournment of the sale without issue of fresh proclamation and beat of drum, does not amount to a waiver preventing him to apply to set aside the sale held on the day adjourned on the ground that proclamation of sale was not served on each of the properties and consequently the sale fetched a low value—*Preo Lal* v. *Radhika Prosad*, 6 C W N. 42. *Distinguished in Raja Thakur Barham* v. *Anant Ram*, 2 C L J. 584.

Failure to publish the sale-proclamation is not an illegality vitiating the sale, but only an irregularity which can be waived by the judgment-debtor; *Nripati* v. *Jatindra*, 91 I C 407· A. I. R. 1926 Cal. 577.

The fact that the judgment-debtor consents that the sale should be held without the issue of a fresh proclamation does not indicate that he waives the non-specification of the hour of the day to which the sale is adjourned, inasmuch as he has no control over the form of the order of the Court.—*Bhikari Misra* v *Rani Surjamoni*, 6 C. W. N. 48 (24 C. 291 *referred to*)

A judgment-debtor got an execution sale postponed on undertaking that he would not raise any objection on the ground of illegality or irregularity. After the sale took place on the postponed date he applied to set it aside on the ground of an illegality of which he was not cognizant at the time he gave the undertaking *Held* that he was estopped from impeaching the sale.—*Lakhsmi Prasanna* v. *Rajindar Poddar*, 47 I. C. 831.

The fact that a judgment-debtor, who petitions to have the sale in execution of the decree against him set aside, on the ground of fraud and irregularity, has, in a petition made previous to the sale, asking for its adjournment, made no mention of the irregularities relied on, does not create an estoppel.—*Mahatap Deo* v. *Leelanund Singh*, 7 C. 613: 9 C. L. R. 398, followed in *Raman* v. *Kunhayan* 17 M. 301. *See, however*, *Girdhari Singh* v *Hurdeo Narain*, 26 W. R. 41, P. C.: L. R. 3 I. A. 230 (*affirming* 19 W R. 227) Followed in *Raja Thakur Barham* v. *Anant Ram*, 2 C L. J 584.

Where a sale was at first proclaimed for a certain date but was twice postponed on the application of the judgment-debtor who consented to waive the making of a fresh proclamation. *Held* that a waiver by a judgment-debtor of a fresh proclamation after sale has been adjourned, does not necessarily prevent another attaching-creditor from objecting to a sale so held on that ground.—*Chakrapani Chettiar* v *Dhanji Setta*, 24 M. 311.

For the meaning of the word "waiver" and its effect, see 11 C. W. N. 848. 6 C L J 62, 34 C 275. 5 C. L. J. 148; *and 6 C. L. J. 111, noted under s. 11.*

Equitable Estoppel—Agreement Not to Challenge Validity of Sale.—In an application under this section the judgment-debtor got time on condition of his paying up the decretal amount within a certain time and then he failed to pay the amount *Held* that the judgment-debtor was bound by the agreement and that he was estopped from contesting the legality of the sale.—*Uttam Chandra* v *Khetra Nath*, 29 C. 557 (8 C. 455 *followed*). Followed in *Harak Singh* v. *Saheb Singh*, 6 C. L. J. 176. Where time had previously been repeatedly granted by the decree-holder for compromise, and on the final date to which payment was adjourned, the judgment-debtor prayed for further time and the decree-holder demanded it as a condition precedent to the grant of further time that the judgment-debtor should definitely agree that, upon his failure to pay the money on the date to be fixed, his right to challenge the validity of the sale should finally cease, and such an arrangement was definitely sanctioned by the Court with consent of all the parties *Held* that the Court had no jurisdiction subsequently to vary the terms of the final agreement at the instance of the judgment-debtor, in spite of the protest of the decree-holder (6 C. L. J. 176: 29 C. 577 *referred to*) *Held*, further, that an appeal need not be preferred against every interlocutory order in an execution proceeding (18 C. 461 *followed*) —*Chandrabala* v. *Probodh Chandra*, 36 C. 422: 9 C. L J. 251.

A judgment-debtor who might have raised objection to a sale, but who has refrained from doing so, and who might have appealed against the order for sale, has no right, after the sale has been carried out, to prefer an objection that the property sold was not legally saleable.—*Umed* v. *Jasram*, 29 A 612 4 A. L. J 519 (26 C. 727, 7. A. 641 *followed*).

Sale of Property in Separate Lots though Advertised to be Sold in a Lump, and Vice Versa.—It is entirely within the discretion of the Court to direct that a property should be sold in portions, even though it had been attached or proclaimed as an entirety; and that the sale of the whole estate against the will of the judgment-debtor, when the sale of a portion would suffice, was an irregularity which caused material injury to the judgment-debtor.—*Abdool Hye* v. *Macrae*, 23 W. R. 1.

When property is advertised to be sold in separate lots, and is afterwards sold in a lump, this is an irregularity; but the person who wishes to set aside the sale on the ground of such irregularity, must show affirmatively that substantial damage has been sustained by him on account of such irregularity.—*Roy Nandipat* v. *Urquhart*, 4 B. L. R. A. C. 181; 13 W. R. 209 (*reversing* 12 W. R. 492).

Combination amoung Bidders Not to Bid Against Each Other, When amounts to Fraud.—Combination among certain purchasers not to bid against each other does not constitute any fraud or impropriety such as would have the effect of vitiating the sale.—*Hari Balkrishna* v. *Nara Moreshvar*, 18 B. 342; *Doorga Singh* v. *Sheo Prasad*, 16 C. 194; *Mohamed Mira Ravuther* v. *Savvasi Vijaya*, 23 M. 227 P. C; *Satis Chunder* v. *Porter* 9 C. L. J. 244, 36 C. 226; *Gobind Chunder* v. *Shyam Lal*, 1 C. L. J. 85. *See*, however, *Ambika Prasad* v. *Sitaram*, 6 C. L. J. 111. Dissented from in *Jyoti Prokash* v. *Jhoo mull*, 36 C. 134: 13 C. W. N. 87.

Application to Set Aside Sale for Arrears of Rent.—The procedure to be followed upon the sale of an under-tenure is now that prescribed by the Civil Procedure Code. S. 311, C. P. Code, 1882 (Or. XXI, r. 90), does not apply only to sales made under Chapter XIX of the C. P. Code, 1882 and the sale of an under-tenure may be set aside upon any of the grounds mentioned in that section.—*Azizoonnessa Khatoon* v. *Gora Chand*, 7 C. 163: 8 C. L. R. 198.

A transferee of a permanent transferable tenure, who has not given notice of the transfer to the landlord, cannot bring a suit to set aside the sale of the tenure in execution of a rent decree against the former tenant; his proper course is to satisfy the rent-decree, or to apply under this section, and to appeal against the order rejecting his application to set aside the sale.—*Panye Chunder* v. *Hur Chunder*, 10 C. 496.

If a judgment-debtor has made an application under this rule he is competent to apply under s. 174 of the B. T. Act, if he withdraws his former application.—*Sital Rai* v. *Nanda Lal*, 13 C. W. N. 591.

A civil suit lies for setting aside a sale held in enforcement of a certificate issued under the Public Demands Recovery Act (VII of 1880, B. C.) on the ground that the sale was vitiated by material irregularity leading to substantial injury.—*Ram Tarak* v. *Dilwar Ali*, 5 C. W. N. 521, F. B. (14 C. 1, and 23 C. 641, *overruled*, and 14 C. 9, *referred to*).

A decree-holder, for rent of a fractional share, stands in the position of ordinary creditors having no lien on the tenure, and is only entitled to sell the right, title, and interest of the judgment-debtor; and consequently a sale of a portion of a tenure under such a rent-decree is a good sale, and cannot be set aside.—*Mohendro Coomer* v. *Heeramohun*, 7. C. 723. *See* also, *Kedar Nath* v. *Ardha Chandra*, 5 C. W. N. 763, where it has been held that a rent-decree by a co-sharer landlord is not a decree under the Bengal Tenancy Act, VIII of 1885.

Necessary Parties to an Application under this Rule.—The decree-holder is a necessary party to an application under this rule. Hence where a judgment-debtor applied under this rule to have a sale in execution of a decree against him set aside, and made no attempt to implead the decree-holder until long after limitation had expired. *Held* that the application must be dismissed.—*Ili Gauhar Khan* v. *Bansidhar*, 15 A. 407. But under the old Code, there was a conflict of opinion whether he was a necessary party to an application for setting aside a sale under s. 311. *Karamat Khan* v. *Mir Ali*, 11 A. W. N. 121; *Surendra Mohini* v. *Amarendra*, 39 C. 647: 14 I. C. 67; *Menajuddi* v. *Toam Mandal*, 39 C. 381: 15

I. C. 176. Under the present Code he is a necessary party ; *see* the proviso to sub-rule (2), r. 92.

A beneficial owner is not a necessary party to a proceeding for setting aside an execution sale. It is competent to the Court to set aside the sale finally and conclusively as against the beneficial owner, although his benamidar only, and not he, is made a party to the proceedings.—*Baroda Kanta* v. *Chunder Kant*, 29 C. 682; 6 C. W. N. 706.

Under Or. XXI, r. 90, the auction-purchaser is a necessary party to a proceeding for setting aside an auction-sale.—*Ajijuddin Ahmed* v. *Khoda Bux*, 50 I. C. 5.

It is sufficient that the auction-purchaser is named in the body of the petition and notice is given to him after the application had become time barred.—*Samitra* v. *Damri*, 62 I. C. 61. The language of this rule, however, does not justify such a strict construction, see *Abdur Rahaman* v. *Har Narain*, 68 I. C. 238, where it has been held that though some of the decree-holders were not made parties, the service of notice upon them even after the period of limitation is a sufficient compliance with the rule. A transferee from an auction-purchaser is a necessary party if the proceedings are commenced after the transfer.—*Menajuddin* v. *Joan*, 39 C. 581 ; but see *Ghaffar* v. *Lal Ram*, 25 I. C. 907, where it has been held that it is not necessary, for a judgment-debtor filing an application under this rule to set out any formal array of parties

Sale on Holiday.—A sale in execution of decree is illegal, if made on a holiday, whether it is a fixed holiday or only a day on which the Courts are closed by order of the High Court.—*Haro Jemadar* v. *Jadub Chunder*, 8 W. R. Mis 24. But see *Bisram Mahton* v *Sahibunnissa*, 3 A 333, where it has been held that sale of immoveable property by an amin on a close holiday is not illegal, nor is it an irregularity in publishing or conducting the sale.

Sale After Satisfaction of the Decree.—An order for sale and a sale under such order are *ultra vires* and nullities if the decree which is ordered to be executed has been satisfied by payment into Court of the decretal money before the order is made.—*Chuni* v *Lala Ram*, 16 A. 5.

An order for sale and a sale under such order are *ultra vires* and nullities when, in fact, there was no jurisdiction in the Court to make the order.—*Balwant Rao* v *Mahammad Husain*, 15 A 324

Limitation for an Application to Set Aside a Sale.—Under Art. 166 of the Limitation Act, 1908, an application to set aside a sale under this rule must be made within 30 days from the date of the sale But where the irregularity in publishing or conducting the sale has, by the fraud of the decree-holder or any other party to the sale, been kept concealed from the judgment-debtor, he is entitled to apply under this rule whether the sale has been confirmed or not and the time for making the application is to be reckoned from the time when the fraud first became known to him.—*Mohendra Narain* v. *Gopal*, 17 C. 769; *Golam Ahad* v. *Judhistir*, 30 C. 142; *Hira Lal* v. *Chaudhury*, 26 C 539, 542; *Bhusan* v *Profulla*, 18 C. 119: 60 I. C. 801.

When an application is made for setting aside a sale on the ground of material irregularity in publishing or conducting it, and consequent substantial loss, it is not open to the judgment-debtor to rely on some other ground for the same purpose; *Harbans Lal* v. *Kundan Lal*, 21 A 140; but he can by way of additional particulars point out by a further application, which may be made after more than 30 days, that certain heavy incumbrances which did not exist had been notified in the sale proclamation, *Ram Saran* v. *Girdhari*, 48 A. 286: 92 I. C. 567: A. I. R 1926 All. 305.

As has already been stated in the commentary to this rule, the application to set aside a sale on the ground of *fraud* in publishing or conducting it, was under the old code, to be made under s. 244 (now s 47) and the period of limitation for such an application was 3 years from the date of the sale. Such application under the present Code must be made under r. 90 and the period of limitation is 30 days from the date of the sale.

Application to Set Aside a Sale on Other Grounds.—Where a judgment-debtor applies to have the sale set aside not only on the ground of material irregularity in publishing and conducting the sale but also on the ground that no notice of the application for attachment and sale was given as required by Or XXI, r 22, the case falls within s. 47, and hence there is second appeal; *Rajagopala* v. *Ramanujachariar*, 47 M. 288: 80 I. C. 92 · A. I R. 1924 Mad 431 F. B. The question whether there was suppression of sale processes, can only be raised under s. 47, and therefore a second appeal lies; *Rasaraja* v *Prasanna*, 40 C. 45; *Rampada* v. *Kanai*, 44 C. L. J. 167: A. I. R. 1926 Cal. 1219. Where the decree-holder is the auction-purchaser, and when an application is made to set aside the sale on any ground other than that covered by this rule, and there is no application under r. 89, the case falls within s. 47 and is subject to second appeal; *Superior Bank Ltd* v. *Budh Singh*, 22 A. L J 413· 83 I. C. 1028 A. I. R 1924 All 698, *Akshia* v. *Goivndarajulu*, 47 M. L J. 549 · A I. R. 1924 Mad. 778. The mere fact that in the application to set aside the sale, s 47 is mentioned, will not bring the application within s 47 either for the purposes of appeal or of limitation; *Malbar* v *Abdul*, 30 C W N. 86 89 I. C 765 · A I. R. 1926 Cal. 100.

A judgment-debtor cannot have a Court-sale set aside on the ground of fraud in the absence of proof that the auction-purchaser was a party to the fraud, and that the fraud came to the judgment-debtor's knowledge subsequent to the confirmation of the sale.—*Abbubakar Saheb* v. *Mohidin Shaheb*, 20 M 10 When a judgment-debtor makes an application to set aside a sale under this section after the expiry of the prescribed period of limitation, he must bring his case within section 18 of the Limitation Act; to enable him to do this, it is not enough for him to show that the execution proceedings were irregular and fraudulent; he must carry the fraud further and show that the existence of his right to set aside a sale has been kept concealed from his knowledge by the fraud of the decree-holder or the auction-purchaser; *Kailash* v. *Bissonath*, 1 C. W. N. Cl.; *Nabin* v *Bipin*, A. I. R 1926 Cal 229. *See* also, *Luchmiput* v *Mussammat Mandil Koer*, 3 C. W N. 333, when it has been further held that if the proceedings be regarded as taken under section 244, C. P. Code, 1882 (s 47), the judgment-debtor need not make his application within

30 days, the limitation for such application being 3 years from the date when the right to make such application accrued. In *Bhubon Mohun* v. *Nunda Lal*, 26 C. 324: 3 C. W. N. 390, in *Nimai Chand* v. *Deno Nath*, 2 C. W. N. 691, in *Lalman Das* v. *Jagannath*, 22 A. 376, and in *Srimati Sarat Kumari* v. *Nimai Charan*, 5 C. W. N. 265, it has been held that the period of limitation for an application to set aside a sale under section 244, C. P. Code, 1882 (s. 47) on the ground of fraud is three years

An application under this rule on behalf of a minor judgment-debtor, was rejected on the ground that the applicant did not legally represent the minor, and the sale was confirmed. From this order the judgment-debtor appealed. *Held* that, assuming that the first application to have been rightly rejected, the second which was made by a duly authorized guardian was not barred under the provisions of section 7 of the Limitation Act.—*Baldeo Singh* v. *Krishen Lal*, 9 A. 411 (1 C. 226 *referred to*)

Where a decree had been made against the judgment-debtor, and after his death application for execution was made against a person as heir, who was, in fact, not the heir and without notices to the proper heirs the property was sold; *Held* that such a sale can only be set aside in the regular way by proceedings under this section or by a regular suit within a year of the confirmation of the sale as provided by Art. 12 (a) of the Limitation Act.—*Malkarjun Bin* v. *Narhari Bin*, 5 C. W. N 10 P C. · 25 B 337, P. C. (reversing 21 B. 424). Explained in *Golam Ahmad* v. *Judhistir* 30 C. 142· 7 C. W. N 305 Distinguished in *Jwala Sahai* v *Masiat Khan*, 26 A. 346, and in *Khirajmal* v. *Diam*, 32 C. 296, P C.: 9 C. W. N. 20. 11 C. L. J. 584, P C.

Purchase by the decree-holder *benami* at a price less than that at which the decree-holder got permission to bid for would vitiate the sale; and an application to set aside such a sale comes under s. 244. C P Code, 1882 (s. 47), and is therefore governed by Art 181 of the Limitation Act — *Srimati Sarat Kumari* v *Nimai Charan*, 5 C. W. 265

Effect of decision on matters falling under this rule.—A decision on questions arising out of an application for setting aside a sale under this rule is conclusive and a separate suit will not lie: nor can a sale be impeached by way of defence without setting aside the sale under this rule *Jhara* v. *Amritman* 38 I. C. 47.

Appeal.—Under Or .XLIII. r 1 cl. (j), an appeal lies from an order under this rule, and r. 92 setting aside or refusing to set aside the sale. But no second appeal lies from the order of the first appeallate Court — *Santendra* v. *Charu*, 45 C. L J 557· A I R 1926 Cal 657: *Mahadeo* v. *Dhobi*, 2 Pat 916· 74 I. C 838· A I R 1923 Pat 283· *Jagannath* v *Daud*, 4 L. 243 75 I. C 103 A. I R 1923 Lah 592; *Jiwan Singh* v. *Sawan Mal*, 2 L. L. J. 41: 54 I. C 941; *Gour* v. *Digambar*, 30 C W N 583: A. I. R. 1926 Cal. 790. Nor does an appeal lie under the Letters Patent from the order of the first appellate Court, *Piari Lal* v *Madan Lal*, 30 A. 191 · 39 I C 460; *Parja* v *Malchand*, 6 L 250: A. I R 1925 Lah 624; *Muhammad* v *Ishanullah*, 14 A 226 F. B

An appeal lies from an order dismissing an application under this rule for default; *Kali Kanta* v. *Shyam Lal*, 25 C. L J 163· 38 I C 593.

Revision.—No revision lies from an order dismissing an application under this rule for default; *Narendra* v. *Rakhaldas*, 41 C. L. J. 286: 79 I. C. 851 A. I. R. 1925 Cal 510. But where the lower Appellate Court misreads a ruling of the Court, and on its basis refuses to entertain an application of a party which it had jurisdiction to entertain, it acts with material irregularity, and revision lies; *Ram Saran* v. *Girdhari*, 48 A. 288 92 I. C 567

Whether Or. IX Applies to Applications under this rule.—The provisions of Order IX do not apply to proceedings in execution; *Basirulllah* v. *Reazuddin*, 53 C. 679 · A. I. R. 1926 Cal. 773; *Hari Charan* v. *Manmatha*, 41 C. 1 18 C. W. N 313; *Balasubramania* v. *Sivaramma*, 38 M. 199 · 25 M L. J 367, *Bhubaneswar* v. *Tilukdhari*, 4 Pat. L. J. 135 *See notes to Or. IX and r. 9 under the heading " Whether Rule 9 Applies to Execution Proceedings."*

91. The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold. [S.313.]

Application by purchaser to set aside sale on ground of judgment-debtor having no saleable interest.

COMMENTARY.

Alterations.—This rule corresponds to section 313, C P. Code, 1882, with some alterations and omissions.

The word " *in execution of a decree* " have been added after the words " any such sale," the words " *the judgment-debtor had no saleable interest in the property sold*," have been substituted for the words " the person whose property purported to be sold had no saleable interest therein," which occurred in the old Code; and the lines " and the Court may make such order as it thinks fit. Provided that no order to set aside a sale shall be made, unless the judgment-debtor and the decree-holder have had opportunity of being heard against such order," which occurred in the old section, have been omitted from this rule, and reproduced in the next rule (r 92) with some modifications.

Scope of the Rule.—The purchaser at an execution sale is entitled under this rule to seek relief, if the judgment-debtor had *no " saleable interest "* in the property sold.—This rule does not apply where he seeks relief on the ground that he was induced to buy the property for more than its real worth owing to misrepresentation or concealment in the sale notification —*Durga Sundari* v. *Gobinda*, 10 C. 368: *Brijmohan* v. *Rai Umrnath*, 20 C 8 19 I. A 154; *Sheo-Gobinda* v. *Dhanukdhari*, 19 C. W N 1291 In such a case he can seek his remedy by a regular suit. But when the judgment-debtor had no saleable interest in the property sold, the auction purchaser's *only* remedy is to apply under this rule; *S. C. Singh* v. *S. A. O Chetty*, 52 I. C. 174.

Want of Saleable Interest.—The words " no saleable interest " mean " nothing to sell," and are not intended to confine the cases in which a purchaser shall be entitled to receive back his purchase-money to the

in which the judgment-debtor though having an interest, such interest, is by prohibition of law or for some other reason, unsaleable.—*Munna Singh* v. *Gajadhar*, 5 A. 577, F. B.

This rule contemplates that either the judgment-debtor had no interest at all, or that the interest was not one he could sell, and the fact that the property is subject to a mortgage, and may fetch little or nothing if sold, does not affect the question.—*Sant Lal* v *Ramji Das*, 9 A. 197 (8 C. L. R. 468 *distinguished*). *See* also, *Protap Chander* v. *Panioty*, 9 C. 506; 12 C. L. R. 488. In *Durga Sundari* v. *Gobinda Chandra*, 10 C. 268, it has been held that the meaning of this rule is, that when a purchaser buys a property which turns out to have no existence at all, or to be of no saleable value whatever, the Court may set it aside. A misrepresentation or concealment in the sale notification which induces a purchaser to buy a property for much more than it is really worth is no ground for setting aside a sale under this rule. In *Ram Coomar* v. *Sushee Bhushan*, 2 C. 626, it has been held that this rule only applies to cases in which the judgment-debtor has no saleable interest in the property sold. It does not apply to cases where the judgment-debtor has no saleable interest in a portion of the property. *See* also, *Sonaram* v. *Mohiram* 28 C. 235 (17 M. 228 *followed*). But in *Naharmul Marwari* v. *Sadut Ali*, 8 C. L. R. 168, it has been held that if, as a fact, the property sold was covered by the mortgage, there was no saleable interest in the judgment-debtor at the time of the sale, inasmuch as under that sale the purchaser would be unable to get the particular property purchased by him

This rule does not apply when the title of the judgment-debtor to part only of the property sold is defective. It applies only to a case where the judgment-debtor had no saleable interest in the property at all.—*Muhammad Rahamatulla* v. *Bachcho*, 27 A 537 2 A. L J. 244. (1950) A. W. N. 99 (23 A 355 *followed*)

If a party purchases at a sale with full knowledge of the true state of things and knowing that the title offered is defective, a claim to be relieved from the consequence of his purchase cannot be listened to —*Sumer Chand* v *Wahid Husain*, 3 A L. J. 819. (1906) A. W N 310

An auction-purchaser has no right to apply under this rule to set aside a sale held in execution of a decree on the ground of deficiency in the area of the land sold —*Brij Mohan* v *Ram Uma Nath*, 20 C. 8 P. C (followed in *Ram Narain* v. *Dwarka Nath*, 27 C. 264: 4 C. W N 13) or on the ground that the title of the judgment-debtor is defective.—*Khetra* v. *Sk. Dilwa*, 46 I. C 614, if he has been misled by any fraud or omission of the decree-holder he may sue him for damages, *ibid;* but see *Seo-Gobind* v. *Dhanukdhari*, 19 C W. N 1291, where it has been held that in case of fraud the execution purchaser has the right to have the sale set aside (20 C 8 P. C. *followed*).

An auction-purchaser at an execution sale is not entitled to compensation on account of any deficiency in area of the land purchased, unless he can prove that he has sustained loss by the misdescription, but is entitled to abatement of rent for such deficiency.—*Dayal Krishna* v *Amrit Lal*, 29 C. 370 (1 C. W. N. 106 *distinguished*, 18 A 322 *dissented from*). Where the misdescription of property in the sale notification does not go to the essence of the contract, the remedy which a purchaser can claim is

compensation and not annulment of the sale.—*Administrator-Genera Bengal v. Aghore Nath*, 29 C. 420; 6 C. W. N. 873.

A Hindu died leaving two widows, one of whom, under authority f her husband, adopted a son. Subsequently, the widows executed a m gage-bond to liquidate the debts of their husband, and the mortgagee a obtaining a decree upon the mortgage, brought to sale the mortgaged | perties which were purchased by a third party. On an application by auction-purchaser to set aside the sale on the ground that the judgm debtors had no saleable interest in the property, as it had, upon the ac tion, vested in the adopted son. *Held* that as one of the widows was nc party to the adoption, it could not be said that the judgment-debtors had saleable interest in the property.—*Faizuddin Ali v. Tincowrie Saha*, C 565

Misdescription of the name and of the rent of the talook sold is nc sufficient ground for setting aside a sale under this rule.—*Kali Kish v Guru Prasad*, 25 C. 99.

Where default has been made in the payment of Government Reve for which the property is liable to be sold, the ownership of the prope nevertheless remains in the person who has made the default and until sale for arrears of revenue actually takes place, the property is liable to sold in execution of decree and the purchaser at the execution sale purch ing the right to receive any surplus sale proceeds.—*Hari Charan v. H Das*, 1 C. L. J 506.

A judgment-debtor who might have raised the objection in execut but refrained from doing so, and who could have also appealed against order for sale, is estopped raising the objection that the property s was not legally saleable, after the sale has been carried out.—*Umed Jas Ram*, 29 A. 591 (7 A 641 · 26 C 727 *followed*).

Separate Suit for Refund of Purchase-money.—*See notes under XXI, rule 93.*

Compensation for Loss of Part of Property Bought at a Court-sale. Every man buys at an execution sale with his eyes open, and the gene principle is that an auction-purchaser cannot attack his own purch except on the ground that the judgment-debtor has no saleable interc *Khetro Mohun v. Dilwar*, 3 Pat. L. J 516: 46 I. C. 614; *Kedar Nath Jagarnath*, 1 Pat. L. R. 73. 74 I. C. 184. This rule furnishes a statute exception to the doctrine of *Caveat Emptor*, *Ram Kumar v. Ram Gour*, C. 67 But apart from the case provided for by this rule and ap-rt frc fraud, a purchaser at an auction-sale must abide by his bargain; *Abinash Bhuban*, 25 C. W. N 756; *Sabapathi v. Thandabharoya*, 43 M. 309; I. C. 515.

Limitation.—The period of limitation for an application to set aside sale under this rule is 30 days under Art. 166 of the Limitation Act IX 1908. Under the Limitation Act, 1877 (Art. 172), the period of limitst. was 60 days, but Art. 172 has been repealed by the present Limitation A (IX of 1908).

" The committee think that in the matter of limitation an applicati under s 313 (C P. Code, 1882), should be brought into line with an app

cation under s. 312 (C. P. Code, 1882), and they therefore propose to repeal Art. 172 and to amend Art. 166 so as to include applications under s. 313."—*See Notes on Clauses to the Limitation Act.*

On the question of limitation for suits for refund of purchase-money see notes under rule 92.

Appeal.—An appeal lies from an order setting aside, or refusing to set aside, a sale made under this rule and r. 92 [Or. XLIII, r. 1 cl. (j).]

Sale when to become absolute or be set aside.

92. (1) Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute. [Ss. 312 & 314.]

(2) Where such application is made and allowed and where in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale: [S. 312 and S. 310-A, Para. 2.]

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby. [S. 313, last Para.]

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made. [S. 312.]

COMMENTARY.

Alterations.—This rule embodies in a concise and amended form the provisions contained in section 312 and 314 and in the second para of section 310-A regarding the period of limitation for an application, and also *the provisions contained in the last part of s. 313 of the C. P. Code, 1882.*

"The committee think it proper to retain the provisions of the Code which make it necessary for the Court to confirm the sale in each case." —*Report of the Special Committee.*

Sub-rule (1) corresponds to para 1 of s. 312 and to s. 314 of the old Code with some omissions and alterations. The words "*the Court shall make an order confirming the sale*" have been substituted for the words, "the Court shall make an order confirming the sale as regards parties to the suit and the purchaser" which occurred in the last part of para. 1 of s. 312. The words "*as regards parties to the suit and the purchaser*" have been omitted in view of the enlargement of the scope of rule 90, which now includes all persons whose interests are affected by the sale. The words "*thereupon the sale shall become absolute*" have been substituted for the words contained in s 314 of the old Code, which ran as follows:

No sale of immoveable property in execution of a decree shall become absolute, until it has been confirmed by the Court."

Sub-rule (2) corresponds to para. 2 of s. 312 and para. 2 of s. 310-A of the old Code with some modifications.

The proviso to sub-rule (2) corresponds to the last part of s. 313 of the old Code with this modification that the notice of application to set aside a sale under any provisions of rule 89, rule 90 or rule 91 is to be given to all persons affected by the sale, and not to the judgment-debtor and decree-holder only

Sub-rule (3) corresponds to last para. of section 312, C. P. Code, 1882, with the omission of the words "*on the ground of such irregularity*," which occurred in the old section after the words "no suit to set aside." The effect of the omission is, that no suit to set aside an execution sale is now maintainable on any of the grounds specified in rules 89, 90 and 91 Therefore, a suit on the ground of irregularity or fraud in publishing or conducting the sale is barred by sub-rule (3). *But a suit to set aside a sale on any grounds other than those specifically mentioned in the above rules is not barred by this rule.* For instance, a suit to set aside a sale on the ground of want of jurisdiction in trying the original suit, or in selling the property, or that the decree in execution of which the sale took place was obtained by fraud, or that there was fraud in the execution proceedings prior to the publication of the sale, or that the judgment-debtor had no title to the property, etc., etc.

The expression "publishing or conducting the sale" in rule 90 refers respectively to rule 66 and to the action of the officers of the Court by whom the sale is conducted (32 B. 572), it does not refer to any irregularity or fraud in the execution proceeding prior to publication or conducting the sale

Rules 89, 90 and 91 refer to sales in execution of a valid and subsisting decree. Therefore sales in execution of such decrees are only voidable and not *ab initio* void. But sales are *ab initio* void where they are held in execution of decrees which are *ab initio* void on the ground of fraud or want of jurisdiction.

Effect of Objection being Allowed.—In a sale of immoveable property, the sale proclamation notified that the decree-holder held two charges on the property aggregating about Rs. 1,000. *Held* that the error in the sale proclamation amounted to an irregularity in publishing the sale, and that the sale must, therefore, be set aside on the ground of the material irregularity in publishing and conducting it —*Kanji Mal v. Sailo*, 8 A. 116

Where a sale in execution of a decree has taken place pending an appeal, and the decree has subsequently been reversed, the Court executing *the decree cannot, after such reversal, grant confirmation of the sale*—*Mull Chand v. Mukta Prosad*, 10 A 83 (2 B. 540 *referred to*).

Confirmation of Sale.—The Court is bound to confirm the sale in the absence of an order setting aside the sale made upon application to that effect ; *Birj Mohan v. Umanath*, 20 C. 8 P. C. ; *Dharam Chand v. Bhisan Krishna*, 54 I. C. 929 , or in the event of no application under rr. 89 90 and 91 being made ; *Umesh v. Shib Narain*, 31 C. 1011· 9 C. W. N

193 It has been held in *Anatullah* v. *Sashi Bhusan*, 24 C. W. N. 73 that this rule does not effect the power of the Court to refuse to confirm the sale, or make it compulsory to confirm the sale when the Court finds that the sale was held under a decree which did not authorize it. A purchaser at a Court-sale has no absolute right to have the sale confirmed where there is an irregularity in the publication or the conduct of it although he is in no manner responsible for the irregularity ; *Raja of Kalahasti* v. *Maharaja of Venkatagiri*, 38 M. 387 · 25 M. L. J. 198 · 21 I. C. 389. Where an application under r 90 is dismissed for default, it amounts to a confirmation of the sale under this rule , *Narendra* v. *Rakhal*, 79 I. C. 351: 8 Pat. 947. Under s. 314, C. P. Code, 1882 (Or. XXI, r 92) the Civil Court cannot upon or without application, refuse to confirm a sale on the ground that the price bid is too low —*Lakshimi* v. *Krishnabhat*, 8 B 424

After the confirmation of a sale, a Court has no power to set aside a sale by a summary order, on the ground that the right to apply for execution under which the sale had taken place was barred —*Mahomed Hossain* v. *Kokil Singh*, 7 C. 91 · 9 C. L R. 53.

If no objection to the sale is made within the time allowed by Art. 166 of the Limitation Act, *i e.*, within 30 days from the date of the sale, the sale should be confirmed.—*Mohendro Narain* v. *Gopal Mondul*, 17 C. 769 F B (780) ; *Haji* v. *Atharaman*, 7 M. 512.

Where the sale proclamation was not issued in the prescribed form, and did not state the extent of the property and the revenue assessed on it, and in consequence there was substantial injury to the applicants, the sale should not be confirmed.—*Athappa Chetti* v *Rama Krishna*, 21 M 51

When, after the date of sale but before the date of its confirmation, the decree in execution of which the sale took place is set aside, the sale falls to the ground, and the sale cannot be confirmed, as the decree is not subsisting on that date.—*Daya Moyee* v. *Sarat Chandra*, 25 C. 175 1 C W. N. 656. Where a decree is admitted by the decree-holder to be satisfied, it ceases to exist as a decree capable of execution, and the Court's powers in execution also cease, and confirmation of the sale which is a proceeding in execution cannot be ordered , *Nilkanth* v *Yeshwant*, 18 N L. R. 134: 65 I. C. 331.

Sub-rule (2).—If Deposit is Made Within 30 Days.—The Court has no power to entertain an application for setting aside a sale unless the deposit is made within 30 days from the date of the sale, because the requirements of sub-rule (2) are mandatory and not directory ; *Vennisami* v. *Periyaswami*, 19 M. L. T. 192 (1916) 1 M. W N. 179: 33 I. C. 996 *See* notes under Or. XXI, r 89.

Proviso.—Before Setting Aside a Sale, Notice to be Given to All Persons Affected.—Under s 313 (para. 2) of the old Act, notice on the judgment-debtor of the decree-holder only was necessary but the proviso to this rule requires that the notice is to be given to all persons affected by the sale. See *Surendra Mohun* v. *Amaresh*, 39 C 687 , *Bibi Sharifan* v. *Mahomed*, 13 C. L. J. 535 ; *Menajuddi* v. *Toam Mandal*, 39 C. 881. An order setting aside an execution sale without giving proper notice to the persons affected thereby, as required by the proviso, is without jurisdiction

and amounts to no order ; *Gossain* v. *Jalpadat*, 62 I. C. 113 ; *Sundararaja* v *Asiri Naidu*, 32 I. C. 891. The duty of moving the court to issue notices lies upon the applicant and on default the court may dismiss the application ; *Mt Bibi Zaniab* v. *Paras Nath*, 4 Pat. L. T. 491: 1 Pat L. R. 361

It is an elementary principle of law that no order should be made against a man's interest without giving him an opportunity of being heard —*Ganeswar Singh* v *Ganesh Das*, 33 C. 1178, P. C. · 4 C. L. J. 157 10 C. W. N. 969.

In the event of the death of the judgment-debtor, notice must issue to his representative—*Bala Kadar* v *Gulam Mohidin*, 7 B 424

Where after filing an application to set aside an execution sale, the auction purchaser dies and no notice goes to his legal representatives, the order setting aside the sale is invalid, *Ramnand* v. *Bajit Jha*, 75 I. C. 863

Sub-rule (3).—No Suit will Lie to Set Aside an Order under this Rule.—Sub-rule (3) means that a person against whom an order under this rule is made cannot bring a separate suit for setting aside the order His only remedy is by way of appeal under Or XLIII, r. 1, cl. (*j*).

An order under this rule may be either (1) an order confirming the sale, or (2) an order setting aside the sale. Again an order confirming the sale may be made either (*a*) where no application is made at all to set aside the sale, or (*b*) where an application is made and disallowed. *In either case* no suit will lie to set aside an order confirming the sale.—*Bhim Singh* v *Sarwan Singh*, 16 C. 33 ; *Damodar* v. *Vinayak*, 26 B. 40 ; *Gajrajmati* v. *Akbar Hossain*, 29 A. 196. 34 I. A. 37 ; *Brahmacyya* v. *Appayya*, 44 M. 351: 62 I. C. 208 ; *Agha Hossain* v. *Quasim Ali*, 23 A. L J 946 A. I. R 1923 All. 35 89 I. C. 1018. Similarly no suit will lie to set aside an order setting aside a sale made on an application under rules 89, 90 and 91 ; *Shib Singh* v *Mukat Singh*, 18 A. 437.

Suit to Set Aside an Execution Sale When Not Barred.—Sub-rule (3) is no bar to any suit except the suits mentioned above. It does not bar a suit by a plaintiff for a declaration that the auction-sale was void on the allegation that by reason of collusion and fraud not only of the decree *holder and the auction-purchaser but of certain other persons also*—*Bhagwandas* v *Suraj Prasad*, 22 A. L. J. 1060 ; nor does it bar a suit by a person whose claim to the property attached and sold as the property of the insolvent, has been disallowed ; *Harnam* v. *Ganpat*, 5 L. L. J. 9: 73 I. C. 367.

Suit to Set Aside a Sale Held under Public Demands Recovery Act, Whether Barred or Not.—A suit to set aside an irregular sale of property held under the Public Demands Recovery Act is not barred by the provisions of s. 244 or s. 312, C. P. Code, 1882 (r. 92).—*Ram Taruk* v. *Mosahebali*, 6 C. W. N. 246 (14 C. 9 *followed*). *See* also, *Ram Tarak* v. *Dilwar Ali*, 5 C. W. N. 521, F. B. : 29 C. 73 (14 C. 1 and 23 C. 641 *overruled*; 14 C. 9 *referred to*); *Grish Chundra* v. *Golam Karim*, 33 C. 451: 10 C. W. N. 347: 3 C. L. J. 235 ; *Janukdhari Lal*, v. *Gassain Lal*, 13 C. W. N. 710. But *see* the cases noted under s 47, in which a contrary view has been taken.

Suit to Set Aside a Sale When Barred by Section 47.—See *notes under section 47, C. P. Code.*

Plea of Bar of Limitation After Confirmation.—No application to set aside a sale held in execution of a decree on the ground that the application for attachment and the sale was barred by limitation, can be made after confirmation of sale ; *Lakhu Rai* v. *Maharaja Kesho Prasad*, 2 Pat. L. J. 157 : 38 I. C. 876.

"Court."—The word " Court " as used in this rule means the Civil Court and not, in the case of a decree transferred to the Collector for execution, the Collector ; *Fazel* v. *Manzur*, 40 A. 425 ; 45 I. C. 773.

Appeal from Order Passed under this Rule.—An order under this rule setting aside or refusing to set aside a sale, is appealable under Or. XLIII, r. 1 (*j*).—*Tota Ram* v. *Khub Chand*, 7 A. 258. *See* also, *Baldeb Singh* v. *Kishan Lal*, 9 A. 411.

An appeal lies from an order setting aside a sale passed under Or. XXI, r 92 ; *Anund Chunder* v. *Nitai Bhoomig*, 16 C. 429 ; *Dakshina Mohan Roy* v. *Srimati Basumati*, 4 C. W. N. 474. But no second appeal lies from the order passed on first appeal ; *Surendra Mohini* v. *Amaresh*, 39 C. 687 ; *Jiwan Singh* v. *Sanwal*, 168 P. R. 1919 ; *Jagmohan* v. *Bachcha*, 25 O. C. 78 : 66 I. C. 929; *Nanak Chand* v *Mt. Jamna*, 91 I C. 213 : A. I. R. 1926 Lah. 204.

An order dismissing for default an application to have a sale set aside, is an order within the meaning of Or. XXI, r. 92 and as such is appealable under Or. XLIII, r. 1 (*j*).—*Kalikanta* v. *Shyam Lal* 25 C. L. J. 163 · 38 I. C. 598. But a contrary view has been taken in *Basaratulla* v. *Reazuddin*, 30 C. W. N 570 · 96 I. C. 705. A. I. R 1926 Cal. 773, where it has been held that an order dismissing an application to set aside a sale merely on default of appearance of the parties, cannot be regarded as in any way confirming the sale, and as such is not appealable under Or. XLIII, r. 1 (*j*)

An appeal lies to His Majesty in Council from an order passed under this rule and r 90 —*Krishna Pershad* v *Motichand*, 40 C. 633 · 40 I A 140.

Revision.—There is no appeal from the order of the Court refusing to confirm the sale, but refusal to confirm a sale in the absence of an application under rr. 89, 90 or 91 is a material irregularity, and revision will lie; *Prem Das* v *Gokal Chand*, 98 I. C 866 · A. I. R. 1927 Lah. 71.

Limitation for Suits to Set Aside a Sale in Execution.—A suit to set aside a sale held in execution of a decree is governed by Art 12 of the Limitation Act, and must be brought within one year from the date of its confirmation.—*Abdul Munsoor* v. *Abdool Hamid*, 2 C. 98; *Mahomed Hossein* v. *Purundur Mahto*, 11 C. 287; *Suryanna* v. *Durgi*, 7 M. 258 *See*, however, *Kali Mohun* v. *Ananda Moni*, 9 C. L R. 18

One year's limitation prescribed by Art. 12 of the Limitation Act is not confined only to suits which seek no relief other than a declaration that a sale ought to be set aside, but apply also to suits where other relief is sought which can only be granted on annulment of the sale —*Malkarjun*

P. C. *applied in principle;* 14 B. 279 *overruled in effect;* 21 B 424 *reversed;* *explained* in *Golam Ahmad* v. *Judhister*, 30 C. 142: 7 C. W. N 305 *distinguished* in *Jwala Sahai* v. *Masiat Khan*, 26 A. 346, and in *Khir ajmal* v. *Daim*, 32 C. 296, P C.: 9 C. W. N. 201, P. C.

The period of limitation for a suit to set aside an execution sale is one year, when the case does not come under s. 244, C. P. Code, 1882 (s 47), but when it does, the period of limitation is 3 years See, *Bhoobun Mohun* v. *Nunda Lal*, 26 C. 324 · 3 C W N. 390; *Nemai Chand* v. *Deno Nath*, 2 C. W. N 691; *Sm. Sarat Kumari* v. *Nemai Churn*, 5 C. W. N. 265; and *Lab Man Das* v *Jagan Nath*, 22 A. 376.

Step in Aid of Execution.—An application by a decree-holder who has purchased the property in execution of his own decree for confirmation of sale, is not an application to take some steps in aid of the execution within the meaning of Art. 182, of the Limitation Act.—*Umesh Chandra* v. *Shib Narain*, 9 C. W N 193 31 C. 1011.

An application by the decree-holder for the rejection of a petition of a judgment-debtor objecting to the sale, and for confirmation of sale is a step in aid of execution —*Gobind Pershad* v. *Rung Lal*, 21 C. 23 (5 A 576 *followed*) But the confirmation of the sale in execution of the decree by the Court of its own motion without any petition of the decree-holder is not an application to take some steps in aid of execution within the meaning of Art 179 (4) of the Limitation Act, 1877; *Mohendro Chandra* v. *Mohendro Nath*, 10 C. L. R 330; *Dhiraj Mahtab Chand* v. *Ram Brahma*, 4 B. L. R A. C. 115; 13 W. R 38. In *Gunga Bishen* v. *Dhiraj Mahtab Chand*, 12 B. L. R 506-*note* · 10 W. R. 224, it has been *held* that where sale was confirmed after objection by the judgment-debtor, and the sale proceeds received by the creditor, that was a proceeding sufficient to keep the decree alive. But in *Chowdhry Sheik Wahed Ali* v. *Mullick Enayet Hossein*, 12 B L. R 500: 20 W. R. 31, it has been *held* that a confirmation of sale in execution is a proceeding sufficient to keep the decree alive. *See* also, *Govind Chunder* v *Johurulnissa*, 18 W. R. 156 In *Mullick Enayet Hossein* v *Wahed Ali*, 13 W R. 315, it has been *held* that where the decree-holder takes no step whatever to cause an execution sale to be confirmed, the confirmation of the sale by the Court cannot be regarded as a proceeding on his part towards enforcing the decree.

Stamp in a Suit to Set Aside an Auction-sale.—In a suit to set aside an auction-sale, the plaint must be stamped, as if the suit were for the recovery of the property.—*Drapu Chowdhry* v. *Ishan Chunder*, 9 C L. R 281

Return of purchase-money in certain cases.

93. Where a sale of immoveable property is set aside under rule 92, the purchaser shall be entitled to an order for repayment of his purchase-money, with or without interest as the Court may direct, against any person to whom it has been paid. [S. 315.]

COMMENTARY.

This corresponds to s. 315, C. P Code, 1882, with some alterations and omissions.

The words "*or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is, for that reason, deprived of it,*" which occurred in the latter part of the first para. of s. 315 have been omitted. The reason for the omission seems to be that those words were the subject of discussion in several cases (5 A. 577, 22 B. 783, 5 C. W. N. 240, 7 C. W. N. 105, and 10 C. W. N. 274), and in those cases it was held that a purchaser at an execution sale was not limited to the special procedure in the execution department mentioned in s. 315 of the old Code, but he was entitled to maintain a separate suit for recovery of his purchase-money. But before a suit can be maintained the two events must occur: (1) It must be found in some other proceedings that the judgment-debtor had no saleable interest; (2) and the purchaser must be deprived of the property. In the cases quoted above it was held that s. 315 of the old Code is only an enabling section and not prohibitive of an independent action in a Civil Court. In 5 C. W. N. 240 and 7 C. W. N. 105, it was *held* that s. 315 does not contain any provision barring a Civil suit, such as to be found in ss. 47 and 312 and Or. XXI, 92 of the Code. In the present rule also there is no express provision prohibiting a separate suit for refund of purchase-money. Therefore under the present rule a separate suit for refund of purchase-money is also maintainable.

The last para. of s. 315, which ran as follows: "*The repayment of the said purchase-money and of the interest (if any) allowed by the Court may be enforced against such person under the rules provided by this Code for the execution of a decree for money*" has been omitted as unnecessary in view of s. 36 of the present Code read with r. 30 of Or. XXI.

"The Committee have added words at the commencement of the clause in substitution of the last para. of the section, which thus becomes unnecessary"—*Report of the Special Committee*

Scope of the Rule.—We have seen that under r. 91 the auction-purchaser is competent to apply for setting aside an auction sale on the ground of the judgment-debtor's having no saleable interest in the property sold. This rule entitles him to apply for a refund of the purchase-money on the same ground. But if the judgment-debtor had some saleable interest in the property however small, no refund can be made under this rule.—*Kunhamed* v *Chattu*, 9 M. 437; *Muhammad* v. *Bachho*, 27 A. 537.

When a Purchaser is Entitled to a Refund of his Purchase-money.—When a sale of immoveable property is set aside, the purchaser is entitled to recover back his purchase-money. If the Court reversing the sale omit to make such order, the purchaser can sue to recover the money from the person who has received it. The suit is not barred by s 244, C. P. Code, 1882 (s. 47).—*Jotindra Mohan* v. *Mahomed Basir*, 22 C. 832 (5 C. W. N. 240 *referred to*). *See* also, *Greesh Chunder* v. *Lookhooda Moyee*, 1 W R 55; and *Doolhin Hur Nath* v *Baijo Oojha*, 2 Agra 50.

Where the judgment-debtor is found to have no interest in the land sold, the purchaser is entitled to a refund of the money paid to the decree-holder.—*Munhi Moidin* v. *Tarayil Moidin*, 8 M. 101. *See* also, *Tirumalaiswami* v. *Subramanian*, 40 M. 1009: 45 I. C. 109.

Where a Court-sale in execution of decree is not vitiated by fraud, the only extent to which the purchaser can claim relief is that indicated

by this rule. The effect of rr. 91, 93 and 94 is that the right, title an interest of the judgment-debtor passes to the purchaser at a Court-sal subject however to the condition that the purchaser may recover ba his purchase-money when he finds that the judgment-debtor has no sal able interest at all. When the judgment-debtor has a saleable interes however small the purchaser at an execution sale purchases at his ow risk, and there being no warranty that the property will answer to th description given of it, the purchaser is entitled to no relief, if the pro perty does not correspond to the description —*Sundara Gopalan* v. *Venkat Varada*, 17 M. 228; *followed* in *Sonaram Dass* v. *Mohiram Dass*, 23 C. 235. *See* also, *Dorab Ally* v. *Abdool Aziz*, 3 C. 806, P. C.; 2 C. L. R. 529, P. C. (*reversing and remanding*, 1 C. 55: 24 W. R. 372) For th decision of the High Court on remand, *see*, 6 C. 356

An auction-purchaser who has deposited his money in Court can, if h finds that no interest in the property has passed to him, only apply und Or. XXI, r. 93 before confirmation. *Difference between the old and th new law pointed out* —*Subbu Reddi* v. *Ponnambala Reddi*, (1918) M. W. N. 655.

A purchaser at a Court-sale who was afterwards deprived of th property by a person claiming a title paramount, has a right to recov his money by an application under this rule, but has no right to recov it by a regular suit.— *Ram Dayal* v. *Rampal Singh*, 22 O. C. 42: 51 I. C. 95.

To entitle a purchaser, under this rule, to a refund of the purchas money, it is not necessary that a Court should have decided in *other pr* ceedings that the judgment-debtor hod no saleable interest in *the proper* sold, or that the purchaser should have obtained actual possession, an have been deprived thereof —*Siva Rama* v. *Rama*, 8 M. 99

This rule empowers the auction-purchaser to require re-payment, bu does not impose upon the decree-holder the duty of tendering the mone as soon as the sale is set aside. The decree-holder is not bound *to d* anything, except pay on demand. The judgment-debtor's action in gettin the sale set aside does not therefore injure the decree-holder, *until he* compelled to refund the purchase-money to the purchaser, and *until then* he has no right to call upon the judgment-debtor to pay his debt *a secon* time —*Ramineedi Venkata* v. *Ayyanna*, 30 M. 209: 17 M. 194

An auction-purchaser sued the decree-holder for interest on the pu chase-money and expenses of the sale, the purchase-money having *bee* returned to him under the order of the Court executing the decree *withou* interest and less such expenses. *Held* that the suit was maintainable.— *Raghubar Dyal* v. *The Bank of Upper India*, 5 A. 364.

A decree-holder fraudulently caused the sale of certain property belong ing to a minor. The minor brought a suit against the auction-purchase and obtained a decree for possession. The auction-purchaser sued th decree-holder to recover his purchase-money and the costs incurred b him in defending the suit brought by the minor. *Held* that he, bei innocent of the fraud, and having purchased in the *bona fide belief th* the property of the minor was saleable, was entitled to recover *the pu*

chase-money.—*Makundi Lall* v. *Kaunsila*, 1 A. 568 (6 N. W. P. 169 *distinguished*).

At the Registrar's sale, the auction-purchaser was allowed to apply to set aside the sale on the ground of material mis-description of the property and to get a refund of his purchase-money.—*Aghore Nath* v. *Administrator-General of Bengal*, 80 C. 468 (5 C. W. N. 593 *referred to*). The purchaser was allowed to rescind the sale and to a refund of his purchase-money on the ground of deficiency in area.—*Bank of Bengal* v. *Akhoy Kumar*, 6 C. W. N. 865.

A purchaser at a Court-sale which had been subsequently set aside obtaining an order for refund of the purchase-money, can execute the order as if it were a decree.—*Venkataramanamurthi* v. *Sundara Ramiah*, 23 M. L. T. 355: 47 I. C. 630.

Suit for Refund of Purchase-money, Where No Saleable Interest.—There is a conflict of authorities on the question whether under this rule the auction-purchaser is competent to bring a separate suit for refund of the purchase-money (where the judgment-debtor is found to have no saleable interest in the property) in addition to the remedy he has under this rule to apply for a refund.

It was held under the old Code that a purchaser at an execution sale can maintain a suit against the decree-holder for recovery of his purchase-money, where it is found that the judgment-debtor had no saleable interest in property sold, and he is not entitled to the special procedure in the execution department mentioned in s. 315 (r. 93).—*Munna Singh* v. *Gajadhar Singh*, 5 A 577, F B. Followed in *Kishun Lal* v *Muhammad Safdar Ali*, 13 A 383; *Gurshidawa* v. *Gangaya*, 22 B. 783; *Pachayappan* v. *Narayana*, 11 M. 269, *Hari Dayal* v. *Sheik Samsuddin*, 5 C. W N. 240, *Nityanund* v. *Juggat*, 7 C W N 105; *Shanto Chandra* v *Nainsukh*, 23 A 355, *Giridhar Das* v. *Sidheswari Prashad*, 40 A. 411 · 16 A. L J. 236. 44 I C. 697; *Surendra* v *Beni Madhab*, 10 C W N. 274; *Makar Ali* v *Sarfuddin*, 50 C. 115. 70 I. C 606 · A. I R. 1923 Cal. 85; *Tirumalaisami* v *Subramanian*, 40 M. 1009. 45 I. C 1001: It was also held under s 315 that whether the auction-purchaser proceeded by an application under that section or by a regular suit, he was not entitled to receive back his purchase-money unless the judgment-debtor had no saleable interest at all, if the judgment-debtor had some saleable interest in the property, however small, he could not, by suit, any more than by application, obtain a refund of the purchase-money in proportion to the extent to which the judgment-debtor had no interest —*Bhagwan Das* v. *Alla Bakhsh*, 52 P R 1919; *Shanto* v. *Nainsukh*, 23 A. 355; *Muhammad* v. *Bachcho*, 27 A. 537; *Surendra* v *Venkata*, 17 M. 228 It was held under the old Code, that the purchaser was entitled to proceed by way of suit even after rateable distribution against those among whom the purchase-money was distributed; *Kishen Lal* v. *Muhammad*, 13 A. 383; *Girdhar Das* v. *Sidheswari*, 40 A. 411, 44 I. C. 497.

Under the present Code an auction-purchaser is not entitled—as he was under the old Code—to bring a regular suit for a return of the purchase-money in cases where the judgment-debtor has no saleable interest in the property; *Nannu* v. *Bhagwan Das*, 39 A, 114; *Ramsarup* v. *Dalpat*, 43 A. 60: 58 I. C. 106; *Mohideen* v. *Mahomed*, 23 M. L. J. 487; *Tiruma-*

laisami v *Subramanian*, 40 M. 1009: 45 I. C. 109; *Subbu* v. *Ponambal* (1918) M. W. N. 655: 49 I. C. 359; *Balvant* v. *Bala*, 46 B 833: 67 I. C. 360: A. I R 1922 Bom. 205; *Juranu* v. *Jathi*, 22 C. W. N. 760; *Banka* v. *Gurudas*, 28 C. W. N. 20: 80 I. C. 257: A. I. R. 1924 Cal 172; *Habibuddi* v. *Hatim*, 6 L. 283: 86 I. C. 622: A. I. R. 1925 Lah. 467

A purchaser at a court-sale who is afterwards deprived of the property by a person claiming title paramount has no right to sue for refund of the purchase-money from the person to whom it is paid.—*Ram Dayal* v. *Rampal*, 22 O C. 42: 51 I. C 95; *Lakhmi Chand* v. *Chaturbhurj*, 65 I C 230 (39 M. 803, 39 A. 114, 36 A 529, 37 C. 67, 35 B. 29, *refd to*). The procedure prescribed by this rule is by summary application within a limited time. So, where, a purchaser after confirmation of sale succeeded in establishing his title to the property in a suit under s. 283, C. P Code, 1882 (r. 63), and then sued for the refund of his purchase-money. *Held*, that the suit was maintainable There is no warranty of title in sales under a decree of a Court.—*Sumer Chand* v. *Wahid Husain*, 3 A. L. J. 819: 6 A. W. N. 310 But see *Dewaji* v. *Amrita Bai*, 15 N. L R 140: 42 I. C. 818.

A decree-holder fraudulently caused the sale in execution of his decree of certain immoveable property belonging to a minor. The minor brought a suit to set aside the sale and obtained a decree against the purchaser The auction-purchaser then sued the decree-holder to recover his purchase-money and the costs incurred by him in defending the suit brought by the minor. *Held*, that he being innocent of fraud, and having purchased in the *bona fide* belief that the property of the minor was saleable was entitled to recover the purchase-money, but not the costs.—*Makundi Lal* v. *Kausila*, 1 A. 568 (6 N. W. P 168 *distinguished*).

A purchaser of an occupancy holding sold in execution of a decree obtained by the mortgagee of the property took possession of it but having been afterwards ejected therefrom by the landlords sued to recover the purchase-money with interest *Held*, that under the present C. P. Code, the suit was incompetent —*Juranee Mahammed* v. *Jathi Mahammed*, 22 C W. N. 760: 46 I C 783 The sale must be set aside before a purchaser can recover back his purchase-money; *Balwant* v. *Balu*, 67 I C 360 *Nannu* v *Bhagwan*, 39 A. 144: 37 I. C. 9; *Banka* v. *Guru*, 28 C W N 20, *Manar Ali* v *Sarafuddin*, 27 C. W. N.183: 70 I. C. 606; *Ram Sarup* v. *Dalpat Rai*, 43 A. 60 When the sale is set aside by reason of irregularities committed by the decree-holder, the purchaser was entitled to bring a suit for recovery of the poundage-fee and interest on the purchase-money paid —*Parvathi* v *Govinda Swami*, 39 M. 803; *Najibulla* v. *Jainarain*, 36 A 529

Where the judgment-debtor is found to have had no saleable interest the remedy of the purchaser is not limited to an application under this rule, but he can maintain a suit for refund of purchase-money even though he did not ask to set aside the auction-sale; *Prasanna* v. *Ibrahim*, 36 C. L J 205. 41 I C. 924; *Asadulla* v. *Karam Chand*, 4 Lah 334 The weight of authority however is decidedly against this view (*vide* the cases noted above)

" Any person to whom the money has been paid."—This includes a decree-holder who has obtained a rateable share of the sale proceeds under s 73 C. P. Code.—*Kishunlal* v. *Muhammad*, 18 A. 383.

Appeal and Revision.—An order under this rule for refund is not a decree, and no appeal therefore lies; *Lingam Krishna* v. *Jagani Venkataswamy*, 3 L. W. 105: (1916) 1 M. W. N. 109: 33 I. C. 285; but is capable of revision under s. 115, *Kunhamed* v. *Chathu*, 9 M. 487; *Lingam Krishna* v. *Jagani Venkatasawamy*, 3 L. W. 105: 33 I. C. 215.

Limitation.—Under Act. 181 of the Limitation Act, the period of limitation for an application under this rule is 3 years from the accrual of the right.—*Girdhari* v. *Sital*, 11 A 372.

A suit under s. 315 of the old Code brought by an auction-purchaser for a refund of his purchase-money was governed by Art. 120 of the Limitation Act, and the period was 6 years from the accrual of the right.—*Nilkanta* v. *Imamsahib*, 16 M. 361; *Sidheswari* v. *Goshain*, 35 A. 410.

"With or without interest."—When a person claims more than he is entitled to the Court can refuse interest —*Moulvi Abdul Hye* v. *Macrae*, 23 W. R. 5; *Nafar Chander* v. *Gopal Chandra*, 19 C. L. J. 358. When it is proved that the purchaser has contributed to the loss he has sustained, no interest should be allowed.—*Kunhi* v. *Ferayil*, 8 M 103. While setting aside a sale the Court has power under this rule to direct the decree-holder to refund the purchase-money with interest for the period during which the decree-holder had use of the money.—*Maharaja Bahadur Singh* v. *A. H. Forbes*, 33 C. L. J 176 P. C.: 25 C W. N. 366.

Certificate to Purchaser.

94. Where a sale of immovable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale become absolute.

COMMENTARY.

This rule corresponds to the first part of s. 316 of the C. P Code, 1882, with some additions and alterations. The latter part of the old section has been embodied in section 65 of this Code. *This rule is to be read with s 65, where all the cases bearing upon this rule have been noted.*

The word "*specifying*" has been substituted for the word "stating" which occurred in the old Code, and the words, "*such certificate shall bear date the day on which the sale became absolute,*" have been added These words have been added adopting the view expressed in 30 A 390. In 3 B. 433 and in 17 B 228, a contrary view was expressed

Scope of s. 316 of the C. P Code, 1882, examined in *Bhowani Koer* v. *Mathura Prasad*, 7 C L J 1.

Sale Certificate.—A sale certificate merely records an accomplished fact, and states what has been sold; it does not create title but is merely evidence of title; *Basir Ali* v *Hafiz Nazir*, 43 C 124, 129; *Promatha* v. *Sourab Dasi*, 21 C. W. N. 1011: 47 C. 1108: 58 I C. 327.

"The Court shall grant a certificate."—The provisions of this rule are mandatory, and a Court has no power to refuse a sale certificate to an auction-purchaser; *Baikunth* v. *Narinda Sundari*, 3 Pat. L W. 76 1 Pat. L. J. 446: 38 I C. 576.

Construction of Sale Certificate.—The certificate of sale is not conclusive as to the property sold at execution sale. In order to determine the title of the purchaser, it is to be seen what was actually offered for sale and bid for What was offered for sale is to be ascertained by the decree, by the order of the Court and the sale proclamation and if the order has been carried out and the property sold accordingly, that sale and nothing else must be taken to have been confirmed, whatever words of description referring to the transaction may have been inserted in the order confirming it or the certificate stating it.—*Balrant* v. *Hirachand*, 27 B 334 (22 W R 181 and 408, 14 W. R. 435, and 15 W. R 546, *referred to and distinguished*) *See* also, *Assamathem Nessa* v *Lutchmuput*, 4 C. 154.

Where a purchaser buys property in a Court auction, he buys what the Court purports to sell, and when the Court gives him a certificate that the property which he buys is sold to him without any limitation, it is not open to the Court, in a subsequent proceeding, to go behind the sale certificate and say that what purports to have been conveyed was not conveyed, *Natesa Patter* v. *Ganapathi*, 52 M. L. J. 68· A I. R 27 Mad 311

A certificate of sale issued by a Court is a document of title, and it ought not to be lightly regarded or loosely construed. Where, therefore, in pursuance of such a certificate the purchaser is placed in possession of the property described therein, and there is no ambiguity in the words of the certificate, it is not within the competency of the Court, in a suit brought by the judgment-debtor, to construe the certificate by reference to other documents, and to place a limitation upon the extent of the property to which it refers, as to do so would defeat the object of the certificate; *Ramabhadra* v *Kadiriyasami*, 63 I. C. 709: (1921) M. W. N 374: 14 L W 125 P C.

The terms "right, title and interest of the debtors" as used in the sale certificate and in the order confirming the sale must be construed with reference to the circumstances under which the suit was brought and the true meaning of the decree under which the sale took place as well as all proceedings leading up to sale.—*Akhoy Kumar* v. *Bejoy Chand*, 29 C. 813, 7 C W N 54 (7 C 357 *referred to*).

Mere inaccuracy of language of mis-description will not vitiate a sale certificate The intention of the parties must be booked to.—*Maula Buksh* v. *Kuruck Lall*, 7 W R 245; *Manson* v. *Golam Kebria*, 15 W. R. 400, *Tara Nath* v. *Joy Soonduree*, 21 W. R. 93.

Where a sale certificate declares the sale of the rights of a particular party in land of which the identity is not in dispute, the mere mis-description of the rights so transferred does not constitute a difficulty in the way of giving the purchaser possession.—*Kuleemooddeen* v. *Ashruf Ali*, 19 W. R. 276.

The Court in construing a sale certificate refused to go into facts lying behind it for the purpose of contradicting its terms.—*Lalla Bissessur* v. *Doolar Chand*, 22 W. R. 181; *Pearee Mohun* v. *Gosto Behary*, 26 W. R. 104.

Where a sale certificate, though containing errors, was accurate as to any part of the description of the subject of sale, and could be used to identify it, with the assistance of extraneous evidence, such evidence could be received to show what was intended to be dealt with.—*Maleebun* v. *Raseeda*, 25 W. R. 401.

Variance between Proclamation of Sale and Sale Certificate.—Where there is a discrepancy between the descriptions in the sale proclamation of what is to be sold and the certificate of what has been sold, the descriptions in the proclamation of sale are to be taken as of superior authority in dealing with the conflicting claims of innocent third parites whose rights are affected by the variation.—*Uma Charan* v. *Gobind*, 1 C. L. R. 460; *Thakur Barmha* v. *Jiban Ram*, 19 C L. J 161 P. C. 41 I. A. 38: 41 C 590; *Rama Chandra* v. *Haji Kassim*, 16 M. 207. Similarly, where the proclamation stated that the entire interest of five brothers in a mortgaged property was to be sold, and by a mistake on the part of the officer conducting the sale, the sale certificate omitted to mention the names of four of them, it was held that what was sold to the purchaser was the property as described in the proclamation, and not the property as erroneously described in the sale certificate; *Balvant* v *Hira Chand*, 27 B. 334; *Christian* v. *Prasad*, 4 Pat. 760 90 I C. 501: A. I. R. 1925 Pat. 615.

Statement of Jumma in a Sale Certificate, How Far Admissible in Evidence.—Any statement as to rent payable for a holding, made by a person in a sale certificate, which was obtained by him as purchaser of the holding, at a sale in execution of a decree against the former tenant, being in the nature of an admission by him or his predecessor in the title, cannot be used as evidence on his behalf, as such a statement does not come within the exceptions to s. 21 of the Evidence Act —*Ramani Pershad* v. *Mahant Adaiya Gossain*, 31 C 380.

Amendment of Sale Certificate.—A Court has an inherent jurisdiction to amend a sale certificate which incorrectly describes the property actually sold.—*Nasiruddin* v. *Sayudur Rahman*, 19 C L J 209; *Bujha Ray* v. *Ram Kumar*, 26 C 529, *Saddo* v *Bansi*, 23 A. 476; *Raja of Kalahasti* v. *Maharaja of Venkatagiri*, 38 M. 387; 25 M. L. J 198 · 21 I. C. 389.

A Court has inherent power to correct a sale certificate, where it appears that the sale certificate includes properties which were not sold, though advertised for sale —*Gobinda Chandra* v *Abhoy Charan*, 12 C. W. N. 1027.

After the confirmation of sale, if it is found by the Court that there was a mistake in its own action, the Court may amend its order and grant a fresh sale certificate —*Mohesh Chandra* v. *Hari Mohan*, 7 C W N 388

Where after the confirmation of sale an error is stating the boundaries given in the sale certificate is discovered, the Court has ample authority as a Court of justice, equity and good conscience to rectify the error and to

mould the relief accordingly as between the original parties or their rep sentatives in interest; *Nandi Lal* v. *Jogendra*, 29 C. W. N. 403: 82 I. 294: A I R. 1924 Cal. 881.

No appeal lies against an order granting a review and directing amendment of a sale certificate to correct the boundaries of the land so the only question in such a case being whether the certificate given to t auction-purchaser give a right description of the property sold, and one relating to execution discharge or satisfaction of the decree within t meaning of s 244, C P Code, 1882 (s 47).—*Bujha Roy* v. *Ram Kum* 26 C. 529: 3 C. W N. 374 (1 C. W. N. 658 *approved*). *See* also, *Ma mod* v. *Locke*, 20 M 487. No appeal lies from an order refusing to ame a sale certificate.—*Saddo Kunwar* v. *Bansi Dhar*, 23 A 476 (26 C 5 and 18 A 36 *referred* to).

No appeal lies against an order refusing to grant a sale certificate the decree-holder auction-purchaser; the question determined being not relating to the execution, discharge or satisfaction of the decree. T decree-holder, auction-purchaser, is a party to the suit, within the mea ing of s. 47.—*Jagarnath* v *Karick Nath*, 7 C. L. J. 436 (1 C. W. N 65 *applied*, 18 A 36 *not followed*: 27 C. 34 *followed*).

Registration of Sale Certificate.—Section 17 of the Registration Act cl. (xii) provides that the registration of a certificate of sale granted to th purchaser of any property sold by public auction by a Civil or Revenu Officer is optional. Under section 89 of the said Act, a copy of the certi ficate is to be sent by the Court to the Registering Officer.

A certificate of sale issued by a Court under s. 316, C. P. Code, 188 (Or. XXI, r. 94), if duly registered, takes effect, under section 50 of the Registration Act, 1877, against all unregistered incumbrances.—*Ramas* v. *Arunachala*, 7 M 248 (6 B. 193 *followed*). But See *Narasayya* v *Jungam*, 7 M. 418; and *Magan Lal* v. *Sakra Girdhar*, 22 B. 945.

Section 50 of the Registration Act, 1877, affects like documents which it is optional, as well as those which it is compulsory to register, and its effect is not modified by the fact that the subsequent registered purchaser buys with full notice of a prior unregistered incumbrance.—*Nalappa* v *Ibram Sahib*, 5 M. 73 (5 C 836 *discussed*).

Sale Certificate Cures All Irregularities.—All irregularities, though material, are cured by the certificate of sale.—*Balkrishna* v. *Masuma*, A 157: 9 I. A. 182; *Naqar* v *Bhaskar*, 10 B. 444.

What Passes at a Court Sale.—What passes to the purchaser at Court sale is the "right title and interest" of the judgment-debtor, whatever that interest may be, in other words, in the case of a Court sale, there is no warranty of title either by the decree-holder or by the Court. The purchaser buys the property with all risks and all defects in the judg ment-debtor's title except as provided by rr. 91 and 93, and in the absence of fraud, his only remedy is to recover back his purchase-money, where it is found that the judgment-debtor had no saleable interest in the pro perty at all, and he cannot by suit or application, obtain a refund in pro portion to the extent to which the judgment-debtor had no interest.—*D Ally* v. *Mohecooddeen*, 5 I. A. 116: 3 C. 806; *Shanto Chunder* v. *Nain*

Sukh, 23 A. 355; *Sundara* v. *Venkata*, 17 M. 228; *Moitheensa* v. *Apsa*, 36 M. 194: 12 I. C. 44; *Sobhagchand* v. *Bhaichand*, 6 B. 193.

Title of Purchaser Without Certificate.—A purchaser of immovable property at an execution sale can establish his title by evidence independently of the sale-certificate; the sale-certificate is not the title but merely the title-deed.—*Tantadhari* v. *Sundar Lal*, 7 C. L. J. 384 (27 B. 379, 2 A. 305 *followed*). *See* also, *Khabhari Singh* v. *Ram Prasad*, 7 C. L. J. 387, and *Brojo Nath* v *Joggeswar Baghi*, 9 C. L. J. 346.

A purchaser of immovable property at a Court-sale, who has been put into possession by the Court, has thereupon a complete title against all persons bound by the decree, notwithstanding that he has no certificate of sale, or one only which has not been registered.—*Shivaram Narain* v. *Ravji*, 7 B. 254 (21 W. R. 349 *followed*) *See* also, *Velan* v *Kumarasami*, 11 M. 296.

The order confirming a sale of immovable property in execution of a decree is sufficient to pass the title in the property to the purchaser, and its production is sufficient evidence of the purchaser's title. The production of the sale certificate is not essential.—*Tara Prasad* v. *Nund Kishore*, 9 C. 842; 12 C L R. 448; and *Doorga Narain* v. *Baney Madhab*, 7 C. 199 (207). *See* also, *Jagan Nath* v. *Baldeo*, 5 A. 305; *Kalee Dass* v. *Hur Nath*, W. R. (1864) 279; and *Khushal Pana Chand* v. *Bhimabai*, 12 B. 589

If it is admitted that the plaintiff purchased immoveable property at a Court-sale, he can recover without producing the certificate of sale.—*Sadagopa* v. *Jamuna Bhai*, 5 M. 54. *See* also, *Naigar Timapa* v. *Bhaskar Parmaya*, 10 B. 444; and *Muzaffar Husain* v. *Ali Husain*, 5 A 297.

The Term " Purchaser " Includes his Representatives.—When a sale in execution has become absolute, the Court can, under this section, grant the certificate prescribed therein to the representatives of a deceased purchaser. *Re Vinayak Narayan*, 24 B 120.

Limitation.—The provisions of Or XXI, r. 94, are mandatory, and it imposes a positive and imperative duty upon the Court in the matter of granting a sale certificate.—*Baikunt Misser* v. *Narinda Sundari*, 1 Pat. L. J. 446. The provisions of the Limitation Act do not apply to applications for a sale certificate. If the Court, therefore, fails to issue a sale certificate and the purchaser has in consequence to apply to the Court for a grant of the certificate the application may be made at any time.—*Kylasa* v. *Ramasami*, 4 M. 172; *Vithal* v *Vithojirav*, 6 B. 586.

Stamp on an Application for Sale Certificate.—An application by an auction-purchaser for a certificate of sale, need bear no Court-fee stamp, since by s. 316, C P. Code, 1882 (Or. XXI, r. 94), it is not even required to be in writing —*Hira Ambaidas* v. *Tekchand Ambaidas*, 13 B. 670.

See notes under s. 65

Delivery of property in occupancy of judgment-debtor.

95. Where the immovable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subse-

quently to the attachment of such property and a certificate in pect thereof has been granted under rule 94, the Court shall the application of the purchaser, order delivery to be made putting such purchaser, or any person whom he may appoint receive delivery on his behalf, in possession of the prop and, if need, be, by removing any person who refuses to vacate same. [S. 3

COMMENTARY.

This rule corresponds to s. 318, C. P. Code, 1882, with some v changes only The word "*immovable*" has been added before word "property," the word "*where*" has been substituted for the "when" and the word "*such*" has been substituted for the word "t after the word "putting." These are the only changes introduce this rule.

"Subsequently to the attachment."—Or. XXI, r. 95 provides th purchaser shall be entitled to be put in possession of the property bo by him, if it is in the possession of a person claiming under a title cr by the judgment-debtor subsequent to the attachment of the proper *Cooverji Hirji* v. *Dewsey Bhoja*, 17 B. 718 (722). He is not, how entitled to obtain summary possession from the lessee *pendenti li* the judgment-debtor and must bring a suit for possession.—*Santaw* v. *Kedar Nath*, 3 C. W. N. 12

Purchaser of Undivided Share.—The purchaser of a share in divided joint family property, cannot be put in joint possession o share purchased by him with the other members of the family; his per remedy is by a suit for partition.—*Balaji Anant* v. *Ganesh Jana* 5 B. 499; *Maruti* v *Lila Chand*, 6 B. 564; *Yelumalai* v. *Sriniva* M. 294. *See* also, *Mandavilla Ramarow* v. *Sivanarayana*, 25 M I 153. 9 L. W. 81. 49 I C 629. But see, *Indrasa* v. *Sadu*, 5 B *note*; and *Cooverji Hirji* v. *Dewsey Bhoja*, 17 B. 718 (721), whe has been held that when the whole right of the family in the pro have been sold, the purchaser is entitled to possession of what h bought, without any necessity for partition.

Putting the Purchaser in Possession.—*Khas* or actual possessi contemplated by this rule A Court has jurisdiction to issue an for *khas* possession, although in the first instance it passed an ord giving formal possession —*Hur Kishore* v. *Sudoy Chunder*, 17 W 80 (9 W R. 454; and 12 W R. 285, *followed*).

Successive Applications.—If one application proves infruct another application may be made if it be within the period of limit prescribed by Art. 167 of the First Schedule of the Limitation A *Raghunandan* v *Ramcharan*, 49 I. C. 150, F. B.

Separate Suit for Possession.—A decree-holder who purchases sale *held* in execution of his money or mortgage-decree, the propert the judgment-debtor, is in the same position as an ordinary purch and if after confirmation of sale he fails to obtain possession from

judgment-debtor, he may claim possession either under this rule or r. 96 or by a separate suit and s. 214, C. P. Code, 1882 (s. 47), is not a bar to such a suit.—*Bhagwati* v. *Banwari Lal*, 31 A. 82, F. B. (30 A. 72 *overruled*: 27 C. 34: 27 M. 740 *dissented from;* 6 C. L. J. 749 *followed*). In this Full Bench case all the rulings of the several High Courts have been referred to, considered and discussed *See* also, *Chotharam* v. *Mussammat Karman Bai*, 8 P. R. 1918 44 I. C 169; *Buddhu* v. *Bhagirathi*, 40 A. 216; *Sashi Bhusan* v. *Radha Nath*, 19 C. W. N. 835, *Goba Nathu* v. *Sakka Ram*, 44 B. 977; *Sridhar* v. *Jogeshwar*, 4 Pat. L. J. 716.

An auction-purchaser, even when he is the decree-holder himself is not bound under this rule to apply for recovery of possession of the property but may maintain a separate suit for recovery of possession of the property purchased.—*Panchanan* v *Sukhamoy*, 50 I. C. 299.

A suit by an auction-purchaser, to obtain possession of land, the subject-matter of his purchase, will lie when it is shown that an attempt has been made to obtain possession in execution proceedings, and that such attempt has been unsuccessful —*Iswar Pershad* v. *Jai Narain*, 12 C. 169 (10 C. L. R. 258 *explained*). *See* also, *Seru Mohun* v. *Bhagoban Din*, 9 C. 602: *Balvant Santaram* v. *Babaji Bin*, 8 B. 602. *Kishori Mohun* v. *Chunder Nath*, 14 C. 644; *Sevu* v. *Muttu Sami*, 10 M. 53; *Shankar* v. *Narsingrav*, 22 B 667; and *Sheo Narain* v *Nur Mohammad*, 29 A 463: 4 A. L. J. 434.

After formal possession, a suit is maintainable for actual possession, and not barred by s. 47. The limitation applicable is that governing suits and not execution proceedings.—*Jagannath* v. *Milap Chand*, 28 A. 722: 3 A. L. J. 504

Limitation.—The period of limitation for an application by the purchaser for delivery of possession is three years from the date when the sale becomes absolute under Act 180 of the Limitation Act. The period of Limitation for a suit for delivery of possession is 12 years under Art. 138.

Effect of Formal Possession in Saving Limitations in Suits for Actual Possession.—Symbolical possession does not amount to dispossession as contemplated by s. 335, C P. Code, 1882 (Or XXI, rr. 97, 99 103).—*Ibrahim Mullick* v. *Ram Jadu*, 30 C 710.

Where possession of property purchased at an auction-sale in execution of a decree is formally given by the Court under s. 318, C. P Code, 1882 (Or. XXI, r. 95), although the actual possession may remain with the judgment-debtor, the date of the granting of such formal possession forms, as against the judgment-debtor, a fresh starting point for limitation in respect of a suit, for possession of the property sold brought by the auction-purchaser or his representative The period of limitation for such a suit is 12 years from the date when the auction-purchaser obtains symbolical possession.—*Hari Mohun* v *Babur Ali*, 24 C. 715, *Mangli Prasad* v. *Debidin*, 19 A 490, *Narain Das* v. *Lalta Prasad*, 21 A 269, *Jagannath* v. *Milap Chand*, 28 A. 722 3 A. L J. 504, *Juggobundhu* v. *Ram Chunder*, 5 C 584; *Juggobundhu Mitter* v *Purnanund*, 16 C. 530, F. B. (10 C 402 *overruled*) (This decision in effect also overrules the

case reported in 2 B. L. R. Ap. 29: 24 W. R. 419-*note*). *See also, Mahadeo* v. *Parashram*, 25 Bom. 358; and *Gopal* v. *Krishna Rao*, 25 Bom. 275, where it has been further held that Arts. 136, 137 and 138 of the Limitation Act refer to cases where no possession (formal or actual) has been obtained through the Court; Art 136 applies to a private purchaser from a person not in possession; Art. 137 applies to an auction-purchaser of the rights of a person not in possession; Art. 138 applies when the actual purchase is made of the rights of a judgment-debtor, who is in possession at the date of the sale; and Art. 144 applies when an auction-purchaser or his assignee has obtained formal possession, but is disturbed by the judgment-debtor or his heirs who have continued in actual possession

In cases where the judgment-debtor is in actual possession, the purchaser ought to take actual possession and mere symbolical possession will be of no avail, and it will not give him a starting point for the purpose of Limitation in a suit to recover possession.—*Shridhar* v. *Ganapati*, 43 B. 559, 51 I C. 72 But see, *Bhulu* v. *Jatindra*, 1923 Cal. 138: 27 C W N. 24.

The auction-purchasers having been resisted in obtaining possession of the property purchased by a person claiming under a mortgage from the judgment-debtor, sued for possession by avoidance of the mortgage, alleging that the same was fraudulent and collusive. *Held*, that the law of limitation governing the suit was not Arts. 91 and 95, but Art. 138 of the Limitation Act, 1877.—*Uma Sankar* v. *Kalka Prasad*, 6 All. 75

Art. 138, and not Art 136 of the Limitation Act, is applicable to a suit brought by the assignee of an auction-purchaser to obtain possession of the land.—*Arumuga* v *Chokalingan*, 15 M. 331. Followed in *Pullaya* v *Ramayya*, 18 Mad. 144 Approved in *Sati Prasad* v. *Jogesh Chandra*, 31 Cal. 681, F B · 8 C. W. N 476, F. B. (23 Cal. 49 *disapproved*) *See also*, *Venkata Lingam* v *Veerasami*, 17 Mad. 89 (14 C 611, and 2 C. 145 *followed*)

See also, notes under Order XXI, rule 96.

Application for Possession is a Step-in-aid of Execution.—An application by a decree-holder to be put in possession of the property which he purchased in execution of his decree, is a step-in-aid of execution within the meaning of Art 182 (5) of the Limitation Act.—*Sanatoola* v. *Raj Kumar*, 27 C 709: 4 C W. N. 681. *See also*, *Moti Lall* v *Makund Singh*, 19 A. 477; *Bhakwati* v. *Banwari*, 31 A. 82, F. B.; *and Prem Krishna* v. *Juramoni*, 13 C. W. N. 691 (10 C. W. N 28 *followed*; 27 Cal 709 *referred to*).

Proceedings Taken by a Purchaser (Decree-holder) under this Rule. Whether Comes Within the Meaning of Section 47.—Section 47 of the C. P. Code, has no application to a suit brought by a decree-holder (who has with the Court's permission purchased the judgment-debtor's property) for recovery of possession of that property on the strength of the sale to him. Nor is such a suit barred because the plaintiff had failed to avail himself of the summary remedy provided by r. 95.—*Chotha Ram* v. *Mussammat Karman Bibi*, 8 P. R. 198: 44 I. C 169

The Effect of Objection being Disallowed.—The word "disallowed," in this rule has no reference to an order passed on an appeal, but refers to the disallowance of the objection by the Court before which the proceedings under this rule are taken.—*Mahomed Hossein* v. *Purundur Mahto*, 11 C. 287.

An objection by a judgment-debtor to a sale in execution of a decree on the ground that the property which was the subject of the sale was not legally saleable, is not a matter which can be entertained under this rule so as to afford a ground for setting aside the sale on account of material irregularity in publishing or conducting it.—*Ram Chaibar* v. *Bechu*, 7 A. 641.

An application by an auction-purchaser to set aside a sale on the ground of his having been deceived as to the extent of the estate sold, does not fall within the provisions of this rule or r. 91, and in the absence of a case falling within those rules, r. 92, requires that the sale should be confirmed.—*Brij Mohun* v. *Rai Umanath*, 20 C. 8, P C. *See* also, *Khetter Nath* v. *Faizuddin*, 24 C. 682, where it has been held that, unless a sale is set aside under rule 89 or rule 90 the Court is bound to confirm the sale under rule 92.

The confirmation of a sale is no bar to an application by the judgment-debtor to have it declared that in execution of the decree the property which had been sold could not be sold; that he had no disposing power in it, and therefore the sale passed no interest to the purchaser, and the enquiry which should have to be made upon an application like the would be an enquiry under the provisions of s 244, C P. Code, 1882 (s. 47), uncontrolled by rules 90 and 93.—*Durga Churn* v. *Kali Prosonno*, 3 C. W N. 586: 26 C. 727 (8 A. 146 and 24 C. 355 *referred to*)

Appeal Against Orders under this Rule.—The Patna High Court has held that no appeal lies from an order under this rule, *Haji Abdul Ghani* v. *Raja Ram*, 1 Pat. L. J. 232 F B The decisions of the Calcutta High Court are conflicting on this point; in some cases it was held that an appeal lies (*Madhu Sudan* v *Gobinda*, 27 C 34; *Sanatoola* v. *Raj Kumar*, 27 C. 709), while in others it was held that it does not lie (*Ram Narain* v. *Bandi Prasad*, 31 C. 737; *Hari Charan* v *Mon Mohan*, 18 C W. N 27; *Sashi Bhusan* v. *Radha Nath*, 19 C W N 835 In the Bombay High Court it has been held that an appeal lies, *Sada Shiv* v. *Narayan*, 35 B. 462.

Revision.—Where the decree-holder or auction-purchaser is resisted in taking possession, and he applies again for delivery of possession without making an application under r. 97, and such application is refused by the lower Court · *Held*, that the High Court will not interfere in Revision where the party has another remedy —*Raghunandan* v. *Ramcharan*, 4 Pat. L J. 91 49 I. C. 150 F B

96. Where the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under r. 94, the Court shall on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property,

Delivery of property in occupancy of tenant.

and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser. [S. 319.]

COMMENTARY.

Alterations.—This rule corresponds to s. 319 of the C. P. Code, 1882 with some verbal alterations.

The words "*on the application of the purchaser*" have been added, after the words "*Court shall*"; the word "*thereof,*" which occurred in the old section, after the word "delivery," has been omitted; and the words "*or other customary mode*" have been substituted for the words "or in such other mode as may be customary." These are the only changes introduced by this rule.

Delivery of Possession to Purchaser.—Symbolical possession is contemplated by this rule. Such symbolical possession is given only in cases when the party in actual posession is entitled under this rule to remain in such possession. It should not be confounded with cases where a party is entitled to actual possession but obtains only what is called a paper delivery, *i.e.*, where he gets no possession at all.—*Govindasami v. Pethaperuma*, 44 I. C. 839.

Possession Otherwise than by Court.—Section 264 of Act VIII of 1859 (which corresponds with this rule) did not limit the applicant to any particular manner of obtaining possession; and it contained nothing to prevent the purchaser at an execution sale from obtaining possession, if he can, without the assistance of the Court.—*Obhoya Churn v. Rajendra Coomar*, 22 W. R. 406.

Possession actually taken by a person having a right to it is not the less effective, as perfecting his title, by reason of an irregularity in taking it. Subsequent ouster will give rise to a new cause of action.—*Lilla v. Annaji*, 5 B. 387. *See* also, *Bandu v. Naba*, 15 B. 238. *See also*, *Sitgram v. Mehcenlal*, 2 Agra 235.

"A certificate in respect thereof has been granted."—It is not incumbent on the Court to put a purchaser into posesssion until he had his certificate of sale.—*Tukaram v. Satwaji Kanduji*, 5 B. 206, *Basappa v. Morya*, 3 B. 433.

"Order delivery to be made."—Under ss. 318 and 319, C. P. Code, 1882 (Or. XXI, r. 95, 96), the Court executing the decree can only deliver possession in accordance with and over the property specified in the sale certificate. Those sections do not contemplate an enquiry into the question of specific shares of property *held* by the several judgment-debtors and not set out either in the sale proclamation or sale certificate; and the Court has therefore no jurisdiction to direct delivery of possession contrary to the terms of the sale certificates.—*Ghulam Shabhia v. Dwarka Prasad*, 18 A. 163.

Delivery of possession under r. 95 and dispossession of tenant of the judgment-debtor thereunder, is not dispossession in due course of law

within the meaning of s. 9 of the Specific Relief Act.—*Muluk Patooni* v. *Bharat Chandra*, 12 C. W. N. 691.

Effect of Delivery of Formal Possession on the Question of Limitation.—A formal possession given by a Civil Court under an execution, operates in point of law and fact as a complete transfer of possession as between the parties to suit; but such possession has no such operation as against third persons who are not parties to the suit.—*Lockessur Koer* v. *Purgun Roy*, 7 C. 418. *Dhondiba Krishnaji Singh* v. *Ram Chandra*, 5 B. 554; *Runjit Singh* v. *Bunwari Lal*, 10 C. 993 (5 C. 584 F. B. *explained*). *See* also, *Krishna Bhupati* v. *Rama Murti*, 18 M. 405. But a third party will be affected, if such delivery of possession takes place in his presence and to his knowledge and he does not obstruct —*Kocherlakota* v. *Vadrevu*, 27 M. 262 But see, *Mahadeo* v *Janu*, 36 B. 376: 14 Bom. L. R. 115.

Where possession of property purchased in execution sale is formally given by the Court under rr. 95 and 96, although the actual possession may remain with the judgment-debtor, the date of granting such formal possession forms, as against the judgment-debtor, a fresh starting point for limitation in respect of a suit, for possession of the property sold, brought by the auction-purchaser or his representative.—*Mangli Prasad* v. *Debi Din*, 19 A. 499; *Narain Das* v. *Lalta Prasad*, 21 A. 269; *Hari Mohun* v. *Babur Ali*, 24 C. 715; *Jogobundhu* v. *Purnanund*, 16 C. 530, F. B. (10 C. 402 *overruled*); *Nasiruddin* v *Sayudur Rahman*, 19 C L. J. 209; *Jagobundhu* v. *Ram Chunder*, 5 C. 584, F. B., *Umbika Churn* v. *Madhub*, 4 C. 870: 4 C. L. R. 35; *Shama Churn* v. *Madhub Chundra*, 11 C. L. R. 93; *Gopal* v. *Krishna Rao*, 25 B. 275; *Mahadeo* v *Parashram*, 25 B. 358. But symbolical possession given under this rule does not, as against third parties, entitle the person to whom such possession has been given to count a fresh period of limitation from the date of the possession —*Doyanidhi* v. *Kelai Panda*, 11 C. L. R 395, *Kishori Lal* v *Lala Shib Lal*, 1 C. W N. 343; *Ram Chandra* v. *Ravji*, 20 B. 351, *Narain Das* v. *Lalta Prasad*, 21 A 269

See also, notes under Or. XXI, r 95.

Limitation for an Application for Delivery of Possession under this Rule.—See *notes under Or XXI, r 95.*

An application under this rule is a step-in-aid of execution —*Prem* v. *Juramani*, 13 C. W. N 694.

Appeal from Orders under this Rule.—See *notes under Or XXI, r.* 95.

RESISTANCE TO DELIVERY OF POSSESSION TO DECREE-HOLDER OR PURCHASER.

Resistance or obstruction to possession of immovable property.

97. (1) Where the holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same. [Ss: 328; 334.]

COMMENTARY.

This rule lays down the provisions of ss. 328 and 334 of the C. P. Code, 1882 The provisions of those two sections, which were almost similar, have been amalgamated in this rule in a more concise form Section 328 of the C. P. Code, contained the procedure which was to be followed in cases of obstruction, or resistance to delivery of possession to decree-holder; and s 334, C. P Code, contained the procedure in case of obstruction or resistance to auction-purchaser in obtaining possession of immovable property. But as the procedure in both the cases was almost similar, therefore the provisions of the above two sections have been embodied in this rule in an amended form, the retention of two separate sections being considered unnecessary. The wordings of the old sections have been changed, and they have been framed in such a way as to include the provisions contained in both the sections

Scope of the Rule.—This rule provides a summary remedy but it does not preclude an aggrieved party from proceeding by way of regular suit.—*Ballav* v *Gulab*, 57 I. C. 177

"Holder of a decree for the possession of immovable property."—A decree passed under s 9 of the Specific Relief Act is a decree for possession within the meaning of r 97, and there is nothing in that rule which prevents its being applicable to such a decree; *Banjoisi* v. *Sarasamman*, (1926) M W N 163, 92 I. C. 61 A I. R. 1926 Mad. 353.

Applicability of the Rule.—This rule does not apply unless the auction-purchaser has made an attempt *to obtain possession* of the property either through Court or out of Court, and he is resisted or obstructed in obtaining possession, *Sobha* v *Tursi*, 46 A. 693, 696: 83 I. C. 923: A. I. R. 1924 All. 495

Regular Suit.—This rule does not make it obligatory on a decree holder or purchaser, who is obstructed in obtaining possession of the property, to pursue his remedy under this rule, and the *failure* of the decree-holder or purchaser to avail himself of the remedy under this rule does not prevent him from proceeding by a regular suit.—*Balvant* v. *Babaji*, 8 B. 602, *Trimbak* v *Narayan*, 8 B. 491. But if he applies for the summary remedy under this rule and fails, the order against him is conclusive unless he brings a suit to establish his right to possession as provided by r 103. Such a suit must be brought within one year from the date of the order —*Sobha* v *Tursi*, 46 A. 693: 83 I. C. 923: A. I. R. 1924 All. 495.

Limitation.—The application under this rule has to be filed within 30 days from the date of the resistance or obstruction as provided by Art. 167 of the Limitation Act.

Fresh Application for Delivery of Possession.—It has been held by the High Courts of Madras and Patna that where a decree-holder or

auction-purchaser, who is obstructed or resisted in obtaining possession, omits to apply under this rule within 30 days from the date of resistance or obstruction, he is entitled to make a fresh application for delivery of possession.—*Muttia* v. *Appasami*, 13 M. 504; *Raghunandan* v. *Ram Charan*, 4 Pat L J. 94: 49 I. C. 150 On the other hand, it has been held by the High Courts of Bombay and Allahabad that he is not entitled to make a fresh application and that his only remedy is by a regular suit; *Vinakrao* v. *Devrao*, 11 B. 473; *Kesri* v. *Abdul Hasan*, 26 A 365.

98. Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the Judgment-debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may extend to thirty days. [Ss. 329, 330 and 334.]

Resistance or obstruction by judgment-debtor.

COMMENTARY.

Alterations in the Rule.—This rule, embodies the provisions contained in ss. 329, 330 and 334 of the old Code, in a concise form, Section 329 of the old Code contained the procedure in cases where the obstruction or resistance was occasioned by the judgment-debtor or by some other person at his instigation; and s 330 of the old Code contained the procedure which was to be adopted in cases where the judgment-debtor or some person at his instigation and without any just cause insisted and continued to offer obstruction or resistance to the delivery of possession.

The words "*without prejudice to any penalty to which such judgment-debtor or other person may be liable under the Indian Penal Code or any other law for such resistance or obstruction*" which occurred in s. 330 have been omitted from this rule, probably on the ground that retention of those words are unnecessary, as independently of those words it would be an offence under the I P. Code. The words "*to be detained in the civil prison*" have been substituted for the words, "commit the judgment-debtor or such other person to jail" which occurred in s 330.

Resistance or Obstruction by Judgment-debtor.—This rule contemplates two cases, namely, where the obstruction is occasioned, *without any just cause*, (*i*) by the judgment-debtor, or (*ii*) by some other person at his instigation Where the obstruction is caused by a person other than the judgment-debtor, the Court has no jurisdiction to pass an order under this rule, unless it is satisfied that the person was acting at the instigation of the judgment-debtor.—*Ezra* v. *Gubbay*, 47 C. 907 60 I C 969; *Mancharam* v. *Fakirchand*, 25 B 478, 486. An application to remove obstruction caused to delivery of possession to a decree-holder purchaser, by a purchaser from the judgment-debtor of the attached property after attachment, must be dealt with under this rule because such purchaser. *Kupanna* v. *Kumara*, 34 M 450: 7 I C 418

" Is resisted or obstructed."—No particular kind of resistence or obstruction is necessary, but there must be some overt act of opposition to the Court's officers on behalf of some one who is actually present—*Mancharam v. Fakir Chand*, 25 B 478, 485. *See also*, *Mahabir Prasad v. Parma*, 14 A. 417

" In obtaining possession."—Both tangible physical possession and constructive possession are meant. Possession does not cease to be real or actual because enjoyed through tenants, servants or members of one's family.—*Mancharam v. Fakir Chand*, 3 Bom. L. R. 58. *See also*, *Brijabala v. Gurudas*, 33 C 487: 3 C L. J. 293

Renewal of Resistance of Obstruction to Execution—Fresh Cause of Action.—A decree-holder who is resisted in the execution of the decree for ejectment may apply for possession again and if again resisted may complain against the second resistance —*Baranagore Jute Factory Co., Ltd. v. Raj Kumar*, 13 C. W N 724 (11 B 473 *referred to*; 5 M. 113 and 13 A. 233, *referred to on the question of limitation*).

Appeal.—An order allowing or refusing delivery of possession after an execution sale is not an order under s. 47, C. P. Code even when the decree-holder is the auction-purchaser and as such no appeal lies. A second appeal lies to the High Court against a decree of the Appellate Court passed without jurisdiction.—*Aduram Haldar v. Nakuleswar Rai*, 29 C. L J. 48: 49 I. C. 137. An order passed against the decree-holder auction-purchaser under Or XXI, r 98 is not appealable, even if questions relating to execution are decided therein; *Surendra v. Satyendra*, 92 I. C. 544: A. I R 1926 Cal. 985

An appeal made under Or. XXI, r. 97 is not appealable to the District Court and is consequently not open to second appeal.—*Meghu Singh v. Basudeva Jha*, 32 I C 383.

Resistance or obstruction by *bona fide* claimant.

99. Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application. [S. 331, Para. 1.]

Presidency Small Cause Court.—A small Cause Court has jurisdiction, in execution of a decree in ejectment, to act under this rule and remove any improper obstruction to the carrying out of its own order.—*Mahomed Ghouse v. Mohideen*, 45 M L J. 66: 73 I. C. 985: A. I. R 1924 Mad. 74.

COMMENTARY.

Alterations in the Rule.—This rule corresponds to para 1 of s 331 of the C. P. Code, 1882, with some alterations and omissions. The words "*the Court shall make an order dismissing the application*" have been substituted for the words " the claim shall be numbered and registered as

a suit between the decree-holder as plaintiff and claimant as defendant," which occurred in the old section. The second, third and fourth paras of section 331, which ran as follows, have been omitted:—

"and the Court shall, without prejudice to any proceedings to which the claimant may be liable under the Indian Penal Code, or any other law for the punishment of such resistance or obstruction, proceed to investigate the claim in the same manner, and with the like power, as if a suit for the property had been instituted by the decree-holder against the claimant the provisions of Chapter V,

"and shall pass such order as it thinks fit for executing, or staying execution of, the decree.

"Every such order shall have the same force as a decree, and shall be subject to the same conditions as to appeal or otherwise"

Scope of the Rule.—The object of the omission is that there will now only be a summary enquiry with regard to the claims of third parties; and they have been allowed the privilege of bringing a regular suit against any order that may be passed against them under this rule (*Vide* rule 103). Under s. 331 of the old Code, a claim by a third party had to be tried as a regular suit and the order passed by the Court was a decree and was appealable. But under rule 103, the order passed under this rule shall be conclusive, subject to the result of the regular suit.

Resistance by Person Other than the Judgment-debtor.—Where in a suit brought by a plaintiff against two defendants, a decree is passed, by consent, against one of them only, the other defendants is not a judgment-debtor. He is a "person other than the judgment-debtor" within the meaning of this rule; *Jathavedan* v *Kunshu*, 30 M 72

A *proforma* defendant in possession of the property decreed and resisting delivery of its possession to the decree-holder is not a judgment-debtor and his claim should be enquired into under this rule *Har Nihal* v. *Shamji Mal*, 21 P W R 1910 64 P L R 1910 5 I. C. 809.

Where a person is entitled to the possession of a share after partition, and a commissioner is appointed to partition the share and to put him in possession of his share, resistance to such commissioner is resistance within the meaning of this rule,—*Kali Kumar* v. *Bramhanand*, 7 C. L J. 98 (16 M. 127, *followed*).

R. 99 contemplates an application by the decree-holder; a third party resisting the delivery of possession may apply under r 100—*Sukan Sing* v. *Baijnath*, 12 C. W N. 115.

"On his own account."—A tenant of the judgment-debtor is not a person claiming on his own account and can not obstruct the judgment-debtor's landlord in his obtaining possession *Jafferji* v. *Miyadin*, 46 B. 526, 64 I. C. 692 A I. R 1922 Bom 273, *Jai Ram* v. *Nawroji* 65 I. C. 212: 23 Bom. L. R 1316, but if the decree-holder landlord knew that the sub-tenant was in possession of the premises at the time of his suit and did not choose to make him party, he cannot claim possession against him in execution proceedings, but should seek his remedy by suit; *Ezra* v *Gubboy* 47 C. 907: 60 I. C. 969.

"Claiming in good faith to be in possession of the property."—The word "possession" as used in this rule is not limited to actual physical possession. It includes also constructive possession, such as possession by a tenant. Where premises sought to be recovered in execution are in occupation of tenants and the landlord of such tenants obstructs the effect executing decree, the claim of such landlord may be investigated under this rule.—*Mancharam* v. *Fakir Chand*, 25 B. 478 (14 B. 627: 22 B. 967: and 15 W. R. 70, *referred to*).

The investigation of claims under this rule is not limited to the fact of possession. Any question of title arising between the contending parties in connection with their right of possession may be finally determined in such investigation as in an ordinary action on ejectment.—*Maula Khan* v. *Gern Khan*, 14 B. 627. Referred to in *Mancharam* v. *Fakir Chand* 25 B. 478. Followed in *Mahip Rai* v. *Dwarka Rai*, 27 A. 453 (14 B. 627: 22 B. 967, *followed*: 10 C. 50, *not followed*) and distinguished in *Mahomed Isub* v. *Bashotappa*, 27 B. 302.

An investigation under this rule was limited to the fact of possession and was no bar to a subsequent suit brought to try the title to the land in dispute.—*Chinna Sami* v. *Krishna*, 3 M. 104.

In a proceeding under this rule, the *onus* is on the plaintiff to establish a *prima facie* case of possession, and it is then incumbent on the claimant to answer that case and show, if possible, a better title.—*Rakhal Chura* v. *Watson and Co.*, 10 C. 50. Not followed in *Mahip Rai* v. *Dwarka Rai*, 27 A. 453; in *Mancharam* v. *Fakir Chand*, 25 B. 478, p. 490; and in *Bapoojirao* v. *Fattesing*, 22 B. 967. In all these cases a contrary view has been taken; but they have been overridden by the present rule.

Dispossession by decree-holder or purchaser.

100. (1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same. [Ss. 332 and 335.]

***Bona fide* claimant to be restored to possession.**

101. Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property. [Ss. 332 and 335.]

COMMENTARY.

These two rules correspond to section 332 and 335 of the C. P. Code 1882. The provisions contained in those sections have been summarised in

these two rules with several alterations and omissions. The language of the old sections has been changed, but the procedure under the old and new law is the same.

The last paras of ss. 332 and 335 have been omitted from these rules and have been inserted in rule 103.

Rules 100 and 101.—These rules are to be read together.

Object and Scope of the Rules.—These two rules refer to events which may arise subsequent to the delivery of possession; and the preceding rules lay down the procedure to be adopted in cases of resistance or obstruction in the course of delivery of possession

Under these rules if any person other than the judgment-debtor is dispossessed in delivering possession either to the decree-holder or to the auction- purchaser, then he may by an application under these rules obtain an order for restoration of possession, if he can satisfy the Court that he is in *bona fide* possession of the property on his own account, etc. His remedy is twofold: he can either apply under this rule or bring a regular suit or he may do both, that is, if he becomes unsuccessful in an application under these rules, he can bring a regular suit under rule 103

The object of rules 97, 99 and 100 is to give power to the Court where an attempt has been made to deliver possession and there is resistance or obstruction to give, after enquiry, a quick *summary* decision which should protect the public peace, prevent obstruction and terminate the execution proceedings subject to the result of a regular suit.—*Sharoda Proshad* v. *Roy Dhunput Singh*, 19 W. R. 221, *Mt. Zahooran* v. *Syad Mahomed*, 18 W. R 87; *Sri Nath* v *Annada Prosad*, 1 C W N. 192

"Is dispossessed."—Delivery of actual possession alone can constitute dispossession under this rule A landlord who is in possession through his tenant may be said to be dispossessed within the meaning of this rule if the decree-holder or purchaser takes delivery of actual possession of the land from the tenant —*Brajabala* v *Gurudas*, 33 C 487.

"He may make an application."—The applicant's remedy is twofold. He may either apply under this section for restoration of possession or bring a regular suit to establish his title under rule 103 Or he may do both, that is, if he does not succeed by an application under this rule, he can institute a regular suit.

Dispossession of Third Person by Decree-holder or Auction-purchaser.—For the meaning of the word "judgment-debtor" within the meaning of this section, see *Vasudeva Upadyaya* v. *Visvaraja Tirthasami*, 19 M 331 and *Jathavedan* v *Kunchu Achan*, 30 M 72, M. L J 433

"Judgment-debtor" includes representatives of the judgment-debtor and all persons who are bound by the decree —*Bhikhia* v *Birj*, 2 Pat L J. 478.

R. 99 contemplates an application by the decree-holder, and a third party resisting the delivery of possession of property to a decree-holder cannot apply under that rule for the investigation of his claim, but he may do so under r. 100, after he has been dispossessed —*Sukhan Singh* v. *Baij Nath*, 12 C. W. N. 115.

A decree in a possessory suit under sec. 9 of Act I of 1877 is a within the meaning of rule 100; and any person dispossessed in ex of such a decree can apply under this rule to recover possession land.—*Brahma Mayi* v. *Barkat Sirdar*, 4 B. L. R. 94 F. B.: 12 25 F. B. *Contra* in *Gobind Chunder* v. *Gobind Ghose*, 7 W. R.

Possession by receipt and enjoyment of rent is as good in actual occupation and this rule is not restricted to cases of personal tion.—*Bhyrub Sircar* v *Sham Manjee*, 15 W. R. 70. Approved i *charam* v. *Fakirchand*, 25 B. 478 Followed in *Brajabala* v. *Guru* C. 487: 3 C. L. J. 293. Present possession does not mean right to sion on redemption, *Baliram* v *Narayan*, 54 I. C. 276

Possession through a mortgagee is sufficient to bring a claim this rule.—*Asgur Ali* v. *Asgar Ali*, 20 W. R. 373. Followed in *B* v. *Gurudas*, 33 C 487: 3 C. L. J 293.

A mortgagee, who is in possession of the mortgaged property the mortgage, is in possession " on his own account " within the m of this rule.—*Shafiuddin* v *Lochan Singh*, 2 A. 94.

A mortgagee from a tenant is in possession on his own acc *Kedarnath* v. *Saday Chandra*, 19 C. L. J. 13.

Planting a bamboo and making proclamation to the occupant estate that it has been adjudged to some other, is sufficient dispo of a landlord to warrant him in applying to the Court under this *Collector of Bogra* v *Krishna Indra Roy*, 2 B. L. R. 301: 11 W. *Followed in Brajabala* v. *Gurudas*, 23 C. 487: 3 C. L. J. 293.

A party dispossessed of land under colour of a decree to which not a party, is entitled to an investigation under r. 100 and if i is established to a decree.—*Hassun Aly* v. *Naib Ahmed*, 11 W. R

A person dispossessed of his land in execution of a decree of Court against a third party should proceed for the alleged obstruc his possession, not by a suit in the Mamlatdar's Court, but by an a tion under r. 100, or by a regular suit.—*Gulabbhai Gopalji* v. *J Ratanji*, 13 B. 213. *See* also, *Ram Chandra Subra* v. *Ravji*, 20 B

Dispossession under Order of Collector.—A person who has be possessed under an order made by the Collector, to whom ex proceedings have been transferred, should apply to the Collector and the Court complaining of such dispossession. This rule has no app when execution has been transferred to the Collector; *Ragho* v. *H* 37 B. 488: 19 I C 903

Cases Not Falling Within the Scope of This Rule.—An object did not claim to be in possession " on his own account or on acc some person other than the defendants," but whose sole ground o vention was that he held a *bona fide* title derived from the defe was not entitled to be heard under section 230 of Act VIII of 1859 (100)—*Eusuf Ali* v. *Shib Shunkur*, W. R. (1864) 384.

A mortgagee under a mortgage from the judgment-debtor after ment is a representative of the judgment-debtor within the mea

s. 47. This rule has no application to such a case.—*Narayanasami* v. *Seshapper*. 17 M. L J. 821; but see *Kedar* v. *Saday*, 19 C. L J. 13.

"Was in possession on his own account."—A member of joint Hindu family cannot say that he is in possession of any particular portion of the joint property on his own account. His possession is the possession of the family.—*Cooverji* v. *Dewsey*, 17 B. 718. But see *Radhagobind* v. *Raghunath*, 18 C. W. N. 695, where it has been held that a person in joint possession with the judgment-debtor, as a member of the family or otherwise is in possession on his own account and entitled to intervene under this rule. *See* also, *Ramkishen* v *Damodar*, 75 I. C 856

A person who purchased a non-transferable holding from the recorded tenant, cannot apply under this rule, when the landlord decree-holder takes possession under a sale in execution of his rent decree obtained against the recorded tenant.—*Panchratan* v. *Ram Shahay*, 43 I C. 969, nor is a purchaser *pendente lite* entitled to apply under this rule.—*Kanashabhai* v. *Rajagopal*, 42 I C 523

Questions for Trial for the Nature of Evidence Required under this Rule.—Where an application is made by a party on the ground that he was in possession and that he has been dispossessed in execution of a decree, the Court should in the first instance examine the applicant.—*Obhoy Churn* v *Rajendro Coomar*, 16 W R 288.

When a person making a claim to certain property under r 100 has been allowed to bring a suit under that section to try his right to the property, it is sufficient in the first instance for him to prove his possession, without proof of title, but if he takes this course, it is open to the defendant to show that although possession may be with the plaintiff, yet he (defendant) has a better title.—*Dilbasc Koonwaree* v *Ganga Pershad*, 5 C. 278. (5 B. L. R 708 *explained*)

It was held under the old Code in some cases that the question of title might be gone into, as well as the question of possession.—*Yusan Khatun* v *Ram Nath*, 7 B L R Ap 26, 15 W. R 327, *Radha Pyari* v *Nabin Chandra*, 5 B L. R 708; 13 W R 80, F B Followed in *Abdool Sobhan* v. *Brahma Deo*, 14 W R. 140. *See* also, *Nugender Chunder* v. *Ram Comul*, 3 W R. 213; *Jadunath* v *Kali Prasad*, 6 B L R Ap. 55; 14 W. R. 358; and *Ajoo Khan* v *Kisto Pershad*, 8 W R. 477 But see *Safiuddin* v. *Lochan Singh*, 2 A. 94, where it has been held that a person claiming under r 100 need not prove his title, but only the fact of possession. *See* also, *Kedar Nath* v. *Saday Chandra*, 19 C L J 13 in which it has been held that no question of title can be gone into in a proceeding under r 101

Where the applicant complains that he has been dispossessed in execution of a decree to which he was not a party, and there are reasonable grounds for thinking that his claim is *bona fide*, it is the duty of Court to treat the case as a regular suit between the claimant as plaintiff, and the decree-holder and judgment-debtor as defendants.—*Lulect Narain* v. *Keshub Deb* 15 W. R. 209; *Bance Madhub* v *Nund Lall*, 22 W R 123; *Yusan Khatun* v *Ram Nath*, 7 B. L. R Ap 26, 15 W R. 327; *Ajoo Khan* v. *Kisto Persad*, 8 W R 477. *Sahoo Gokul Pershad* v *Zynub*, N. W. P. 176 (Ed. 1873), 255.

If there are several applications, each application should be tried separately.—*Sharoda Moyee* v. *Nabin Chunder*, 11 W. R. 255.

Burden of Proof in a Claim Case under this Rule.—The onus of proving his case is on the applicant.—*Mahomed Ausur* v. *Prokash Chunder*, 8 W R 8, *Woodoy Tara* v *Abdul Gunee*, 12 W R. 16; *Judoo Nath* v *Kali Pershad*, 14 W. R. 358; *Brindabun Chunder* v. *Tarachad*, 20 W R 114

The applicant must prove whether or not the judgment-debtor was in possession at the date of the sale. Mere proof that he was in possession at some time prior to 12 years before suit does not discharge him from the onus —*Nasiruddin* v. *Sayudur Rahman*, 19 C L. J. 209, *Mohima Chunder* v *Mohesh Chunder*, 10 C 473 P C

Ex-Parte Order for Delivery of Possession.—Or. IX, r. 13 does not apply to execution proceedings, and a party against whom an order under r 101 is passed even though it be *ex parte*, can only seek his remedy by way of suit under r 103 —*Hari Charan* v. *Manmatha*, 41 C 1 *See* also, *Jugolkishore* v. *Bachinder Mohan*, 52 I. C. 416, where it was held that Or IX, r 9 has no application in the case of proceedings under rr. 100 and 101.

Limitation.—Under Art 165 of the Limitation Act, an application under this rule must be made within 30 days from the date of the dispossession, *Abdul Karim* v *Islamunnissa*, 38 A. 339: 14 A. L. J 403: 34 I. C. 231.

Dismissal of Application for Default.—It was held by the Patna High Court, in *Satyanarain* v *Govind*, 3 Pat L. J. 250: 43 I. C 951, that a party not bound by a decree may, under Or. IX, r. 9, obtain a re-hearing of a claim made by him under this rule, which has been dismissed for default; but the same High Court took a contrary view in *Bhubaneswar* v *Tilakdhari*, 4 Pat L. J 135: 49 I. C. 617.

Appeal.—No appeal lies from an order made under Or. XXI, r. 101, C. P. Code —*Musst Golabi Bibi* v. *Aslam Khan*, 57 P. R. 1917: 91 P W. R. 1917. 101 P L R 1917. 41 I C. 891; *Bai Mani* v. *Ranchodlal*, 25 Bom L R 147: 72 I C 256· A. I. R. 1923 Bom. 214. It has been held by the Madras High Court that where an application is contested between persons who were parties to the suit or representatives of parties the case falls within s 47, and an appeal lies from the order; *Appu* v *Kuthurava*, 41 M L J 54. 63 I. C. 730; *Meyyappa* v. *Chidambaram*, 39 M. L. J 603. 61 I C 349, *Veyindra* v. *Maya*, 43 M. 696: 58 I. C. 541

Rules not applicable to transferee lite pendente.

102. Nothing in rules 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

[S. 333.]

COMMENTARY.

This rule corresponds to s. 333, C. P. Code, 1882, with some modifications The words "*to resistance or obstruction in execution of a decree for the possession of immoveable property by a person,*" have been added after the words "shall apply," and the words "*or to the dispossession of any such person*" have also been added after the words "was passed." The word "*passed*" has been substituted for the word "made" which occurred in the old section.

103. Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit, if any, the order shall be conclusive. [Ss. 332 & 335, last Para.]

Orders conclusive subject to regular suit.

COMMENTARY.

This rule corresponds to the last paras. of ss. 332 and 335, C P. Code of 1882, with some modifications

This rule does not apply unless an order under r. 98, r. 99, or r. 101 has been made —*Hargolal* v. *Chandulal*, 69 I. C. 557. A person against whom an order is made under rules 98, 99 or 101, may institute a suit to establish the right which he claims to the present possession of the property; but he is not bound to proceed under the foregoing rules. If he proceeds under those rules and becomes unsuccessful, he must bring the regular suit within one year and the order unless set aside by a regular suit within the statutory period, becomes final and conclusive

Scope and Effect of an Order under this Rule.—An order rejecting a claim petition under Or. XXI, r 100, not being appealed against within one year, acquires the force of a decree —*Achuta* v *Mammavu*, 10 M 357 (8 M. 506 *followed*). The order intended to become final under this rule is an order which is passed after enquiry into the matter of resistance, but if the Court declines to pass an order under r 97 or r. 100 and refers the claimant to a separate suit, then Art 11-A of the Limitation Act has no application.—*Meerudin* v. *Rahisa Bibi*, 27 M. 25 (12 C 550 *referred to*).

This rule does not apply to an order dismissing an application for default of prosecution because it is not an order made after investigation.—*Sarat Chandra* v *Tarini Prasad*, 34 C 491 11 C W N. 487. *See* also, *Bhimrao* v. *Martand*, 45 I C 102, *Wamandhar* v *Kamta Prasad*, 22 N L. R 94 · 97 I C 178 A I R 1926 Nag 423

There must be an enquiry before a valid order under this rule can be made —*Gouri* v *Sita*, 14 C W N 316

Or. XXI, r 103 which gives a right of suit to a party who is not a judgment-debtor, is not restricted by the general provisions of s. 47.—*Badami Seshiah* v *Katti Chinna*, 52 I C 928.

In a suit under this rule, not only the question of possession, but also the right or title on which the claim of possession is based should be gone into; *Kunni Moidin* v. *Pocker*, 44 M. 227, and such right to possession may be established without shewing that the plaintiff was in possession at the date of the dispossession or summary order.

Period of Limitation for a Suit to Establish Right.—A party against whom an order under Or XXI, r. 101 is made, must bring his suit to establish the right which he claims within one year from the date of the order, otherwise the suit will be barred by Art. 11-A of the Limitation Act, 1908.—*Bhimappa* v. *Irappa*, 26 B. 146 *See* also, *Mahadev* v. *Babi*, 23 B. 730; *Ram Singh* v. *Kundan Singh*, 96 P. W. R. 1916: 103 P. L. R 1916: 36 I. C. 211 The fact that there was a pending suit regarding the title to the property in which he had set up his title does not absolve him from the obligation under s 103; *Kumaarn Unni Achan* v. *Kunni Krishnan*, 75 I. C. 814. In *Bhiku* v *Sujat Ali*, 26 C. 25, it has been held that if an objection under Or. XXI, 100 is rejected, the objector is not precluded from instituting a suit to enforce his mortgage lien over the property, more than a year after the date of the order. A suit to establish mortgage lien over property is not a suit to establish a right to the property Where an application is dismissed for default on the petitioner applying to withdraw his petition for want of evidence, the opposite party being present *Held*, that there was no enquiry within the meaning of Or. XXI, r 100, and the suit was not barred by one year's limitation.—*Sarat Chandra* v. *Tarini Prashad*, 34 C 491; 11 C. W N. 487. *See* also, *Kunj Behari* v *Kuadh Proshad*, 6 C L J. 862, where it has been held that merely because the claimant, does not adduce evidence or is absent, it does not follow that there are no materials before the Court to enable it to enquire into the matter. If the Court does not enquire into it and dismisses the application, the order is made upon investigation.

Suit by Auction-purchaser for Possession upon a Different Cause of Action.—The provisions of this rule do not apply to a suit brought by an auction-purchaser against the opposite party for possession, not under his *auction purchase*, but *upon a different title* altogether. In such a case the suit need not be brought within one year from the date of the decree as required by Art. 11-A of the Limitation Act; *Ambica* v. *Ram Prosad*, 30 C. W. N. 163: 90 I C. 575: A. I R. 1926 Cal. 877.

Amount of Court-fee Payable in a Suit under this Rule.—An auction purchaser who was resisted obtaining actual possession, and whose application under Or XXI, r. 100 was rejected, brough a suit against the person in possession, for a declaration of his right to the property and to be put in actual possession thereof *Held*, that the suit was properly stamped with a Court-fee stamp of Rs. 10.—*Pirya Das* v. *Vilayat Khan*, 23 A 884 (9 B 20 *referred to*).

ORDER XXII.

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES.

No abatement by party's death, if right to sue survives.

1. The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. [S. 361.]

COMMENTARY.

This rule exactly corresponds to section 361 of the last Code. The illustrations attached to the old section have, however, been omitted by the Select Committee as they seemed too obvious to serve any useful purposes.

" Right to sue."—This means the right to seek relief by legal proceedings. It is the right to institute a suit claiming the same relief which the deceased plaintiff claimed at the time of his death.—*Gopal* v. *Ram Chandra*, 26 B. 597; *Sarat Chandra* v. *Noni Mohon*, 36 C. 801. The cause of action in the original and revived suits must be the same, and that no fresh cause of action can be imparted into the revived suit.—*Sham Chand Giri* v. *Bhagyaram Panday*, 22 C. 29. *See* also, *Umrao Begum* v. *Irshad Husain*, 23 C. 997 P. C.

An application under Or. XXII, r. 1, C P. Code to be brought on record as the legal representative of the deceased plaintiff could not be rejected on the ground that the original plaintiff had no cause of action which would survive to the applicant. The " right to sue " as specified in Or. XXII, r. 1, C. P Code means merely the right to obtain relief by means of legal procedure (26 B. 597 *refd. to*); *Gundappa* v. *Manjappa*, 2 Mys. L. J. 1.

Cases Where the Right to Sue Survives and Where it does Not.—In order to understand what is meant by the expression " *right to sue survives* " it is necessary to look into the provisions of s. 306 of the Indian Succession Act XXXIX of 1925 (which corresponds to s. 89 of the Probate and Administration Act) and s. 37 of the Indian Contract Act. S. 306 of the Succession Act says: " All demands whatsoever, and all rights to prosecute or defend any action or proceeding, existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code or other personal injuries not causing the death of the party; and except cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory.

It is clear from the above that the right to sue does not survive in suits for defamation, assault or other personal injuries not causing the death of the party and in cases where after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory

Section 37 of the Contract Act says. "Promises bind the representatives of the promisors in case of the death of such promisors before performance unless a contrary intention appears from the contract." Where it appears from the terms of the contract itself that the obligation must end with the death of the promiser, the right to sue does not survive against his representative because the obligation is determined by the death of the promisor Generally speaking all contracts which involve the exercise of special or personal skill are not binding on the representatives of the promisors *See* illustration (b) to sec. 38, Indian contract Act

Suits for damages for breach of contract, suits on promissory notes, suit for recovery of debts, suits on mortgages, suits for wrong done to property are suits that do not abate on the death of the plaintiff or defendant

A suit for damages for malicious prosecution and obstruction of a right of way abates on the death of the defendant in the absence of any allegation that the estate of the wrong-doer was benefited thereby: *Ma Shew Thit* v. *Maung Po Aung*, (1921) 4 U. B. R 73: 65 I C 66

In a suit for damages for malicious prosecution, if the plaintiff dies before trial, the right to sue or the cause of action survives to his legal representatives as such a suit falls within the scope of s 89 of the Probate and Administration Act —*Krishna Bihari Sen* v. *The Corporation of Calcutta*, 31 C 993. 8 C W. N 745 (confirming in appeal 31 C 406 8 C W. N 329) On the other hand, it has been held by the High Courts of Bombay, Madras and Patna that the right to sue does not survive and that the suit abates on the original plaintiff's death; *Haridas* v *Ramdas* 13 B. 677, *Rustomjee* v *Nurse*, 44 M 357: 62 I. C. 260 F. B., *Manjappa* v *Pannusami*, 44 M 828 62 I. C 757; *Palaniappa* v. *Raja Rajeswara*, 49 M 208 92 I C 366: A I R. 1926 Mad. 243; *Punjab Singh* v. *Ramautar*, 4 Pat. L. J. 676 52 I. C. 348. But if a defendant after appealing to set aside the decree dies before the hearing, his legal representative is *not debarred from prosecuting the appeal* —*Gopal Ganesh* v. *Ramchandra Sadashiv*, 26 B 597. Followed in *Paramenchetty* v *Sundararaj Naick*, 26 M. 499.

An action to recover damages for breach of a contract of marriage abates on the death of the plaintiff; *Hiralal* v. *Nanalal*, 44 B. 416· 55 I C 624 A suit to establish the plaintiff's right to the office of a mokrer abates on his death, because the right claimed is a personal right to an office, *Sham Chand* v. *Bhayaram*, 22 C. 92. There is a conflict of authorities on the question whether the right of pre-emption under the Mahomedan Law does or does not abate at the pre-emptor's death; *Sayyad Ziaul* v *Sitaram*, 36 B. 144; *Muhammad* v. *Niamatunnissa*, 20 A. 88; *Yusuf Ali* v *Dal Kumar*, 20 A. 148.

During the pendency of a suit by a Hindu widow for possession of her husband's estate, she died. *Held* that the cause of action survived on the death of the plaintiff, and therefore the suit did not abate —*Parbutty* v. *Higgin*, 17 W R 47: 8 B. L. R. Ap. 98.

Where a Hindu mother who sued to restrain encroachment on the share allotted to her on partition and agreed to sell her interest to the defendants at the value to be found on arbitration, died after the award

but before the decree, it was held that the right of action on the award survived to her sons.—*Denomoyee* v. *Chooneymoney*, 4 C. W. N. 280. Affirmed on appeal in 28 C. 155: 5 C. W. N. 242.

A revisioner's suit for a declaration that an alienation made by a Hindu widow is invalid, abates on the death of the plaintiff, and it cannot be continued by the next reversioners; *Sakyahani* v. *Bhavani*, 27 M. 588; *China* v. *Lakshminarasamma*, 37 M. 406 22 M. L. J. 375. But it has been held by the Privy Council that a suit brought by the presumptive reversioner for declaration that an alleged adoption is invalid, is brought by him in a representative capacity and on behalf of all the reversioners, and on the death, therefore, of the presumptive reversioner, the next presumable reversioner is entitled to continue the action begun by the deceased; *Venkatanarayana* v. *Subbammal*, 30 M. 406: 42 I. A. 125: 29 I. C. 298

Where an agent who sues on behalf of an undisclosed principal dies pending suit, the suit (if it can be continued at all) can be continued by the agent's representatives, and not by the principal.—*Periannan Chettiar* v. *Rengachi Reddy*, 17 M. L. J. 116.

Where a testamentary guardian applies to be appointed guardian under this rule and dies pending the proceedings, the application abates, and as his claim was based on a personal trust, his representatives are not entitled to continue the proceedings; *Gangabai* v *Khashabai*, 23 B. 719. Where, however, the claim is not based on a personal trust, the proceedings can be contained by the legal representative of the deceased; *Sami Chetti* v *Adai Kalam*, 47 M. 459 46 M L J 179 84 I C 613· A I. R. 1924 Mad 484.

The right to the grant of letters of administration is a personal right and does not survive to the heir of the residuary legatee of the testatrix; *Hari Bhusan* v. *Manmatha*, 45 C. 862 51 I C 76; *Sarat Chandra* v *Nani*, 36 C. 799: 3 I. C. 995 Where, pending a suit filed by a partner on behalf of a firm, he dies, there is no question of abatement at all. *Bansidhar* v *Debi Persad*, 93 I C 144. A I R 1926 All 351

Against an order of Court appointing a particular person as guardian of a minor, the minor's paternal uncle who opposed the appointment in the lower Court, preferred an appeal; on the death of the appellant pending the appeal, his son sought to continue appeal; objection was taken that the right to sue did not survive and the appeal abated *Held* that the appeal did not abate and could be prosecuted by the son of the deceased appellant; *Sami Chetti* v. *Adaikkalam Chetti*, 46 M L J 179.

If a defendant is dead at the time of the institution of the suit, the plaintiff cannot go on with the suit by applying for the substitution of the deceased defendant.—*Kristodas Law* v *Kumar Khiroda Kanta*, 51 I C 160

A suit by a Hindu mother for a share at a partition among her sons under the Dayabhaga School, abates on her death —*Tripura* v *Dakshina*, 5 C. L. J. 310: 11 C W N 098.

A suit for personal injunction abates when the person against whom the suit is brought dies.—*Josiam* v. *Samu*, 7 M L T. 195 5 I C. 937.

Abatement of Right to Sue In Formâ Pauperis.—The right to make an application to sue *in forma pauperis* is a personal right and does not survive to the heirs of the pauper; *Jatindra Nath* v. *Sourindra Nath*, 64 I C. 63.

No Abatement by Reason of the Death of the Plaintiff After Decree.—A suit which has terminated in a decree cannot abate by reason of the death of the plaintiff after the passing of the decree; *Mulchand Kalwar* v *Gobind Singh*, 59 I C. 939.

Death of Either Party Pending Appeal.—Hence where, during the pendency of an appeal against a decree in favour of the plaintiff in a suit in which the right to sue would not survive if the plaintiff died before decree, either party dies, the appeal does not abate; *Muhammad* v. *Khushalo*, 9 A. 181; *Gopal* v *Ramchandra*, 26 B. 597; *Paramen* v. *Sunderaraja*, 26 M. 499. But if the plaintiff's suit is dismissed, and the plaintiff has appealed from the decree, and either party dies pending the appeal, the appeal will abate, *Gopal* v. *Ramchandra*, 26 B. 597; *Sakyahani* v. *Bhavani*, 27 M. 588, *Josiam* v *Sawmi*, 34 M 76; *Saklat* v. *Bella*, 2 R. 91: A I. R 1924 Rang. 217

Procedure where one of several plaintiffs or defendants dies and right to sue survives

2. Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

[S. 363]

COMMENTARY.

This rule corresponds to section 362, C. P. Code, 1882, with this modification that the word "*where*" has been substituted for the words "where" and "if."

"To the surviving plaintiff or plaintiffs alone."—A and B, as joint owners of certain land, brought an action for damages on account of trespass. B died after the action was brought. *Held* that the cause of action survived to A The words "cause of action" mean right to bring an action —*Chunder Mohun* v *Biswambhur*, 1 B. L R. 42: 6 W. R Civ Ref. 2; and 17 B 645

A Mahomedan appellant died leaving sons and daughters The sons applied to be brought upon the record, but they did not bring their sisters upon the record along with themselves, *held* that they not having done so, the appeal abated.—*Haidar Husain* v. *Abdul Ahad*, 30 A 177: 5 A L. J. 62

A, B, and C, members of a joint Mitakshara family, sued for a declaration of their right, after refusal of their application for registration of names under the Land Registration Act, and obtained a decree During

the pendency of the appeal against the decree, A died, and more than six months after, the appellant applied to have B and C noted as legal representatives who had taken the estate by survivorship. *Held* that the application was governed by this rule, which is not limited in its application to cases, in which the right of suit survives against the surviving defendants, by reason of some circumstance antecedent to the suit.—*Shyamanand* v. *Rajnarain*, 11 C. W. N. 186: 4 C. L. J. 568.

If the right to sue survives against the surviving respondents, even by reason of any cause which arises after the institution of the suit or the appeal, *e.g.*, the purchase of the interest of the deceased by them during the pendency of the appeal, the case would fall within the purview of Or. XXII, r. 2; *Jhangi Ram* v. *Musst. Rupan Bai*, 102 I. C. 436: A. I. R. 1927 Lah. 501.

"Against the surviving defendant or defendants alone."—If the defendants in a suit are jointly and severally liable to the plaintiff, the suit does not abate merely because one of the defendants has died and his legal representatives have not been brought upon the record.—*Jwala Prasad* v. *Kopiya Munda*, 59 I. C. 890.

"The suit shall proceed."—The word "suit" includes an appeal, *see* r. 11.

Procedure in case of death of one of several plaintiffs or of sole plaintiff.

3. (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survive, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. [Ss. 363, 365.].

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff. [S. 366, Para. 1.]

COMMENTARY.

Alterations in the Rule.—The provisions contained in sections 363, 365 and 366 of the C. P. Code 1882 have been embodied in this rule with several alterations and omissions.—(1) The words "*so far as the deceased plaintiff is concerned*" in sub-rule (2) are new. (2) The words "*the suit shall abate*" in sub-rule (2) have been substituted for the words "the Court may pass an order that the suit shall abate" which occurred in s. 366 of the Code of 1882. Under the present Code it is not necessary to make an order that the suit shall abate as it abates *ipso facto*, if no application is made under sub-rule (1) within the time limited by law (90 days);

Ram Gopal v. *Hari Kishan*, 7 L. L. J. 517: 88 I. C. 478: A. I. R 1925 Lah 598; *Lachmi* v. *Muhammad*, 42 A. 540: 59 I. C. 903.

Limitation.—The period of limitation for an application under this rule is 90 days, *see* Art 176 of the Limitation Act IX of 1908

The Suit shall Abate " so far as the deceased plaintiff is concerned."—The words " *so far as the deceased plaintiff is concerned* " mean that the suit shall primarily abate so far as the deceased plaintiff is concerned, but they do not mean that the suit shall in no case abate as a whole. In a suit by the partners of a firm to recover a partnership debt if one of the partners dies pending the suit and his legal representative is not brought on the record, the suit will abate only so far as the deceased partner is concerned, *Sarju* v. *Ram Sarup*, 19 A. L. J. 266: 60 I C 755 But where the suit cannot proceed in the absence of the deceased plaintiff's legal representative, as when the shares of the parties in the joint property have to be determined, the death of one of such plaintiffs, if no legal representative of the deceased plaintiff is brought upon record within limitation, will have the effect of causing the suit to abate as a whole, *Huda* v *Lala*, 41 P R 1915; *Raj Chunder* v. *Gangadas*, 31 C 487 31 I. A 71.

This Rule Applies to Appeals.—This rule applies to the case of a deceased appellant as it does to the case of a deceased plaintiff (s 107 and Or XXII, r 11) Therefore where one of two or more appellants dies, and the right to appeal does not survive to the surviving appellants alone, the legal representative of the deceased appellant should be brought on the record If this is not done, the appeal will abate so far as the deceased appellant is concerned The decision of the question whether the death of one of the appellants causes the appeal of the others to abate, turns upon the question whether the right to appeal survives to the surviving appellants. If it does, the appeal of those appellants does not abate by reason of the death of one of the appellants, *Ram Sewal* v *Lambar Pande*, 25 A 27, *Lachmi* v. *Amin Chand*, 97 P. R 1900 Where several plaintiffs or defendants jointly appeal from a decree in a case to which Or. XLI, r. 4 of the Code applies, the death of one of such appellants, if no legal representative of the deceased appellant is brought on the record within the period of limitation, can only have the effect of causing the appeal to abate so far only as the deceased appellant is concerned, it cannot have the effect of causing the appeal to abate as a whole, *Chandarsang* v *Khimabhai*, 22 B. 718; *Ram Sewak* v. *Lambar*, 25 A 27, *Chintaman* v *Gangabai*, 27 B. 284; *Somasundaram* v. *Vaithilinga*, 40 M 846, *Piyare Lal* v. *Charamani*, 84 P. R. 1918; *Maung Byaung* v *Maung Shwe*, 2 R 486: 81 I. C. 170: A. I. R. 1924 Rang 376 But the appeal will abate as a whole if the case is of such a nature that the appeal cannot proceed in the absence of the legal representative of the deceased appellant.

Two or More Legal Representatives.—The words " legal representative " in Or XXII, r. 3 must, where there are more than one legal representative, be read in the plural. Hence, where a sole appellant died during the pendency of his appeal, leaving three legal representatives and only one of them was brought upon the record within the prescribed period of limitation: *Held*, that the appeal must abate Either all the

representatives should have been brought upon the records as appellants, or if any had refused to be joined as appellants, they should have been brought on as respondents.—*Ghamandi Lal* v. *Amir Begum*, 16 A. 211. Followed in *Haidar Hussain* v. *Abdul Ahad*, 30 A. 117 5 A L. J 62 *See*, however, *Musala Reddi* v. *Ramayya*, 23 M. 125, where it has been held that when there are more than one legal representative, all of them must, so far as it is possible for this to be done, join in an application under this rule, and the words " legal representative " must in such a case be read in the plural. But where all the representatives cannot be joined as applicants, this rule should not be constructed so as to have the effect of rendering the application no application by " the legal representative " within the meaning of this rule (10 B. 220, and 16 A 211 *considered*).

Legal Representative of Deceased Plaintiff.—For the definition of the words " legal representative," *see* s. 2 (11) The words " legal representative," as used in this order, have a very wide significance and are not synonymous with the word "heir "; *Ram Din* v *Raj Rani*, 8 N L. R. 113. On the death of a Hindu widow during the pendency of a suit by her to recover property belonging to her deceased husband, the reversionary heirs of her husband are her legal representatives within the meaning of this rule; *Premmoyi* v *Preonath*, 23 C 636; *Tribhuwan* v. *Sri Narain*, 20 A 341; *Rikhai Rai* v. *Sheo Pujan*, 33 A 15 A suit brought by the head of a *mutt*, on behalf of the *mutt*, may be continued on his removal by his successor in office, because his successor is a person on whom the trust property devolves within the meaning of Or XXII, r. 10; *Ratnam* v *Nataraja*, 46 M. L. J. 341: A I R 1925 Mad 615 34 I. C 200 The legal representatives of a daughter, who dies after instituting a suit to recover possession of her father's property as his heir, are the next heirs of the father entitled to come in after her; *Ramaswami* v *Pedamunayya*, 39 M 382; *Jadubansi* v *Mahpal Singh*, 38 A 111. On the death of a reversioner, pending a suit for a declaration that an alleged adoption is invalid, the next reversioner is the legal representative within the meaning of this rule; *Venkata Narayan* v *Subbammal*, 38 M. 406: 42 I A. 125.

An executor appointed by the will of a deceased plaintiff or appellant is his legal representative within the meaning of this rule —*Payyath Nanu Menon* v *Thiruthipalli Raman*, 20 M 51.

An administrator appointed under section 10 of Bombay Regulation, VIII of 1827, does not, by such appointment, become the legal representative of the deceased, or entitled to continue an appeal filed by him —*Malapa Sidapa* v *Devi Naik*, 21 B 102

If a question arises as to whether any person is or is not the legal representative of the deceased plaintiff, such question should be determined by the Court under Or XXII, r 5 —*Oula* v *Beepathee*, 17 M 200

The original plaintiff sued for redemption of a mortgage executed by her father She claimed as the only unmarried daughter of three arraying as defendants, besides the mortgagee, her surviving married sister and three children of a deceased sister. The plaintiff died during the pendency of the suit *Held* that the claim being personal to the plaintiff,

the suit abated, and the surviving sister could not be permitted to carry on the suit in substitution for the original plaintiff.—*Balak Puri* v. *Durga*, 30 A. 49

The right of the mother to a share on partition among the sons, is in lieu of her maintenance, and such share on her death, reverts to the sons. Where the mother brought a suit against the sons for her share of certain G. P. notes, which had been partitioned amongst themselves by them. *Held* that on her death the right to sue did not survive in her executor—*Tripura Sundari* v. *Dakhina Mohan*, 11 C. W. N. 698: 5 C. L. J 310

Death of Pauper Applicant.—Right to obtain permission to sue as a pauper is only a personal right. on the death of such applicant his legal representative cannot come and ask to be substituted in his place. There is a marked distinction between a right to sue and right to make an application for permission to sue as a pauper.—*Lalit Mohan* v. *Satish Chandra*, 33 C. 1163: 4 C L. J. 234 *See* also, *Farzand Ali Khan* v. *Amir Haidar*, 26 I. C 714.

Minor Applicant.—A minor is entitled to be made a party as the legal representative of a deceased plaintiff in the same way as an adult, but his application must be through a next friend; *Ruckmani* v. *Veerasami*, 47 M. L. J 870: 80 I. C. 942 A I R. 1924 Mad. 813.

Death of Plaintiff After Preliminary and Before Final Decree.—Where in a suit a plaintiff dies after the passing of the preliminary decree and before the passing of the final decree (as in a mortgage suit), this rule applies; *Lakshmi* v. *Subbarama*, 89 M. 488: 29 I. C. 42; *Subbarayader* v. *Ramadasu*, 42 M. L. J. 310: 68 I. C 942: A. I. R 1923 Mad 237; *Natesa* v. *Kannammal*, 46 M. L. J 181: 78 I. C. 61: A I. R 1924 Mad 786, *Hemendra* v. *Fakir*, 50 C 650: 74 I. C. 929: A. I R 1923 Cal 626.

Death of Sole Plaintiff—Abatement of Suit.—The section refers to a death only as occurring before decree.—*Bhugwan Das* v. *Nilkanta*, 9 C W. N. 171; *Ramananda* v. *Minatchi*, 3 M 236.

Upon the death of a sole plaintiff, if no application to revive is made within the prescribed time, the suit abates. But the Court may, under s. 371, C. P. Code, 1882 (Or. XXII, r. 9) revive the suit, on the application of the legal representative of the plaintiff, within 3 years from the time when the right to apply accrues, if he can show that he was prevented by sufficient cause from containing the suit.—*Bhoyrub Dass* v. *Doman Thakoor*, 5 C 139. 4 C L. R. 374. *See* also, *Ram Protap* v. *Lal Chand*, 9 C W N 369 and *Fulvahu* v. *Goculdas*, 9 B 275

A sole plaintiff having died after decree an application was made after the prescribed period of limitation by his legal representative to be substituted on the record in his place. *Held* that s. 365, C. P. Code, 1882 (Or. XXII, r 3) does not apply to the case of a sole plaintiff dying after decree, the right to sue being merged in the decree.—*Cally Churn* v. *Bhuggobutty Churn*, 5 C L. R. 108. *See* also, *Ramananda* v. *Minatchi*, 3 M. 236

On the death of a reversioner pending a suit for a declaration that an alleged adoption is invalid, the next reversioner is the legal representa-

tive and is entitled to be brought on the record as such —*Venkatanarayana* v. *Subbammal*, 38 M. 406.

The legal representative of a deceased plaintiff can only prosecute the cause of action as originally framed; similarly a defendant cannot raise any defence against the legal representative which he could not have raised against the deceased plaintiff himself —*Sham Chand* v. *Bhayaram*; 22 C. 92; *Subbaraya* v. *Manika*, 19 M. 345.

On the death of a partner the right to sue in respect of debts due to the firm survives to the surviving partners.—*Balkissen* v. *Kanhyalal*, 17 C. L. J. 648.

Abatement Where No Application by the Deceased Plaintiff's Representative.—Upon the death of a sole plaintiff, if no application to revive is made within the prescribed period of limitation from the date of the plaintiff's death, the suit abates But the suit can be revived within three years on the application of the legal representative under s. 371, C. P. Code, 1882 (Or. XXII, r. 9), if it can be shown that he was prevented by sufficient cause from continuing the suit.—*Bhoyrub Dass* v. *Doman Thakoor*, 5 C. 139: 4 C. L. R. 374; *Fulvahu* v. *Gokuldas*, 9 B 275; and *Ram Pratap*, v. *Lall Chand*, 9 C. W. N 369

Award of Costs.—Notwithstanding that s 582 C P. Code, 1882 (s. 107 and Or. XXXII, r. 11) does not expressly direct that the word " plaintiff " in s. 366, C P. Code, 1882 (Or. XXII, r 3) shall be held to include an " appellant " yet the power conferred by section 366 (Or XXII, r 3, cl. 2) in the Court of original jurisdiction to award costs against the estate of a deceased plaintiff, may by analogy, be taken to be conferred on the Appellate Court.—*Rajmonee Dabee* v. *Chunder Kant*, 8 C. 440. 10 C. L R. 437 (4 B. 654 *followed*) *See* also, *Dontu Pedda* v. *Mallan Balayya*, 37 M L J. 596.

Limitation.—Under Art. 176, Act IX of 1908 the period of limitation for an application under this rule by the legal representative of a deceased plaintiff and under s 582, C. P Code, 1882 (s 107, Or XXII, r 11) by the legal representative of a deceased appellant is 90 days from the date of death.

An application for an order to set aside an abatement must be made within 60 days from the date of the abatement, under Art 171 of the Limitation Act and an application to have the legal representatives of a deceased plaintiff made parties, within 6 months from the date of the deceased party under Art 176.—*Mamanthin* v *Maung Po Win*, 10 Bur L. T. 27

The provisions of Act XXVI of 1920 curtailing the period of limitation for bringing on record the legal representative of a deceased appellant to three months from the date of his death, apply also to cases where the death has taken place even before the passing of the amending Act, *Nimba* v. *Janki*, 71 I C 176; *Vijaya Singh Dattaji Rao* v *Shivaji Rao*, 26 Bom L. R. 378

If a plaintiff dies after decree, his representatives are not bound to apply within the prescribed period of limitation to be made parties to the suit, but have the same time to file an appeal as the plaintiff would have

had. Ss. 363 and 365, C. P Code, 1882 (Or. XXII, r. 3) and Art 171 of the Limitation Act 1877, do not apply to the case of a plaintiff, dying after decree —*Ramananda* v. *Minatchi*, 3 M. 236

Execution Proceedings.—The provisions of this rule do not apply to execution proceedings by virtue of r. 12 of this order.

Revision.—Under this rule, the Court must enter the name of the legal representative on the record if he applies for the same within the prescribed period Its not doing so amounts to a failure to exercise juris diction vested in it by law under this rule, and the High Court may interfere in revision under s 115 —*Janardhan* v. *Ram Chandra*, 26 B 317

Appeal Against Orders under this Rule.—No appeal lies from an adjudication that a suit or an appeal has abated, because such an adjudication does not amount to a decree; *Hamida Bibi* v. *Ali Husen*, 17 A 172, *Walayat* v *Ram Lal*, 12 A L J 1113; *Muhammad* v. *Manohar*, 20 A L. J 214 64 I C 838. But see *Mati Lal* v *Bishambhar*, 47 A 741' 88 I C 95 A I R 1925 All 431. An order of the Court declaring that a suit has abated owing to the cause of action not surviving, or that the death of one of several plaintiffs has caused an abatement *in toto*, is a decree, and appealable as such, *Niranjan* v. *Afzal*, 128 P R. 1916 F. B ; *Subramania* v *Venkatanamier*, 31 I. C. 4, so is an order directing the abatement of a suit in consequence of no legal representative of a deceased plaintiff having applied within the time prescribed by law to be brought upon the record, *Ram Sarup* v *Matiram*, 1 Lah 493 57 I C 137

Held, that an order rejecting an application that a suit might be declared to have abated by reason of the death of the plaintiff, and the invalidity of an application to the Court to bring his legal representative on to the record, was not one of the orders contemplated by s 366, C P. Code, 1882 (Or XXI, r 3), and no appeal would lie therefrom — *Bhagwan Das* v *Maharaja of Bharatpur*, 17 A. 286.

Procedure in case of death of one of several defendants or of sole defendant.

4. (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant. [S. 368.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to section 368, C. P. Code, 1882 The old section has been remodelled and its words have been changed. The present rule has embodied the material provisions of the old section in a more concise form. Several words and phrases of the old section have been omitted, but no material change seems to have been made in the meaning. Under the old section, application for substitution was to be made by the plaintiff or by the legal representative of the deceased defendant. But in the present rule the words "*on an application made in that behalf,*" have been added so as to include the application of both, and hence para. 3 and the last para of the old section have been omitted as unnecessary. The insertion of the above words have also rendered the case (9 B 59) obsolete and inoperative The words "*and shall issue a summon to such representative to appear on a day to be therein mentioned to defend the suit*" which occurred in para 5 have been omitted as unnecessary, the omission being supplied by Or. 1, r. 10, sub-rule (4).

In sub-rule (1) of this rule the words "*shall cause the legal representative of the deceased defendant to be made a party,*" have been substituted for the words "the Court shall thereupon enter the name of such representative on the record in the place of such defendant" which occurred in para. 4 of the old section The above amendment clearly shows that under the present rule the legal representative of the deceased defendant " is to be made a party Such addition therefore comes within Or. I, r 10 (4) *See* also. 8 M 300, which will explain the object of the amendment

Suit.—The word "suit" in this rule includes an appeal, and the word "*defendant*" a respondent, *see*, r. 11

Death of Defendant and Substitution of his Legal Representative.—The section applies to the case of a defendant who dies before a decree is passed.—*Sambasiva* v. *Veera Perumal*, 28 M. 361.

Where a defendant dies pending a suit, it is open to his legal representative to come on record on his application notwithstanding the plaintiff's omission to implead him. In such a case, the Court might award costs to the legal representative; *Kuppuswami* v. *Singaravelu Chetty*, 45 M L J 233 (1923) M W. N. 867.

In a suit where a defendant dies, it is not open to the plaintiff to ask the Court to add some body other than the legal representative of the deceased defendant as a party to the suit, and an application asking for this to be done would not bind the real representative; *Mahomed Junaid* v *Aulia Bibi*, 61 I C 947.

Where a suit was brought against a firm and the alleged sole proprietor died but no steps were taken to bring his legal representatives on record, *held* the suit abated; *Ram Prasad Chiman Lal* v. *Anundji & Co* 49 C. 524

A Mahomedan sought to recover possession of his minor daughters, who were alleged to have been illegally detained by the defendant. Pend-

had. Ss 363 and 365, C. P Code, 1882 (Or. XXII, r. 3) and Art. 171 of the Limitation Act 1877, do not apply to the case of a plaintiff, dying after decree —*Ramananda* v *Minatchi*, 3 M. 236

Execution Proceedings.—The provisions of this rule do not apply to execution proceedings by virtue of r 12 of this order.

Revision.—Under this rule, the Court must enter the name of the legal representative on the record if he applies for the same within the prescribed period Its not doing so amounts to a failure to exercise jurisdiction vested in it by law under this rule, and the High Court may interfere in revision under s 115 —*Janardhan* v. *Ram Chandra*, 26 B. 317

Appeal Against Orders under this Rule.—No appeal lies from an adjudication that a suit or an appeal has abated, because such an adjudication does not amount to a decree; *Hamida Bibi* v. *Ali Husen*, 17 A 172, *Walayat* v *Ram Lal*, 12 A. L J 1113; *Muhammad* v. *Manohar*, 20 A L. J 214 64 I C 838 But see *Mati Lal* v. *Bishambhar*, 47 A 741. 88 I C. 95 A I R 1925 All 431 An order of the Court declaring that a suit has abated owing to the cause of action not surviving, or that the death of one of several plaintiffs has caused an abatement in toto, is a decree, and appealable as such; *Niranjan* v. *Afzal*, 128 P. R. 1916 F. B , *Subramania* v *Venkatanamier*, 31 I C. 4; so is an order directing the abatement of a suit in consequence of no legal representative of a deceased plaintiff having applied within the time prescribed by law to be brought upon the record, *Ram Sarup* v. *Matiram*, 1 Lah. 493 · 57 I C 137.

Held, that an order rejecting an application that a suit might be declared to have abated by reason of the death of the plaintiff, and the invalidity of an application to the Court to bring his legal representative on to the record, was not one of the orders contemplated by s. 366, C P Code, 1882 (Or XXI, r 3), and no appeal would lie therefrom —*Bhagwan Das* v *Maharaja of Bharatpur*, 17 A. 286

Procedure in case of death of one of several defendants or of sole defendant.

4. (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant. [S. 368.]

"*Does not survive against the surviving defendant or defendants* **alone.**"—Three defendants were sued jointly as representing the estate of their late father and their liability, if any, was joint and indivisible. The lower Court dismissed the suit and the plaintiffs appealed. During the pendency of the appeal one of the defendants respondents died and the application to bring his legal representatives on the record was made nearly two years later *Held*, that the appeal abated in as much as the right to sue did not survive only against the two defendants on the record; *Gurdas Mal* v *Kashi Ram*, 2 Lah L J 64.

"The Court, on an application made in that behalf."—Under the old Code, application for substitution was to be made by the plaintiff or by the legal representative of the deceased defendant But in the present rule, the words "*on an application made in that behalf*" have been added so as to include the application of both So when a defendant dies pending a suit, it is open to his legal representative to come on record on his own application notwithstanding the plaintiff's omission to implead him. In such a case, the Court might award costs to the legal representative; *Kuppaswami* v. *Singaravelu*, 45 M. L J 233: A. I. R. 1923 Mad. 679 If the legal representatives of a deceased respondent are already on the record as parties, it is not necessary to make an application for substitution and it is enough to make an entry on the record to that effect. Or. XXII r 4 is not applicable to the case, *Hafizunnissa* v *Jawahir*, 24 O. C. 374: 66 I C 24 (32 A 551 32 A 563 *followed*)

In a case where all the heirs of a deceased respondent are already parties to the appeal, there need be no formal application under Or. XXII, r. 4, to bring on record the legal representatives of the deceased and, the appeal will not abate on that ground Rr. 2 and 4 of Or. XXII contemplate two different sets of circumstances, and the provision in r. 2 is independent of and in no way subject to the provisions of r 4, and so r. 2 is applicable, and no application need be made under r 4, *Gopal Das* v. *Mul Chand*, 7 Lah 399: A I R 1926 Lah 607

Where No Application is Made Within the Period of Limitation.—Where on a party's death, no application is put in to bring in his legal representatives within the time allowed by law, the suit or appeal abates though the party was ignorant of the death of the deceased; *Mir Nawab* v. *Hardeo*, 60 P R 1911, *Hadu* v *Lala*, 41 P. R 1915, *Jamna* v *Sarjit*, 67 P R 1919, *Jowala Ram* v *Hari Kishen*, 5 Lah. 70 80 I. C 690: A. I R 1924 Lah. 429, *Hari Saran* v *Eradat*, 2 P L R. 279 Ignorance of death may, however, be a good ground for setting aside the abatement, *Daya Singh* v. *Buta Singh*, 118 P. R 1916

The Suit shall Abate as Against the Deceased Defendant.—Ordinarily a suit or appeal does not abate in its entirely on the death of one of several defendants or respondents because of the failure of the plaintiff or appellant to revive it against the representative of the deceased—the abatement only takes place as against the latter, *Kali Dayal* v. *Nagendra*, 24 C. W N. 44 30 C L J 217 54 I C 822, *Narain Das* v *Sheodin*, 48 A. 251: A. I R 1926 All 234 A suit or appeal does not abate in its entirety by reason of the failure of a plaintiff or appellant to bring on record the representative of a deceased defendant or respondent within the time prescribed therefor, if the suit or appeal can proceed in

the absence of such representative fo a final and complete adjudication, *Chandarsang* v *Khimiabai*, 22 B 718; *Bai Full* v. *Adesang*, 26 B 205, *Joy Gobind* v *Monmotha*, 33 C 580; *Upendra* v *Sham Lal*, 34 C 1020, *Mehdi Hussain* v *Sughra*, 25 A 206, *Runga* v. *Jnanaprakas*, 30 M 67 *Abdul Aziz* v *Baldeo*, 34 A. 604; *Shankarbhai* v. *Moti Lal*, 49 B 118 A I R 1925 Bom 22, *Rai Kashinath* v *Kailas*, 4 Pat 53. 89 I C 296 A I R 1925 Pat 48, *Raghbir* v *Sohan*, 6 Lah. 233 · A. I R 1925 Lah 38, *Lajjaram* v *Sambhunath*, 5 L. L J. 14: A I. R. 1923 Lah 252, *Mahant Darshan* v *Bikramjit*, 23 A L J. 938: 89 I. C 953: A I R 1926 All 938

But the suit or appeal will abate as a whole if it is of such a nature that it cannot proceed, in the absence of the legal representative of the deceased, to a final and complete adjudication, *Raj Chander* v. *Gyan Das*, 31 C 487 · 31 I A 71; *Hem Kunwar* v. *Amba Prasad*, 22 A 430 *Imamuddin* v *Sadaath*, 32 A 301, *Nanak Chand* v. *Ram Chand*, 4 L L J 189 77 I C 186, *Shabbar* v *Abbas*, 23 A. L. J. 935: 90 I C 324 A I R 1925 All 152; *Ma Zang* v *Maung Kyaw*, 1 R 189 74 I C 1027 A I R 1923 Rang 258; *Wajid Ali* v *Puran Singh*, 47 A 101 85 I C 66 A I R 1925 All 108, *Kalidayal* v. *Nagendra*, 24 C W N 44 54 I C 822, *Sidik Muhammad* v *Saran*, 76 I C. 314

If on the death of one of the defendants his legal representatives are not brought on the record, the question whether the suit abates as a whole depends upon whether the suit can proceed in the absence of the legal representatives of the deceased defendant. Where the lands in dispute are separately held by some of the defendants and the deceased defendant had no joint interest in those plots of land, the suit does not abate; *Sarat Kamini* v *Chaitanya*, 67 I. C. 290, *Ratanlal* v *Jadeo*, 75 I C 820

Held that the legal representatives of one of the deceased mortgagees not having been brought on the record within the period of limitation the appeal abates as a whole, because the suit being for redemption it cannot proceed without all the mortgagees being before the Court. *Bhagwan Singh* v *Jamal*, 3 L. L J. 252.

Where in a suit for pre-emption, the legal representatives of one of the respondents are not brought on record, the whole suit abates as the decree is indivisible —*Imam* v *Sadarat*, 32 A. 301.

Where a defendant dies, it is for the plaintiff to choose against whom he proposes to proceed, and if some one else with an adverse claim to the nominee wishes to be made the representative, he should be added as a party —*Rameswar* v *Janeswar* 18 C. W N. 129, 19 C L J 19

If pending an appeal arising out of a suit for damages against several joint wrong-doers one of the wrong doers (respondents) dies, his representative must be made a party It is not open to the plaintiff appellant to prosecute his appeal only against some of the wrong-doers (respondents) at his choice; *Kali Narayan* v *Haran Chandra*, 62 I C 714

Abatement of Suit Or Appeal as against the Deceased Defendant or Respondent Only.—Where a person is made party to a suit on a mortgage as being personally liable as a surety for the payment of the debt

and on the death of such person, his legal representative is not brought on the record, the suit abates as against him only, and not as a whole; *Mehdi Husain v. Sugra Begum*, 25 A 206

Where the liability of the defendants is joint and several, and in appeal, on the death of one of the defendants, his legal representatives are not substituted in his place, the appeal abates so far as the deceased defendant is concerned; *Joy Gobind v Monmotha*, 33 C 580, *Shankerbhai* v. *Mati Lal*, 49 B. 118 26 Bom L. R 1217; The liability of fixed rate tenants to pay rent is joint and several So if one of them dies during the pendency of an appeal in a suit for recovery of rent and his legal representatives are not brought on record, the appeal abates only so far as the deceased tenant is concerned, *Abdul Aziz v Baldeo*, 34 A 664: 10 A L J. 183, *Kashinath* v. *Kailash*, 4 Pat. 53: 89 I C 236· A. I. R 1925 Pat 480; *Upendra v Shamlal*, 34 C. 1020. Whether or not the appeal abates as against the deceased respondent only or as a whole must depend upon the particular circumstances of each case The test to be applied being whether in the absence of the respondent against whom the appeal has abated, the appeal can proceed, *Midnapore Zamindary Co.* v *Amulya*, 53 C 752· 95 I. C. 649: A. I R 1926 Cal 893

Abatement of Suit or Appeal as a Whole.—Where relief sought against defendants is joint and indivisible, abatement against one is abatement against all; *Chet Ram* v *Msst Ilaicho*, 92 I C 35 26 P. L R 797; *Sarada* v *Allapyar*, A I R 1923 Lah 132 73 I C 604, *Shah Muhammad* v *Karam Ilahi*, A I R 1922 Lah 131 65 I C 121 In the same way where the interests of the respondents are joint and a decree can not be reversed without the representative of a deceased respondent being brought on the record, the appeal abates *in toto*, *Bejoy Gopal v Umesh*, 6 C W N 196, *Hadu* v *Lala*, 14 P R. 1915, *Fatter* v. *Sikandar*, 2 L. L J. 442, *Dharanjit* v *Chandeshwar*, 11 C W N 504, *Munshi Ram* v *Radha Kishan*, 6 L L J 192 A I R 1924 Lah. 461 The test to determine as to whether or not the failure to bring upon the record the heirs of one of several respondents, who has died, has the effect of causing an abatement of the entire appeal or *qua* that particular respondent alone, is as to whether or not the appeal can be decided without, as a result of that decision, bringing into existence two decrees contrary to each other If the result of hearing and deciding the appeal would be to bring into existence two decrees of Courts of competent jurisdiction contrary to each other, the appeal must abate as a whole, *Sheo Chand v Sita Ram*, A. I R 1927 All 331, *Wajid Ali* v *Puran Singh*, A I R. 1925 All. 108 47 A 100, *Darshandas v Bikramjit*, 48 A 81 A I R 1926 All. 128

" May make any defence appropriate to his Character."—The legal representative occupies the same character as the deceased and hence must stick to the position taken up by him in the pleadings, *Pathinhare v Sankara Menon*, 73 I C 376

See notes under section 50

Order XLI, Rule 20 and Abatement.—Or XLI r 20 does not override the provisions of Or XXII of the Code, *Manindra* v *Bhagabati*, 30 C. W. N 45, 90 I C 986 A I R 1926 Cal 335

Limitation.—Under Art 177 of Act IX of 1908, an application for substitution of the legal representatives of a deceased defendant or respondent must be made within 90 days, from the date of the death of the defendant or respondent as the case may be. The word "respondent" in Art. 177 of Act IX of 1908 is not confined to a respondent in the first appeal only, *Susya Pillai* v. *Aiya Kannu*, 29 M. 529; but it includes also a respondent in the second appeal; *Upendra* v *Sham Lal*, 34 C 1020, *Madhuban* v *Narain*, 29 A. 535. Where a respondent dies leaving more than one heir and one of the heirs is substituted as heir on the record within time but substitution of the names of the other heirs is made after the time allowed, appeal will not abate under this rule; *Sidhu Saran* v. *Nand Kumar*, 7 Pat L T 716. 94 I C. 209. A I R 1926 Pat 276

Where before the making of a final decree in a mortgage suit, the sole judgment-debtor dies and the decree holder fails to apply within six months of his death to have his heirs substituted and made subject to the preliminary decree, the suit (under Or XXII, r. 4) will abate, *Bhut Nath* v *Tarachand*, 25 C W. N 595: 33 C L J. 115.

Death of Pro Forma Defendant.—The death of a *pro forma* defendant or respondent during the pendency of a suit or appeal affords no ground for the abatement of a suit or appeal and the passing of a decree without his legal representative being brought on record does not render the decree a nullity; *Ambika Prosad* v *Jhinak Singh*, 45 A. 286: 21 A. L J. 91, *Abdulla* v *Mahammad*, 2 L L J 601; *Ram Labhaya* v. *Kartar Singh*, 7 L L J 466 92 I C 261 A. I. R. 1925 Lah. 651, *Brij Inder* v *Kanashi Ram* 44 I A 218 104 P R. 1917: 45 C 94.

Appeal.—An appeal lies from an order refusing to set aside an order of abatement —*See Order XLIII*, (1) (*k*).

An order under the penultimate clause of s 368, C. P. Code, 1882 (Or. XXII, r 4), declaring a suit to have abated is appealable not as a decree, but as an order, under Or XLIII, r. 1.—*Mehdi Husain* v. *Sughra Begum*, 25 A 206 The case of *Benode Mohini* v. *Sharat Chunder*, 24 C 837 10 C L R 119, in which a contrary view was taken is no longer the law

The High Court can take cognizance of the case under s 622, C. P Code, 1882 (s 115) —*Benode Mohini* v. *Sharat Chunder*, 12 C. L R 121

Decree for or Against a Dead Person.—A decree against a defendant who was dead at the institution of the suit is a nullity; *Ram Partab* v *Gouri Shanker*, 25 Bom L R 7: 85 I C 464: A. I. R. 1925 Bom 140, *Mohim* v *Azum*, 12 W R. 45; *Veerappa* v. *Tindal*, 31 M 86 A decree passed in favour of a number of plaintiffs one of whom is dead at the time is not necessarily a nullity in its entirety in every case. A decision of this matter will depend on a variety of consideration; *Sikandar Khan* v *Baland Khan*, A I R. 1927 Lah. 435.

Death of Defendant After Preliminary and Before Final Decree.—A preliminary decree does not put an end to a suit which remains pending till final decree. Where, therefore, a defendant dies after the passing of a preliminary decree against him and an application to bring his heirs

upon the record is not made within the period of limitation the suit abates *Moti Lal* v. *Ram Narain*, 39 A. 551: 40 I. C. 1006; *Jaganath* v. *Ram Karan*, 20 A. L J 575: 68 I C. 251: A. I. R. 1922 All. 396; *Bhutnath* v. *Tara Chand*, 25 C. W. N. 595; *Jungli Lall* v. *Laddu Ram*, 4 P. L. J. 240; *Seshamma* v. *Venkata Rao*, 47 M L J. 235: 80 I. C. 397: A. I. R. 1924 Mad. 713

Indian Succession Act and Legal Representative.—The legal representatives of a deceased subject to the Indian Succession Act are his executors or administrators and not his heirs, *Barnet Brs.* v. *Mrs. Fowle*, 3 R. 46 A I R 1925 Rang 186; *Framji* v *Adarji*, 18 B. 337.

Rehearing of Suit or Appeal.—A plaintiff whose suit is heard and dismissed is not entitled to a re-hearing of the suit on the ground that one of the defendants had died previous to the hearing of the suit and that the suit was heard without bringing the legal representative of the deceased defendant on the record The same applied to appeals.—*Vellyam* v. *Jothi* 28 M. L J 138

Execution Proceedings.—This rule does not apply to execution proceedings —*See* r 12

Determination of question as to legal representative.

5. Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court. [S. 367.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s. 367, C P. Code, 1882, with some alterations and omissions The word " the Court may either stay the suit until the fact has been determined in another suit " have been omitted, and the effect of the omission is that when rival parties claim to be the legal representative of a deceased plaintiff or defendant, the Court must determine that question, and it has no longer any option in the matter. The old section is reproduced below for the purpose of comparison " *If any dispute arise as to who is the legal representative of a deceased plaintiff the Court may either stay the suit until the fact has been determined in another suit, or decide at or before the hearing of the suit, who shall be admitted to be such legal representative for the purpose of prosecuting the suit.*"

" Shall be determined by the Court."—The Court in Or. XXII, r. 5, means the Court before whom the question as to who the legal representative is, arises *viz.*, the trial court if the question arises at the trial stage or the appellate Court if the question arises in appeal.—*Mt Chand Mani* v. *Kartik Singh*, 3 Pat. L. T. 380: 65 I. C. 131.

Where a dispute arises in the course of the trial as to who are the representatives of a deceased party, it is the duty of the primary Court to decide the dispute after investigation and if it fails to do so, the appellate Court can decide the question, *Taja* v. *Devi Ditta*, 4 Lah. L J. 314,

Rival Claimants for Substitution—Court to Determine Who is the True Legal Representative.—This rule empowers the Court, in a case where a dispute arises as to who is the legal representative of a deceased plaintiff, to appoint a legal representative *for the purpose of prosecuting the suit*, but the appointment of such legal representative is not a determination of any issue which is properly raised in the suit, and particularly (in a suit for partition of family property) such a vital issue as to whether the deceased plaintiff was joint or separate from the rest of the family.—*Parsotam Rao* v *Janki Bai*, 28 A 109: (1905), A. W. N. 206

When a question arises as to who are the legal representatives of a deceased plaintiff, it is obligatory on the Court to decide it—*Subrahmania Iyer* v *Muthu Vaithilinga*, (1918) M. W. N. 108: 44 I. C. 987.

When rival parties claim to be the legal representatives of a deceased plaintiff or appellant, the Court should, either before or at the time of hearing of the suit or appeal, ascertain and determine for the purpose of the prosecution of the suit or appeal, who is the true legal representative of the deceased, and should not admit on the record all the rival claimants as legal representatives of the deceased—*Muhammad Hussain* v. *Khushalo*, 50 A 223, F B, *Har Narain* v. *Kharag Singh*, 9 A. 447; *Vithu* v. *Bhima* 15 B 145 *See*, however, *Sankali* v *Murlidhur*, 12 A. 200; and *Balibar* v. *Ganesh* 27 B 162, in which all the cases on the point have been referred to and discussed. *See also*, *Palchur Mahalakshamma* v. *Veri Reddi*, 44 M. L. J 60 69 I C 529.

Or XXII, r 3 presupposes that the party claiming to represent a deceased plaintiff is his legal representative; but if the representative character is denied, or when two or more persons claim it, the procedure prescribed in this rule should be followed.—*Oula* v. *Beepathee*, 17 M 209 Distinguished in *Meenatchi Achi* v *Ananthanarayana*, 26 M 224

A dispute within the meaning of this rule need not be between persons claiming to represent the deceased plaintiff—*Subbayya* v. *Samiyadayyar*, 18 M 496. Followed in *Hanmant Singh* v. *Ram Gopal*, 30 A 348: 5 A L J 363 Distinguished in *Meenatchi Achi* v. *Ananthanarayana*, 26 M 224

Where an alleged adopted son of a deceased plaintiff applies to be made a legal representative of the deceased and his adoption and representative character is denied by the defendant, the Court is bound to enquire as to his representative character under this rule—*Vanjinathayar* v *Vaithinathayar*, 16 I. C 798. *See* also, *Vatsalabhai* v *Sambhaji*, 20 Bom L R 902 47 I C 757

The Court executing a decree is not competent to entertain the question of the legitimacy of the heir of the deceased judgment-creditor seeking to continue execution proceedings.—*Abidunnissa* v. *Amirunnissa*, 2 C 327 P. C. (affirming 20 W R 305).

A respondent having died, a *conditional order* was, on the application of the appellant, made substituting the name of his alleged representative on the record That order was cancelled upon the application of another person, who satisfied the Court that he and not the person whose name had been conditionally substituted was the *real representative*, and who asked to have his name put on the record. *Held*, that the Court had no

power to substitute the name of the applicant on the record, and no further application having been made by the appellant to complete the record, the appeal was ordered to abate —*Sadhu Sarun* v *Dwarka Singh*, 12 C. L. R. 45

Effect of Bringing a Wrong Representative on Record.—Where a person who is not the legal representative is in fact brought on record as such and the Court allows the wrong representative to be brought on record and to continue the litigation, the benefit of that litigation may be taken advantage of by the proper legal representative and the representatives on record will be accountable to him, *Zamindar of Bhadrachalam* v. *Raja Venkatadri Appa Rao*, 43 M L J 486 (1922) M W N 532

Legal Representative, Who Is?—For the purposes of Or XXII, r. 5, it is sufficient if a person has succeeded in forcing recognition of his status from the deceased and has intermeddled with the deceased's estate and is actually in possession of a portion of it, *Goor Bachan Singh* v. *Giam Singh*, (1922) Lah 175.

Appeal.—No appeal lies from an order under this rule —*Dunni Chand* v *Arja*, 37 A 272

No appeal lies from an order dismissing the application of a person to be brought on record as the legal representative of a deceased plaintiff, such an order not being a decree, *Ram Sarup* v *Mati Ram*, 1 L 493· 57 I. C. 737, *Rukhmini* v *Veeraswami*, A. I. R 1924 Mad 819; *Sahadeo* v. *Vidawati*, 91 I C 166 A I R 1926 Lah 181, The same view was taken by the Madras High Court in the recent Full Bench case of *Venkata Krishna* v *Krishna Reddi*, 49 M 450: 50 M. L. J. 485. 95 I. C. 489 A I R 1926 Mad 586, where it was held (overruling *Ayya Mudali* v *Veerayee*, 43 M 812) that no appeal lies against an order refusing the application of a person to be brought on record as the legal representative of a deceased plaintiff on the objection of the defendant even when there is no rival claimant for being brought on the record as his legal representative

An order under Or XXII, r 5, which brings on record two rival claimants as the legal representatives of a party to a suit without adjudicating on the relative claims of both is not appealable —*Shaik Aptab* v. *Moyan*, 39 I C 371 (1917) M W N 148 (27 B. 162 *distinguished*). *See* also, *Subramania Iyer* v *Muthu Vaithilinga*, (1918) M. W. N. 198: 44 I. C. 987

No abatement by reason of death after hearing.

6. Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place. [New.]

COMMENTARY.

This rule is new; it has been framed to give effect to the decisions noted below. *See* also notes under s. 50.

Where a party to a suit died after argument and before delivery of judgment, the decree passed in the suit or appeal is a valid decree, and can be executed against the heirs of the deceased defendant under s. 234 C. P. Code, 1882 (s. 80.).—*Ramacharya* v. *Anantacharya*, 21 B. 311. *See* also, *Narna* v. *Anant*, 19 B. 807; *Chetan Charan* v. *Balbhadra Das*, 21 A. 314, *Surendra* v. *Doorga*, 10 C. 573, P. C.; *Raghunatha* v. *Venkatesa*, 26 M. 101, *Goda* v. *Soondarmall*, 33 M. 167. But where he died before hearing or completion of arguments, the decree is a nullity.—*Janardhan* v. *Ramchandra*, 26 B. 317. *See* also, *American Bible Foreign Mission Society* v. *Ammala Nadhani*, 18 I. C. 859: *Vinayak* v. *Lallu*, 10 Bom. L. R. 270.

See the Report of the Select Committee.

Suit not abated by marriage of female party.

7. (1) The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may, notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may be executed against her alone.

(2) Where the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree. [S. 369.]

COMMENTARY.

This rule corresponds to section 369, C. P. Code, 1882, with the difference only that the word "*where*" in sub-rule (2) has been substituted for the words "if the case is one in which," which occurred in para. 2, of the old section.

A party having died while a suit was pending against him, his widow was brought upon the record, and a judgment was given against her, which was confirmed in appeal. The original decree embraced an award of certain mense-profits (occurring after the husband's death) for which the widow was personally liable. Between the original decree and final judgment, she married again and accordingly execution was sought against her second husband. Held that he was not liable and that the term "judgment" in this rule did not include the judgment in appeal.—*Brojobhur Chunder* v. *Mohintosh*, 9 W. R. 442.

8. (1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct.

When plaintiff's insolvency bars suit.

(2) Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate. [S. 370.]

Procedure where assignee fails to continue suit or give security.

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s. 370, C. P. Code, 1882, with some alterations and additions.

The word "*bankruptcy*" which occurred in the old section has been omitted. The first para. of the old section is reproduced below for the purpose of comparison and observing the change introduced in sub-rule (1):—

"*The bankruptcy or insolvency of a plaintiff in any suit which his assignee or the receiver appointed under s. 357 might maintain for the benefit of his creditors shall not bar the suit, unless such assignee or receiver declines to continue the suit and to give security for the costs thereof within such time as the Court may order.*"

Sub-rule (2) is almost similar to para. 2 of the old section. The changes made are merely of a verbal character.

Plaintiff's Insolvency.—*This rule does not apply to a case where there* has been only an application to declare the plaintiff to a suit an insolvent and vesting order made, but the proceedings are subsequently annulled, and the party is not declared either a bankrupt or an insolvent; therefore in such a case, where a suit has been dismissed for the non-appearance of the plaintiff or the Official Assignee on the date fixed for hearing, Or. IX, r. 9 applies.—*Amrita Lal* v. *Rakhali Dassi*, 27 C. 217: 4 C. W. N. 291.

If pending a suit the plaintiff is adjudged insolvent, the Court ought not to dismiss the suit without notice to the Official Receiver in whom the property of the insolvent vests, to appear and state his willingness or otherwise to continue the suit; *Official Assignee of Rangoon* v. *Chidambaram*, (1920) M. W. N. 704: 12 L. W. 551.

Section 107 of Act VIII of 1859 (this rule) means that a suit abates by the insolvency of the plaintiff, but that the defendant shall not plead the abatement without giving the Official Assignee an opportunity of

prosecuting the suit Where, therefore, the plaintiff after the institution of a suit, became insolvent, and the defendant thereupon obtained an order that the Official Assignee should give security for his costs within 14 days, and should be made party to the suit within one month, and that in default, the suit should be set down for dismissal within eight days after the expiration of the time so limited. *Held*, that such an order was irregular —*Gamble* v *Abdul Rahiman*, 12 Bom. H. C 257

If an assignee who has been substituted for the plaintiff under section 106, Act VIII, of 1859 (this section), declines to furnish security within such reasonable time as the Court may order, the defendant may, within 8 days after such neglect or refusal, plead the bankruptcy or insolvency of the plaintiff as a reason for abating the suit.—*Heera Lall* v *Carapiet*, 13 W. R 431

After the institution of a suit the plaintiff was declared insolvent, and, on the date fixed for hearing, the Official Assignee appearing applied for a postponement The Court accordingly made the following order — "It is ordered that the suit be dismissed unless the Official Assignee elects within two months to continue the suit and give security for the defendant's costs " The time for complying with the order was subsequently extended, and the plaintiff in the meantime obtained an order allowing the insolvency proceedings to be withdrawn The defendant now applied for dismissal of the suit in pursuance to the terms of the above order, and the plaintiff objected as he was no longer insolvent and now ready to prosecute the suit *Held*, that the order had been made in an improper form, inasmuch as this rule gives the Court no power to order the dismissal of the suit, and that the Court could now rectify it by cancelling that portion of the order —*Lekhraj Chuni Lal* v. *Sham Lal*, 16 B 401.

After the institution of a suit the plaintiff was declared an insolvent and thereupon the defendants obtained an order under this rule directing the Official Assignee to elect within the time fixed by the order, whether he would proceed with the suit, and, if so, to give security for costs Subsequently a creditor of the insolvent obtained an order from the Insolvency Court for the examination of the defendants with reference to the estate and effects of the said insolvent *Held*, that the defendants who have filed written statements in the suit, and who have in that suit given inspection of the decuments in their possession, ought not to be examined until that case is heard —*In re Bhagwan Das*, 22 B 447.

Insolvency of Pauper Applicant.—Where a pauper applies for leave to sue *in forma pauperis*, and after such application is granted, becomes insolvent, the provisions of the present rule can be applied, but not before. *Chidambaram* v *Kother*, 48 M L J 491: 87 I. C. 720. A. I R 1925 Mad 791

" Or. to give security."—Security for costs required to be furnished by the official Assignee should be at the time when electing to proceed with the suit he brings himself on the record as plaintiff Where without any such security being demanded, the option is given to the official assignee to continue the suit and on that option he has brought himself on the record and has been prosecuting the suit, no order for security of costs can be made at any subsequent stage ; *Venusami Iyengar* v

Varadaraja Iyer, A. I. R. 1927 Mad. 511: 100 I. C. 440 The object of Or. XXII, r. 8 is to make the Official-Assignee, in case he fails in the suit, liable for all costs of the suit and not only liable for such costs as were incurred after he appeared on the scene Under this rule, the official assignee should give security for the costs of the suit incurred up to the date when the official assignee is made a party plaintiff and not all costs that may be incurred till the termination of the suit, *Gulam Hussain* v *Pianally*, 28 Bom L. R. 1074 A. I R 1926 Bom 533

Limitation.—There is no limitation provided for the Official Assignee to appear and apply for substitution in place of a plaintiff who is adjudged an insolvent or for such plaintiff to appear and apply for the restoration of his name on the record after the adjudication is annulled Till therefore an order is obtained under Or XXII, r 8 of the C P. Code, the proceedings cannot abate and must be deemed to continue, *Khunnilal* v. *Rameshar*, 43 A 621 19 A L J 685

Execution Proceedings.—*This rule does not apply to execution proceedings See rule* 12

Effect of abatement or dismissal.

9. (1) Where a suit abates or is dismissed under this Order no fresh suit shall be brought *on the same cause of action.*

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit. [S. 371.]

(3) The provisions of section 5 of the Indian Limitation Act, 1877, shall apply to applications under sub-rule (2) [S 372-A.]

COMMENTARY.

Alterations in the Rule.—Sub-rule (1) corresponds to para 1 of s 371, C. P Code, 1882, with verbal changes only

Sub-rule (2) corresponds to para 2 of s 371, C P Code, 1882, with some alterations and additions The words "*the plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff,*" have been substituted for the words, "but the person claiming to be the legal representative of the deceased bankrupt or insolvent plaintiff," which occurred in the beginning of para 2 of the old section The other changes in this sub-rule are mere verbal

Sub-rule (3) corresponds to s 372-A of the C P Code, 1882, with the omission of the words "applicable to appeals," which occurred in the old section

Limitation.—An application to set aside an abatement or order of dismissal is to be made within 60 days under Arts 171 and 172 of the Limitation Act

Appeal.—An appeal lies from an order refusing to set aside the abatement or dismissal of a suit, under Or XLIII, r. 1 (*k*).

Where a party to a suit dies and more than 3 months after an application is made to bring on record his legal representative, the application is one under Or XXII, r 9 (2), and the order thereon is appealable under Or. XLIII, r 1 (*k*)

" May apply for an order to set aside the abatement."—The following persons are competent to apply under sub-rule (2), *viz.*, (*a*) the plaintiff [where a suit has abated under r 4 (3)] (*b*) the legal representatives of a deceased plaintiff [where a suit has abated under r. 3 (2)] and (*c*) the assignee of an insolvent plaintiff [where a suit is dismissed under r. 8 (2)].

Each one of the appellants is entitled to prosecute the appeal and to apply for setting aside abatement and for substitution ; *Sadhusaran v. Nandkumar*, 7 Pat L T 746 A I R 1926 Pat 276

Where a suit abates on account of the death of the sole defendant in the suit, the abatement must be set aside under Or. XXII, r 9, before a substitution of parties could be made ; *Mt. Bibee Khozaima v The Official Liquidator of the Kayestha Trading and Banking Association*, 2 Pat 168 , *Mahanth Ramperkash v Kunj Lall*, 4 Pat. L. T. 567. *See also*, *Jogunessa Bibi v Satish* 28 C W N 559, where it was held that where substitution had already been made the order for substitution could be treated as being one setting aside the abatement.

Whether Formal Order of Abatement Necessary Before Abatement can be Set Aside.—Where no application is made within the prescribed time to bring upon the record the legal representatives of a deceased plaintiff or appellant, the suit *or appeal* abates automatically. There is no necessity to pass an order that the suit has abated ; *Ram Gopal v. Har Kishen*, 7 L L J 517 88 I C. 478. A. I. R 1925 Lah 508, *Qaim v Nura*, 7 L 73 A. I R 1926 Lah. 234 ; *Sarat Chandra v. Maihar Stone Co Ltd* , 49 C. 62· A I. R. 1922 Cal. 335; *Lachmi v Muhammad*, 49 C 62· 42 A 540 But in *Gujrati v. Sitai*, 44 A. 459 66 I C 554, the Allahabad High Court held that before there can be an order of abatement, there must be an order, and it is from the date of the order that limitation begins to run

" No fresh suit."—When it is sought to revive a suit on the death of the plaintiff, the cause of action of the original and the revived suit must be same, and that no fresh cause of action can be imported into the revived suit —*Sham Chand v Bhayaram*, 22 C. 92. *See also*, *Umrao Begum v Irshad Hussain*, 21 C 997, P. C.

" Sufficient cause."—Where the plaintiff shows sufficient cause for not making the application for the substitution of the legal representative of the deceased defendant within the prescribed period and when he shows a *bona fide* desire throughout to effect the substitution, his application is not barred.—*Syed Hossain Ally v Abdur Rahim*, 7 C. W. N. 520.

Mere ignorance of the fact of death is not a sufficient excuse under Or XXII, r. 9; *Chuni Lal* v. *Kala Khan*, 4 L L J. 171 67 I. C. 596: A. I. R. 1922 Lah. 61; *Phulwati* v *Mahishtwari*, 75 I. C 909

Before an abatement is set aside the Court has to be satisfied that there was sufficient cause for not applying in time Ignorance of death, standing by itself, may be sufficient cause, but if it is accompanied by great delay and dilatoriness it would be otherwise, *Sarat Chandra* v *Maihar Stone and Lime Co. Ld*, 49 C 62. 67 I C 917, *Tirath Ram* v. *Mahomed Abdul Rahim Shah*, 73 I C 616, *Jowala Ram* v. *Hari*, 5 L 70: A I. R. 1924 Lah 429; *Rajani* v. *Raja Jyoti*, 27 C. W. N 710: 75 I C 255· A. I R 1924 Cal. 90 Ignorance of the whereabouts of the legal representatives of the deceased may also be a sufficient cause unless the ignorance was due to negligence, *Munshi Ram* v Radha, 6 L. L. J 192: 80 I. C 694 A I R. 1924 Lah 461; *Muhammad Mohsin* v. *Muhammad Abid*, 91 I. C 560

Under Or. XXII, r. 9, it must be proved that the appellant was prevented by "sufficient cause" from going on with the suit within the time allowed by law; otherwise the appeal once abated shall not be revived and the High Court has no discretion in the matter —*Gopallal* v *Kerani Gope*, 28 I C 803 *See* also, *Daya Singh* v *Butu Singh*, 118 P R 1916

It is the duty of the person prosecuting an appeal to keep himself informed of the existence of his adversary A mere plea of ignorance of the death of the opposite party is not a sufficient ground for setting aside an order that an appeal should abate.—*Mahomad Aslam* v *Lalu*, 45 I. C. 591· 21 O C 68

The provisions in Or. XXII, r. 9 (3) does not confine the sufficient cause mentioned in Sub-rule (2) to the circumstances given in s 15 of the Limitation Act; *Lachmi Narain* v. *Muhammad Yusuf*, 42 A 540: 18 A. L. J 688

Where more than three months after the death of a defendant in a suit the Court brought his legal representatives on record on an application for that purpose, on the ground that the parties were ignorant of the reduction of the time allowed by recent legislation, *held*, that the delay was properly excused; *Lakshmibai* v *Yeswant Vithal*, 24 Bom L. R 909.

Where the appellant had reason to suppose that the enactment of Act XXVI of 1920 would not affect the period of limitation for an application to implead the legal representative of a respondent who had died before the Act came into force, the abatement was set aside, *Niaz Ahmed Khan* v *Abdul Latif*, A I R 1923 Lah. 475

Where one of the defendants died pending the appeal, and the legal representatives of the deceased defendants were under the impression that the co-defendants were prosecuting the appeal and challanging the validity of the entire decree, it was held that it was a sufficient ground for excusing the delay in making the application to bring him on the record; *Chandrakumar* v *Sandhyamani*, 36 C 418: 2 I C 112

As to what is "Sufficient Cause," *see* also, *Shiba Prasad* v. *Rati Maity*, 53 I C 586, *Tiur Sing* v. *Todar Mal*, 22 P. W. R. 1919: 49 I C 50, *Syed Akhtar Hussain* v. *Qudrat Ali*, 9 O & A L R 267 73 I C 215. *See* also, sub-rule (2) of the rule and s. 5 of the Limitation Act which says: "*The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period of limitation may be sufficient cause within the meaning of the section.*"

Sub-rule (3).—If no application is made within 60 days to set aside the abatement or dismissal under Arts. 171 and 172 of the Limitation Act, the Court has the power under s. 5 of the Limitation Act to admit the application after the expiry of that period, if the applicant satisfies the Court that he has sufficient cause for not making the application within 60 days.

Substitution without setting aside abatement.—Where a suit abates on the death of a sole defendant, no order for the substitution of his legal representative in place of the deceased can be made untill the abatement has been set aside under this rule; *Bibi Khozaima* v. *Official Liquidator*, 2 Pat 168, A I R 1923 Pat. 417. According to the Bombay High Court the omission to set aside the abatement is merely a formal defect; *Lakshmibai* v. *Yeshvant*, 47 B 92.

10. (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved. [S. 372.]

Procedure in case of assignment before final order in suit.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1). [New.]

COMMENTARY.

Alterations in the Rule.—Sub-rule (1) corresponds to s. 372 of the C. P. Code, 1882, with some additions and alterations. The change introduced in sub-rule (1) will be apparent on a comparison with the provisions of the old section, which is reproduced below: "*In other cases of assignment, creation, or devolution of any interest pending the suit, the suit may, with the leave of the Court given either with the consent of all parties, or after service of notice in writing upon them and hearing their objections (if any), be continued by or against the person to whom such interest has come either in addition to, or in substitution for, the person from whom it has passed, as the case may require.*" On a comparison it would appear that the words "*during the pendency of a suit*" have been substituted for the words "pending the suit," and the words "*by leave of the Court*" have been substituted for the words "with the leave of the Court."

The words "*given either with the consent of all parties, or after service of notice in writing upon them and hearing their objections (if*

any)" and the words "*either in addition to or in substitution for, the person from whom it has passed, as the case may require,*" which occurred in the old section have been omitted

On a comparison of sub-rule (1) with the old section, it would appear that under the present rule it is not necessary for the Court to give leave with the consent of the parties or after service of notice upon them By the above alteration in language, no change seems to have been made in the meaning.

Sub-rule (2) is new. It has been framed to override the case of *Chail Behari* v. *Rahmal Das*, 20 A. 38, in which it was held that a creditor of a decree-holder who had attached the decree pending an appeal against it was not entitled to be made a party respondent under this rule

"Other cases of assignment, creation or devolution of interest pending suit."—Rules 2, 3 and 4 deal with the case of devolution of interest on the death of a party to a suit Rule 7 deals with the case of creation of an interest in a husband on marriage of a female party, and Rule 8 deals with the case of assignment on the insolvency of a plaintiff. This rule provides for cases of assignment, creation and devolution of interest other than those mentioned above.

The words "other cases" in this rule mean cases other than those specifically mentioned in the previous rules If therefore the proceeding rules, though they have dealt with the event of death, have so dealt with particular cases only, other cases will fall under this rule. A mortgage suit even after an order absolute for sale is a pending suit until the sale actually takes place, and an application made before sale by the legal representatives of the decree-holder for substitution would fall under this rule; *Bhugwan Das* v *Nilkanta*, 9 C W N 171 *See* also, *Chunna Lal* v. *Abdur Ali*, 23 A. 331; *Dakoju Subbarayadu* v *Musti Ramadasu*; 42 M. L. J. 301. (1922) M W N. 375 R 10 is a residuary rule governing only those cases which are not provided for by the pending rules, *Sahdev Singh* v. *Vidyawati*, 91 I C. 166. A I R 1926 Lah 181.

"Interest."—The "interest" contemplated by this rule is an interest which will be vitally affected by the suit; *Harihar* v *Gendilal*, 43 I. C 811. The word "interest" in this rule means interest in the property which is the subject-matter of the suit; *Harish* v *Chandpore Co. Ltd*, 30 C 961 A obtained a decree for money against a certain limited company The company had sold their properties to a third person who again sold his rights to another limited company On an application for execution of the decree against the latter company, substituting them on the record as the legal representatives of the former company on their dissolution *Held*, that the decree could not be enforced against the latter company, this rule not being applicable to the case, *Harish* v *Chandpore Co Ltd*, 30 C 961 (*followed in Arbuthnots' Industrials* v. *Muthu Chettiar*, 31 M 464 4 M L T 90) An adoption is not a "devolution" or the "creation" of an interest within the meaning of this rule It is the creation of a status to which certain incidents are attached by law; *Ganpatrao* v *Laxmi Bai*, 15 N L R 24

Assignment, Creation or Devolution of Interest Pending Suit.—A suit brought on behalf of a *mutt* by a trustee not properly appointed

can be continued by a properly appointed successor on whom the repre- sentation of the institution has devolved. Or. XXII, r. 10, and not Or. XXII, r. 5 applies to such a case; *Ratnam Pillai* v. *Annamalai* [illegible] 46 M. L. J. 341 : 19 L. W. 367.

Where a trustee dies or retires and another is elected in his place the estate devolves on the new trustee and it is a case of devolution of interest within the meaning of this rule. The new trustee can be added under Or. XXII, r. 10; *Thirumalai* v. *Aruna Chella*, 92 I. C. 529: A. I. R. 1926 Mad. 540.

Where a suit is alleged to have been compromised and a document embodying the compromise has been filed in Court, the suit does not cease to be pending until the passing of the decree. Consequently it is open to a person alleging himself to be the purchaser of the property before the compromise to apply under Or. XXII, r. 10 to be added as a party to the suit; *Lakshan Chandra* v. *Nikunjamani*, 27 C. W. N. 755 (32 C. 4[illegible] 13 C. L. J. 487, 43 M. 37, 37 A. 326 *refd. to*).

Where the High Court sends for the records in an appeal filed by the plaintiff against an interlocutory order of the lower Court refusing to appoint a receiver of the property, the suit is still pending on the file of the trial Court and it has jurisdiction to bring on record, the legal representatives of a deceased plaintiff. *Bhogilal* v. *Darasha Kooverji*, 25 Bom. L. R. 308.

The words " during the pending of a suit " in Or. XXII, r. 10, relate to a suit in which no final order has been made.—*Gocool Chunder* v. *The Administrator-General of Bengal*, 5 C. 726: 5 C. L. R. 569.

A party seeking to bind the Official Assignee by the result of a suit pending which the interest in its subject-matter has devolved upon him by operation of law, should apply under this rule to have him joined as a party to the suit. This rule is applicable only to the case of an assignment of an interest in the subject-matter of the suit during the pendency of the suit.—*Punnitharolu* v. *Bhashyam*, 25 M. 406 (18 C. 43 *referred to*). The " devolution " referred to in Or. XXII, r. 10 is not of the same character as is referred to in the definition of " legal representative " in s. 2 (11) and only means the devolution of the interest of the person who instituted the suit.—*Lakshmi* v. *Subbarama*, 28 M. L. J. 491 : 29 I. C. 142.

The " cases of assignment, creation, or devolution " of any interest pending a suit contemplated by this rule are those in which " the person to whom such interest has come " is arrayed on the same side in the suit as " the person to whom it has passed." *Held*, therefore, that a compromise in a suit for land between the plaintiffs and one of the defendants whereby the latter consented to a decree being given to the former for half of the land, was not a " case of assignment " of interest in such land within the meaning of this rule.—*Radha Prasad* v. *Rajendra Kishore*, 5 A. 209.

Order XXII, r. 10 applies to an application made by a person who has not obtained any assignment directly from a party to the suit but has obtained an assignment derivatively from a party to the suit.—*Prasanna Kumar* v. *Ashutosh*, 18 C. W. N. 450; 20 I. C. 685.

Where a public trust is represented at different stages of a suit by different representatives, one not claiming under the other, the rule applicable to the case is Or. XXII, r. 10, and not Or. XXII, r. 8 of the C. P. Code; *Sundaresan Chetty* v. *Visvanatha*, 45 M. 703: 43 M. L. J. 147: (1922) M. W. N. 444.

A person who had advanced monies to the plaintiff to carry on the suit and had obtained an assignment of half of her interest, which assignment was disputed by the plaintiff, was made a party defendant on his own application only upon the statement of the plaintiff that the assignment was executed but without deciding her objection that the assignment was not good and valid.—*Rajaranee Dassee* v. *Debendro Nath*, 8 C W. N. 754.

A mortgagee of defendant's property before suit, who has also made further advances to the defendants on the same security after the suit, is entitled to be made a party to the suit under this rule on defendant's declaring his intention of abandoning his defence.—*Ahmedbhoy Hubibhoy* v. *Vulleebhoy*, 8 B. 323.

The language of Or. XXII, r. 10 is sufficiently wide to cover the cases of leases such as those which are alleged to have been granted by the defendants during the pendency of the litigation *Ramkumar Lal* v. *Raja Mukund*, 1 Pat L. J 596 (39 C. 220 *distd*). *See* also, *Maharaja Sir Manindra Chandra* v. *Ramlal Bhagat*, 27 C W N. 29 P. C.; 36 C. L. J 542; 49 I A 220 P. C.

When certain persons applied to be made co-plaintiffs and failed, they could not apply to have the application treated as one under Or. XXII, r. 10 for substitution of new plaintiffs on the ground that there had been a transfer or devolution of interest from the plaintiff, *pendente lite*.—*Srimati Bibi Jan* v. *Abdul*, 36 I. C 999.

The words " devolution of interest " in this rule do not mean only devolution by *death*, but are applicable to a case in which, pending a suit instituted by the manager of Chota Nagpore encumbered estate, the estate is released from the management and restored to the owners It is open in such a case to persons alleging themselves to be owners of the estate to apply to be made plaintiffs in the place of the manager, under this rule —*Sourindra Mohun Tagore* v *Siromoni Debi*, 28 C 171; 5 C. W N. 307. The assignee of a mortgage deed has a right to come in under this rule. When a receiver has filed a suit and has been discharged during its pendency the person beneficially entitled to the property, may be allowed to continue the suit as plaintiff —*Macleod* v. *Kishan*, 30 B. 250: 6 Bom. L. R. 996

The insolvency of defendants in a mere money suit does not affect the devolution of any interest upon the Official Assignee within the meaning of this rule which is substantially the same in its terms as s 372 of the old Code.—*Jethalal Kalianji* v. *Gangaram*, 29 I. C. 30 8 S. L. R. 325.

On the death of the plaintiff, his sons, who were mere heirs of a joint Mitakshara family, of which their father, the deceased plaintiff, was a managing member, applied for the revival of the suit. *Held*, that it was not necessary that either letters of administration or certificate under Act

VII of 1889 should be obtained in order to entitle the applicants that they may be permitted to proceed with the suit —*Beejraj* v *Persaud*, 23 C. 912

An adoption is not the creation of an interest within Or. XXII, but is the creation of a status. It does not operate as a devoluti interest or as an alienation —*Ganpat Rao* v. *Laxmi Bai*, 43 I. C. 6

If a person applies to be substituted or added under Or. XXII, on the ground of assignment *pendente lite* and it is disputed, the has power to decide that dispute. This rule is not confined to ca admitted assignment, creation or devolution of interest.—*Enday* *Benodini* 29 C L. J 362 51 I. C. 233; *Surendra Narayan* v *Nit* *Narayan*, 90 I C 267 A. I. R 1926 Cal. 173; *Allah Jawaya* v *Rai*, 94 I. C. 926 A. I R. 1925 Lah 574.

Assignment or Devolution of Interest Pending Appeal.—This does not apply to a case where the devolution of interest occurs be the time of the passing of a decree and the time of filing an appeal the decree —*Collector of Muzafarnagar* v. *Husaini Begum*, 18 A Distinguished in *In re Durga Prasad*, 22 A. 231. *See* also, *Narain* v. *Dy Commr., Pertabgarh*, 38 I. C. 511: 20 O. C. 31.

Held, that the rule applies as well as to the case of a devoluti interest pending an appeal as to the case of a devolution of interest ing a suit —*Held*, also, that a person may, under this rule be add substituted as a party either on his own application, or on the appli of one of the parties already on the record.—*Gokal Chand* v. *Sarat* *dra*, 18 A 285 Followed in *In re Durga Prasad*, 22 A 231; *Rajani* v. *Raja Joyti Prasad*, 27 C. W. N. 710

Death of respondent pending appeal—Right of assignee his in to be substituted in his place *Held*, that where there has not only bee death of the respondent, but an alleged prior conveyance to him o property awarded by the decree appealed against, there is a fact in tion to the fact contemplated by s 368, C. P. Code, 1882 (Or. r. 4) and this rule being alone sufficiently inclusive, must apply —*So* *ram Bhagvat* v. *Jibai*, 9 B. 151 Approved in *Jamna Das* v. 16 B. 27

A obtained a decree against *B*, declaring his right to a house decree was reversed on appeal, and *A's* claim was dismissed. The Court reversed the decree of the District Court and remanded the ap On remand the District Court made a decree in favour of *A* confirmin original decree of the first Court. Subsequent to the decree of District Court on remand, *B* sold the house to *C*. *B* then preferr special appeal to the High Court. but died before it was heard that *C* could not carry on the special appeal after *B's* death —*More* *Bapuji* v. *Kushaba*, 2 B. 248

Assignment of decree pending appeal—Assignee of decree made pondent to appeal—Decree reversed in appeal—Liability of assignee costs of hearing in lower Court *Held*, that the assignee of a decree, is made respondent in an appeal from it and takes no steps actively support it, ought not to be ordered to pay costs —*Ramji Morarji* v *Ellis*, 20 B. 167.

A receiver who filed the appeal was discharged and a new receiver was appointed in his place. *Held*, that the litigation commenced by him did not abate, but it cannot proceed without his successor being impleaded.—*Akula Paradesi* v. *Dhelli Jagannatha*, 28 A. 157.

No New Suit.—The suit, carried on with the leave of the Court by the person who has acquired an interest by devolution, is not a new suit. It is the old suit carried on at his instance, and he is bound by all proceedings up to the stage when he obtains leave to carry on the proceedings; *Rai Caran* v. *Biswanath*, 20 C. L J. 107. The essence of this rule, whether applied to proceedings in the Court of the first instance or proceedings in appeal, is that the suit is one from the beginning, and that the addition of the transferee does not initiate, as regards him, a new proceeding; *Chuni Lal* v. *Abdul 'Ali*, 23 A. 331, 335.

Limitation.—The right of the assignee to apply for substitution in a pending suit is a right which accrues from day to day and is not therefore barred by limitation.—*Kedar Nath* v. *Hara Chand*, 8 C. 420, *Surendra Keshub* v. *Khetter Krishto*, 30 C 609; *Prasanna Kumar* v. *Ashutosh*, 18 C. W. N 450.

In a partition suit a preliminary decree was made in July 1887. Since then no steps had been taken to carry out the decree. The plaintiff, the father of the petitioners, died in December, 1891, leaving the petitioners, who now applied to have the suit revived in their name *Held*, that the application was made in a pending suit, and though falling within this rule was not time barred, the right to apply being one which accrues from day to day.—*Ram Nath* v. *Uma Charan*, 3 C W. N 756 (8 C 420 *followed*).

After the preliminary decree and before the final decrees where the judgment-debtor dies and more than six months after his death an application is made to bring his legal representatives on the record, such application falls under Or. XXII, r 10, and not under Or. XXII, r. 4 and is not barred by time, *Tularam* v. *Tukaram*, 64 I C 307

Appeal Against Orders under this Rule.—Under Or XLIII, r. 1, cl (*l*), an appeal lies from an order under this rule giving or refusing to give leave

On an application for substitution made under this rule, it was objected that the application could not be granted, but the Court overruled the objection and ordered the substitution applied for. *Held*, that the order for substitution was practically the same as an order disallowing objections, and that there was nothing in the terms of section 588 (21), C P. Code, 1882 [Or XLIII, r. 1, cls (*k*), (l)], to prevent an appeal from that order.—*Sourindra Mohun Tagore* v. *Siromoni Debi*, 28 C. 171. 5 C. W. N 307.

An order dismissing on its merits an application by the assignee of a plaintiff in a suit to be brought upon the record either in addition to or in substitution for the plaintiff, is a judgment within the meaning of article 15 of the Letters Patent and an appeal lies therefrom.—*Commercial Bank of India* v. *Sabju Saheb*, 21 M 252

Execution Proceedings.—It is doubtful whether Or. XXII, r 10 applies to execution proceedings.—*Harish Chandra* v. *Chandpore Company*

Limited, 30 C. 961. This rule seems to have been made applicable to execution proceedings by Or. XXII, r. 12 by the principle of exclusion—*Midnapore Zemindary Co Ld* v. *Kumar Naresh Narain Roy*, 16 C. W. N. 109 (30 C. 961 *referred to*)

Application of Order to appeals.

11. In the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal [S. 582]

COMMENTARY.

This rule corresponds to the latter part of section 582, with some alterations The first portion of the section has been incorporated in s 107.

This rule gives effect to *Shoshi Bhusan* v. *Girish Chunder*, 11 C 604, *Chajmal Dass* v *Jagadamba Prosad*, 10 A. 260; *Debi Din* v. *Chunna Lal*, 10 A. 264, *Rajmonee* v. *Chunder Kant*, 8 C. 440: 10 C. L R 437: 11 A. 408 and 22 A 430 In these cases it has been held that the word "plaintiff" or "defendant" must be held to include "appellant" or "respondent" respectively The cases in which a contrary view was taken have been overridden by this rule.

Death of Appellant or Respondent—Abatement of Appeal.—Where the right to sue is a personal right, it ceases with the death of the appellant and the appeal abates, as in the case of a reversioner.—*Satyabhami* v *Bhavani*, 27 M. 588

The test to determine whether or not the failure to bring upon the record the heirs of one of several respondents, who has died, has the effect of causing an abatement of the entire appeal or *qua that particular respondent* alone, is as to whether or not the appeal can be decided without, as a result of that decision, bringing into existence two decrees contrary to each other. If the result of hearing and deciding the appeal would be to bring into existence two decrees of Courts of competent jurisdiction contrary to each other, the appeal must abate as a whole; *Sheo Chand* v *Sita Ram*, A. I R 1927 All. 331

Where pending an appeal by the plaintiff in a suit for malicious prosecution on the ground that the damages awarded were insufficient, the appellant (plaintiff) died: *Held*, that the appeal abated; *Murugappa Chettiar* v. *Ponnusami*, 44 M. 828: 41 M. L. J. 304: (1921) M. W. N. 138

At the date of the hearing of the appeal the appellant was dead, but neither the pleader nor the Court was aware of the fact. The Court heard and decided the appeal Subsequently the deceased appellant's son applied for re-hearing of the appeal. *Held*, that the decree of the lower Appellate Court was a nullity The Court was barred under s 365, C. P. Code, 1882 (Or. XXII, r 3) to enter his name on the record and to rehear the appeal.—*Janardhan* v *Ram Chandra*, 26 B. 317.

Death of joint appellant pending appeal—Legal representative of the deceased appellant not brought on the record—Appeal proceeded with

by surviving-appellant. *Held*, that the Appellate Court had power to hear the appeal and reverse the whole decree under s. 544, C. P. Code, 1882 (Or. XLI, r. 4).—*Chintaman* v. *Gangabai*, 27 B. 284: 5 Bom. L. R. 90.

Pending the hearing of a special appeal the appellant died, and after the prescribed period of limitation, his son and the sole heir applied to be substituted as appellant in place of the deceased for the purpose of prosecuting the appeal. *Held*, that the application was not made under s. 365, (Or. XXII, r. 3) but under s. 587, C. P. Code, 1882, (s. 108) and was, therefore, not barred by art. 171 and 172 of the Limitation Act. —*In the matter Ram Sunker*, 3 C. L. R 440.

Leave to revive the the widow's appeal, which abated on her death before the hearing was obtained by the younger daughter of the deceased *talukdar*, one of the defendants· she being next among those who would have a claim to inherit the *taluk* in succession should the appeal be decreed. *Held*, that the appellant by revivor must be restricted to the suit for the *taluk*, and could not advance on this appeal any claim of her own which she might have preferred in a suit to inherit property which had belonged to the deceased other than the *talukdari* estate.—*Umrao Begum* v. *Irshad Husain*, 21 C. 997, P. C.

Procedure analogous to that laid down in s 368, C. P. Code, 1882 (Or. XXII, r. 4), in respect of the death of a defendant must be applied in the case of the death of a respondent. Where, therefore, a respondent dies pending an appeal, the appellant is at liberty to select one or more persons to defend the appeal; and no person, other than the person so selected, has a right to force himself into the proceedings and to claim to have his name entered as representative of the deceased respondent against the appellant's consent.—*Lakshmi Bai* v *Balkrishna*, 4 B. 654. *See* also, *Rajmonee Dabee* v *Chunder Kant*, 8 C 440, 10 C. L R 437.

Although a Court is bound by s 368, C P Code, 1882 (Or. XXII, r. 4), to place on the record the name of the person alleged by the appellant to be the legal representative of a deceased respondent, nevertheless, where a person, other than the person alleged by the appellant to be such representative, claims, on good *primâ facie* grounds to be the representative of the deceased respondent, and the interest of the person entitled to the estate of the deceased may be prejudiced, the Court should under s. 32, C. P Code, 1882 (Or I, rr 8, 10, 11), proceed to make such claimant also a party to the appeal —*Athappa* v *Ayanna*, 8 M 300.

On the death of a respondent pending an appeal, the assignee of his interest has a right to be substituted in his place —*Rajaram Bhagvat* v. *Jibai*, 9 B 151.

Where several plaintiffs or defendants jointly appeal against a decree to which s 544, C. P Code, 1882 (Or XLI, r 4) applies, the death of one of such appellants, if no legal representative of the deceased is brought upon the record within limitation, can only have the effect of causing the appeal to abate only as against the deceased appellant, it cannot have the effect of causing the appeal as a whole to abate —*Ram Sewak* v. *Lambar Pande*, 25 A 27 (22 A 222 *overruled*, 16 A 211 *distinguished*). *See* also, *Alla Baksh* v *Madho Ram*, 23 A. 22; and *Chandarsang* v.

Khimabhai, 22 B. 718. Followed in *Bai Full* v. *Adesang*, 26 B. 203 and in *Upendra Kumar* v. *Sham Lal*, 34 C. 1020: 11 C. W. N. 1100, 6 C. L J. 715. Referred to in *Chintaman* v. *Gangabai*, 27 B 284. But where the relief sought against the defendants is joint and indivisible, abatement against one is abatement against all; *Sardara* v. *Allahyar*, 73 I. C. 604.

Where a joint decree for possession in favour of the several plaintiffs was passed by the trial Court and pending an appeal therefrom by the defendant, one of the plaintiffs respondents dies and his legal representatives are not brought on record within time, the whole appeal abates, *Arjun Mirdha* v *Kali Kumar*, 68 I C. 194; *Sheikh Dendoo* v. *Shaikh Sachon*, 72 I. C. 2

Where for failure to bring on record the representatives of one of the respondents who is a necessary party, the appeal abates, it also abates as against all respondents, *Ma Zan Nyein* v. *Maung Kyaw Zan*, 1 Rang 189. 74 I. C 1027.

Where a respondent dies during the pendency of an appeal and his legal representatives are not brought on record within time, the appeal automatically abates as against him, even where the appellant is not aware of his death, *Sheo Chand* v. *Sita Ram*, 100 I. C. 482: A I R 1927 All 331 (A. I R 1926 All 217, *folld*).

Where one of four respondents in the lower Appellate Court died, and no application was made within 6 months to put the legal representative on the record, and, in the application that eventually was made, the wrong person was named as legal representative: *Held*, that the appeal was one where the right to appeal did not survive against the surviving respondents, but against them and the representatives of the deceased respondent Under the circumstances s. 368, C. P Code, 1882 (Or. XXII, r 4), read with this rule, applied, and the proper order was to have directed the suit to abate —*Hem Kunwar* v. *Amba Prasad*, 22 A. 430. Distinguished in *Dharan Jit Narayan* v. *Chandeswar Prosad*, 11 C W N. 504, 5 C L. J 393 and in *Joy Gobind* v. *Monmotho Nath*, 33 C. 580

In a suit for accounts of partnership business, all the partners are necessary parties and the suit cannot go on in the absence of any one of them. A respondent, to whom a sum of money was due under the decree of the first Court died, pending an appeal to the High Court An application for substitution of his representative was made more than 6 months after his death, and no sufficient cause was shown for the delay *Held*, that the nature of the suit being such that the right to sue did not survive against the other defendants (respondents) alone, the appeal abated —*Raj Chunder* v *Ganga Das*, 31 C. 487, P. C.: 8 C. W. N 442

Where in an appeal the interests of the several respondents cannot be discriminated, an order of abatement in respect of one of the respondents results in the abatement of the appeal against all; *Srimati Golasmaler Khatun* v. *Nawab Khajah Habibulla*, 64 I. C 49.

An appeal does not abate by reason of the failure of an appellant to bring on record, the representative of a deceased respondent within the prescribed period, if the appeal can proceed, in the absence of such representative, to a final and complete adjudication.—*Ranga Srinivasa*

v. *Gnanaprakasa Mudaliar*, 30 M. 67 (31 C. 487. 8 C. W. N. 442 *distinguished*).

Where on the death of a respondent it appears that his heirs are already parties to the appeal, it cannot be said to have abated merely because no fresh application is made to bring on the record the legal representatives of the deceased; *Kartar Singh* v. *Lal Singh*, 59 I. C. 238

When during the pendency of an appeal against a decree for rent one of the plaintiffs (respondents) died and his heirs were not brought on the record: *Held*, that the appeal ought to be dismissed—*Tarip Dafadar* v. *Khotjannessa*, 10 C W N 981 (6 C. W. N. 196 *followed*)

Where the special appellant died during the pendency of the appeal: *Held*, that the appeal must abate; and that the respondent could not require that it should proceed, in order that he might have an opportunity of taking objections to the decree of the lower Court. If the respondent desires to secure the right of asking for a decision on his objection, he must file a separate appeal.—*Jatta Bin* v. *Babu Bin*, 3 Bom H. C 81.

Limitation for Application for Substitution.—Articles 176 and 177 of the Limitation Act IX of 1908 are
Legal representatives of the dece
and the period is 6 months from
overridden the cases (12 C. 590; 10 A. 264; 7 A 693, and 10 B. 663) in which it was held that Art. 178 of the Limitation Act, 1877 (Art. 181 of Act IX of 1908), was applicable to such cases

When a respondent in a second appeal dies during the pendency of the appeal, an application by the appellants to substitute ... record is governed ...

CALCUTTA HIGH COURT

XV *Add* the following to Rule 11, Order XXII —

" Provided always that where an Appellate Court has made an order dispensing with service of notice of appeal upon legal representatives of any person deceased under Order XLI, Rule 14 (3), the appeal shall not be deemed to abate as against such party and the decree made on appeal shall be binding on the estate or the interest of such party " (P. 1577.)

COMMENTARY.

Scope of Object of the Rule.—This rule is new It has been framed to set at rest the several conflicting rulings under the old Code. Under

the Code of 1882, it was held in several cases that Chapter XXI of that Code, which has been replaced by this Order, did not apply to proceedings in execution of a decree. But this rule provides that with the exception of rules 3, 4 and 8 of this Order all other rules shall apply to execution proceedings. Rule 3 deals with the procedure in case of death of one of several plaintiffs or of sole plaintiff; rule 4 deals with the procedure in case of death of one of several defendants or of sole defendant; and rule 8 deals with the procedure in case of plaintiff's insolvency.

Application of Order XXII to Execution Proceedings.—On the death of a judgment-debtor or execution-creditor, the execution proceedings do not abate, and the legal representatives may apply to proceed with the execution.—*Monmatha* v. *Rakhal*, 14 C. W. N. 752: 10 C. L J. 396

The provisions of Or. XXII relating to the abatement of suits and appeals do not apply to execution proceedings or to appeals from orders made in such proceedings *Mir Khan* v. *Sharfu*, 5 L L J. 163: 71 I C 577.

Or. XXII, r 12 provides that rule 3, which refers to substitution of legal representatives of a deceased plaintiff, does not apply to proceedings in execution of a decree. On the death of the applicant for execution, it is open to his legal representatives to apply immediately for carrying on the proceedings in execution of the decree, or to apply for fresh execution under Or. XXI, r 16. It is not necessary for them nor is it competent, to make an application for substitution, and therefore an order for substitution, if made, cannot have the effect of continuing the application made by the predecessor, *Akhoy Kumar* v. *Surendra*, 30 C. W. N. 735 96 I C. 378 · A. I. R. 1926 Cal 957.

ORDER XXIII.

WITHDRAWL AND ADJUSTMENT OF SUITS.

1. (1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

Withdrawal of suit or abandonment of part of claim.

(2) Where the Court is satisfied—

(*a*) that a suit must fail by reason of some formal defect, or

(*b*) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others. [S. 373.]

COMMENTARY.

Alteration in the Rule.—Sub-rule (1) is new, except the words "*at any time after the institution of a suit*" in the first line. The most important change introduced in this sub-rule is the substitution of the words "*withdraw his suit*" *for* the words "withdraw from the suit" which occurred in the old section. The distinction between the above two expressions has been clearly pointed out in 32 B 345, noted below.

Sub-rule (2) corresponds to first para. of section 373, C. P. Code, 1882, with some additions, alterations and omissions. The word "*on the application of the plaintiff*," which stood after the words "the Court is satisfied," have been omitted from the present rule. The words "*allowing the plaintiff to institute*" have been substituted for the words "permitting

him to bring " in clause (*b*). The words " *as to costs or otherwise* " which stood after the words " *terms* " in the old section, have been omitted The other alterations made in sub-rule (2) are mere verbal

Sub-rule (3) corresponds to para. 2 section 373, C P Code, 1882 with change of some words and phrases, without any change in the meaning. The words " *in respect of such subject-matter or such part of the claim,*" have been substituted for the words " for the same matter or in respect of the same part " which occurred in the old section

Sub-rule (4) is almost similar to para. 3 of the old section

Object of the Rule.—The object of Or. XXIII, r. 1 is not to enable a plaintiff after he has failed to conduct his suit with proper care and diligence and after his witnesses have failed to support his case, to obtain an opportunity of commencing the trial afresh in order to avoid the result of his previous misconduct of the case and prejudice the opposite party — *Nathuni Ram* v *Musammat Sheo Kuar*, 3 Pat. L J. 460 · 5 Pat. L. W 104 (1918) Pat. 220, 46 I C 179.

The main *object* of Or XXIII, r 1 (2) is to prevent a defeat of justice on technical grounds Where no formal defect necessitating failure of the suit is shown to exist there must still be a defect which has the effect of shutting out a fair trial on the merits and arises out of some error made in good faith by the plaintiff which can only be effectively set right by a trial *de novo*—*Doma* v. *Dayaram*, 48 I C. 1005.

Distinction between the expressions " Withdrawal from suit " and " Withdrawal of Suit."—Sub-rule (1) contemplates a withdrawal of the suit and sub-rule (2) a withdrawl from the suit If a party desires to withdraw from the suit with liberty to bring a fresh suit, he must apply to the Court under sub-rule (2) for permission so to withdraw. If he does not desire to withdraw from the suit, with liberty to bring a fresh suit then he can under sub-rule (1) *withdraw the suit* of his own motion for which the Court's order is not necessary —*Mohant Behandasji* v. *Parshotamdas*, 32 B. 345 · 10 Bom L. R 293.

Power of Court to Allow Withdrawal of Suit.—*There is no general* jurisdiction given by the C P. Code for allowing a party to withdraw except under Or. XXIII, r 1 If there is no formal defect in the case, the plaintiff cannot be allowed to withdraw the suit with liberty to bring a fresh one If the plaintiff is allowed in such a case, the High Court will set aside the order —*Ramchandra* v. *Hachunika Faker*, 35 I. C. 843 (16 C. W. N. 1027 *approved*).

Or. XXIII, r. 1 does not apply except to cases where the suit is properly pending in a Court in which the leave is granted. Therefore a Court which has no jurisdiction cannot permit withdrawal of a suit.—*Ramdeo* v. *Gonesh*, 35 C. 924: 12 C. W N. 921.

Where a plaintiff does not desire to withdraw unless with liberty to bring a fresh suit and the Court considers that such liberty ought not to be granted no sufficient ground having been made out, the proper course is to dismiss the application—*Suradhani* v. *Chandranath*, 20 C. W. N 1011 (32 B. 345 *followed*).

A Court has no jurisdiction to allow withdrawl of a suit after an award is made by an arbitrator against the plaintiff.—*Debi Churn* v. *Bipra Prasad*, 7 C. W. N. 186.

An application for withdrawl cannot be conditional, to the effect, " that if the Court considers the suit to be badly framed, then the plaintiff may be permitted to withdraw." Such conditional application is not contemplated by the rule.—*Baij Nath* v *Ravaneswar Prosad*, 6 C. L. J. 163 (166).

Courts in India have no power to dismiss a suit with liberty to bring a fresh suit.—*Hiralal* v. *Udoy*, 16 C. W. N. 1027. 16 C L. J. 103.

Permission under section 97, Act VII of 1859 (this rule), to bring a fresh suit, could not be given after final judgment has been pronounced.—*Sheoraj Nandan* v *Raj Coomar*, 24 W. R. 23

An Appellate Court has no power to interfere with the discretion of the first Court in allowing a plaintiff, at any time before final judgment, to withdraw from the suit with liberty to bring a fresh suit in the same matter.—*Ram Kanye* v *Haru Chunder*, 17 W. R. 229.

Withdrawal of Application to Withdraw Suit.—An application to withdraw a *suit can itself be withdrawn for proper reason, and the suit could* be proceeded with thereafter; *Lakshmana* v *Appalwar*, 44 M L J. 77 71 I. C. 288.: A I R. 1923 Mad 246

Finality of Order Allowing Withdrawal.—Where a suit has been allowed to be withdrawn with liberty to sue afresh, the Court trying the subsequent suit is not competent to enter into the question whether the Court which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit had properly made such order, *Samaddi Sheikh* v. *Fulbash Bewa*, 1923 Cal 269

Power of Appellate Court to Allow Withdrawal of Suit.—Where a plaintiff's suit is dismissed, and he appeals from the decree, the appellate Court has power, *under this rule read with s 582, C P Code, 1882* [s. 107 (2)], to allow a plaintiff to withdraw from the suit with liberty to bring a fresh suit —*Afzal Begum* v *Akbari*, 37 A 326. 13 A. L J 444; *Ganga Ram* v. *Data Ram*, 8 A 82; *Kamayya* v *Papayya*, 40 M 259: 37 I. C 41 F B; *Channubhai* v. *Dahyabhai*, 44 B 598; *Sheikh Hassain* v. *Mahomed*, 45 B. 206 59 I C 210; *Sheikh Hussan Gulam Mohidin* v. *Mahamed Ali*, 22 Bom L R. 1183 45 B 206; *Udoy Chand* v *Mulla Reasat Hossain*, (1922) Cal. 58, *Tewari Gajraj* v. *Sri Thakayi*, 74 I. C 894. But see *Kaliprasanna* v *Panchanan*, 44 C 357 33 I. C. 670, where a contrary view was taken The appellate Court has no power to grant leave to withdraw the suit before the appeal is admitted —*Eknath* v. *Ranoji*, 35 B 261: 10 I. C 813

A Court ought to be very cautious before allowing an application for withdrawal when the case has reached the stage of appeal, even though it orders the entire costs of the defendant to be paid by the plaintiff; *Kamta Prasad* v *Ram Ratan*, 24 A L J 721 A. I. R 1926 All 548

The question whether leave should be granted in second appeal to a plaintiff to withdraw his suit depends upon whether the Court is satisfied

that the decree against the plaintiff should be set aside. Where the decree is based on a concurrent finding of fact, it is not open to the Court to grant leave to withdraw; *Ram Kumar* v. *Safiunnessa*, 63 I C 169.

An Appellate Court ought not to grant permission to a plaintiff who has been unsuccessful in the trial Court to withdraw his suit with liberty to bring a fresh suit, more especially where the parties quite understood what were the matters in dispute between them and exactly what it was that the plaintiff claimed and the defects are more apparent than real; *Sunghai Bajilal* v. *Kanhai*, 61 I C 584.

See section 107, *sub-rule* (2).

Allowing Withdrawal Alone Without Liberty to Bring Fresh Suit, Whether Proper.—Where plaintiff prayed for leave to withdraw his suit with liberty to bring a fresh suit but the Court simply allowed him to withdraw his suit and refused him permission to bring a fresh suit: *Held*, that the Court, acted without jurisdiction in dividing the plaintiffs' petition into two parts and attempting to treat the application as one under the first part of Or. XXIII, r. 1, cl. (1); *Shamnandan* v *Mulchandram*, 1 Pat L T. 292.

"**Formal defect.**"—Where the Court is satisfied that a suit must fail by reason of "some formal defect," or that there are "other sufficient grounds" for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit, the Court may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit, with liberty to institute a fresh suit in respect of the subject-matter of such suit. A Court ought not to grant leave to withdraw a suit with liberty to bring a fresh suit, on a mere allegation that there is formal defect, without satisfying itself that it does exist as a matter of fact; *Kironmoyi* v. *Ramanath*, 64 I C. 556; *Radharaman* v *Tularam*, 10 A. L. J. 393. A mere general statement that there are formal defects is not sufficient—the plaintiff must specifically state the formal defect —*Pundalik* v. *Chandrabhan*, 43 I. C 346. Misjoinder of parties and causes of action is a formal defect; *Watson* v. *Collector of Rajshaye*, 13 M. I A. 160, (170), *Gamshi* v. *Khairati*, 16 A 279, *Afzal* v *Lachmi Narain*, 40 A. 7. 42 I. C. 856. Improper valuation of the subject-matter of a suit and consequent insufficiency of Court-fee is also a formal defect; *Watson* v. *Collector of Rajshaye*, 13 M I. A. 160; 3 B L R P C 48; *Kannuswami* v *Jagathamlal*, 41 M. 701. Want of proper stamp or non-registration of a material document is a formal defect. *Watson* v. *Collector of Rajshaye*, 13 M I. A., 160; *Misser Debee* v. *Baldeo* 5 N. W P 116. If the defect is curable by amendment of the pleadings, no leave to withdraw should be granted; *Rameswar* v. *Rasul Beg*, 21 O C 66: 45 I. C 603. The omission by the plaintiff to include in his plaint all his causes of action, which are inconsistent with each other, cannot be said to constitute a formal defect in the plaint, and is not a sufficient ground to allow withdrawal of the suit with liberty to bring a fresh one; *Manbhari* v. *Sumerchand*, 12 A. L. J. 441. If a plaint is defective, the only sort of defect which attracts this rule is a formal defect; *Pali Kanji* v. *Krishna Aiyar*, 23 L W. 525: 94 I. C 983: A. I. R 1926 Mad 863.

"**Other sufficient grounds.**"—The power to dismiss a suit, with liberty to bring a fresh one for the same matter, is limited to cases where the

suit fails by reason of some point of form. Such liberty should not be given where, after issue joined, the plaintiff has failed to make out his case.—*Watson* v. *Collector of Rajshahi*, 3 B. L. R. 48, P. C.: 13 M. I. A. 160, P. C. *See* also, *Mona Bibee* v. *Oomed Ali*, 16 W. R. 276: and *Muddun Ram* v. *Israil Ali*, 21 W. R. 291. *See*, however, *Omesh Chunder* v. *Thakoor Dass*, 23 W. R. 345.

The circumstances contemplated by Or. XXIII, r 1 of the Code are confined to those cases mentioned in cls. (*a*) and (*b*) of r. 1, sub-rule (2) of the order, and do not include a case where the Court making the order is not satisfied that the circumstances mentioned in cls. (*a*) or (*b*) exist If the Court is not satisfied that the circumstances contemplated in the rule exist then it has no jurisdiction to make the order as the jurisdiction is only conferred where the Court is so satisfied. If this condition is not fulfilled, it is clear that the jurisdiction does not arise; *Raj Kumar* v. *Ram Khelawan*, 1 Pat 1920: (1922) Pat. 17. 3 Pat. L. T. 80 F. B.

The words " other sufficient ground " in Or. XXIII, r. 1 cl. (2) mean that the ground must be one *ejusdem generis* with the formal defect referred to in sub-cl. (*a*). Mere inability of a party to prove his case is not sufficient ground for permitting him to withdraw it with liberty to bring a fresh suit.—*Buratha Gunta* v. *Thurla patti*, 8 I C. 868: 9 M. L. T. 204: (1911) M. W N. 105; *Lala Punju Shet* v *Motiram*, 50 B 192: 94 I. C. 777: A. I. R. 1926 Bom. 315.

Absence or incompleteness of evidence is no sufficient ground for permitting a plaintiff to withdraw with liberty to bring a fresh suit.—*Khub Chand* v. *Ajodhya*, 11 A. L. J. 733.

Where a plaintiff asked for permission to withdraw his suit, on the ground that it would be out of his power to adduce the evidence, which he pointed out as existing in certain records, within the period fixed by the Court for hearing the case, the Court was competent to grant him permission to withdraw the case.—*Paresh Narain* v *Sarat Soonduree*, 16 W R. 100. But see, *Bai Keshibai* v. *Shidappa*, 15 Bom L R 823 37 B 682.

In a suit for enhancement of rent, the plaintiff also, claimed additional rent on account of excess area under s 52 of the Bengal Tenancy Act, but gave no evidence as was necessary under that section, *held*, that, under the *circumstances of the case, the plaintiff could be allowed to* withdraw the claim with regard to additional rent with respect to the additional area with liberty to bring a fresh suit in respect of the same subject-matter; *Indu Bhusan* v *Jath Mallik*, 62 I C. 699.

The fact that notices on the heirs of a deceased defendant could not be served is no ground for allowing plaintiff to withdraw a suit with liberty to file a fresh suit, *Lakshmibai Jagannath Joshi* v. *Yeshwant Vithal*, 24 Bom L. R. 909

Change in substantive law during progress of a suit—Application for withdrawal in order to get benefit of the alteration in the substantive law *Held*, that permission should not be given by the Appellate Court —*Prabhakar* v *Khandera*, 10 Bom. L. R 625.

The omission by the plaintiff to include in his plaint all his causes of action, which are inconsistent with each other, cannot be said to con-

stitute a formal defect in the plaint and is not a sufficient ground to al withdrawal of the suit with liberty to bring a fresh one.—*Manbhari Sumer Chand*, 12 A. L. J. 441 (7 M L. J. 288 *referred to*).

Where according to one of the plaintiffs, a pedigree filed is incorr in several particulars, there is no formal defect to allow the suit to withdrawn, with liberty to bring a fresh suit.—*Gulab Dei* v *Patam D* 30 I. C. 351.

Where a plaintiff brought a joint suit against three sets of defend to set aside separate alienations made by a Hindu widow during her l time; and the suit was bad for misjoinder of parties and causes of acti the plaintiff was allowed to withdraw his suit against two sets of defenda with liberty to bring a fresh suit.—*Ganeshi Lal* v. *Khairati Singh*, 16 279

Where it would be difficult to execute the decree against the defe ant on account of his absence, the plaintiff might be allowed to withd the suit with liberty to bring a fresh suit on the same cause of action *Syed Ali* v. *Adib*, 15 B. 160.

An order for withdrawal under Or. XXIII, r. 1, cannot properly made on the ground that the plaintiff had failed to produce evidence support of his claim Cl (*b*) of sub-rule (2) should be read in conjuncti with cl. (*a*) Hence the grounds included in cl. (*b*) must be of the sa nature as the ground specified in cl. (*a*).—*Hriday Nath* v. *Akshaylal*, C. L. J. 454. 39 I C 963 (11 C L. J. 45. 11 C. L. J 512: 23 C. L 489, *referred to*); *Munna Lal* v *Chhabil Das*, 46 I. C. 181; *Mahendra R* v *Singi Mal*, 3 Pat. L J 651 48 I C 197.

Plaintiff's inability to produce important evidence is not suffici ground within Or XXIII, r 1 (2) (*b*), C. P. Code, for permitting him withdraw the suit with permission to bring a fresh suit in respect of t same subject-matter, *Uchant Ahir* v. *Basawan Ahir*, 6 Pat L. J. 11 2 Pat L. T. 634

Where a suit is brought for the interest due on a mortgage, it is a sufficient cause for granting leave to withdraw the suit with libe to sue afresh that a subsequent suit for the principal would be barr by Or II, r 2, C P. Code, *Parduman Chand* v. *Gangaram*, 66 I. C. 2

In order to succeed in an application for withdrawal, the plaintiff mu specifically state the formal defect. A mere general statement that th are formal defects is not sufficient.—*Pundalik* v. *Chandrabhan*, 43 I. 346.

A special Judge appointed under s. 54 of the Dekkan Agricultur Relief Act (XVII of 1879) is *not competent in the exercise* of his revisi powers to allow a plaintiff *to withdraw his suit with liberty to bring* new one, merely on the ground that he has made some mistake in fil the suit.—*Muktaji Bhagoji* v. *Manaji*, 12 B. 684.

In a suit against a Ruling Chief, if the consent of the Governor-Gene in Council under s 433, C. P. Code, 1882 (s. 86), has not been obta n before the commencement of the suit, the Court should allow the plai to withdraw it with liberty to bring a fresh suit under *this section* *Chandu Lal* v. *Awad Bin*, 21 B. 351.

Effect of Erroneous Grant of Leave to Withdraw.—An order for withdrawal of a suit with leave to institute a fresh suit made under Or. XXIII, r 1 but in circumstances not within the scope of the rule, cannot be treated as an order made without jurisdiction; such order is consequently not null and void A fresh suit instituted upon leave so granted is not incompetent. The Court trying the subsequent suit is not competent to enter into the question, whether the Court which granted permission to the plaintiff to withdraw the first suit had properly made such order.—*Hriday Nath* v *Ram Chandra*, 31 C L J 482 (23 C. L J 489: 20 C. W. N. 1000, *overruled*); *Sammadi Shaikh* v. *Fulbash*, 65 I C 704.

Assuming that a Court ought not, under Or XXIII, r 1 of the C P. Code, to grant permission to a plaintiff to consolidate the claim in the suit which is withdrawn with that in another suit pending at the time, the order granting the permission is not a nullity and the plaintiff cannot without complying with the terms of the order, maintain a fresh suit in regard to the same subject matter; *Lakshmanan* v *Muttaya Chetty*, 40 M L. J. 126: 29 M. L T 189

Where the Court allows some plaintiffs to withdraw with liberty to file a fresh suit without the consent of the others, the Court acts without jurisdiction and a fresh suit is barred, *Mt Ram Dei* v. *Mt Bahurrani*, 1 Pat. 228: A. I. R. 1922 Pat. 489.

Power to Allow Withdrawal of Appeal.—An Appellate Court has authority to permit an appeal to be withdrawn.—*Ram Pershad* v *Bhurosa Koonwar*, 9 W. R. 328.

The High Court allowed the appellant to withdraw his second appeal after it had been argued, though not decided, in order that he might apply to the lower Court for a review of its judgment on the ground of discovery of new evidence —*Pandu* v *Deva*, 7 B 287.

One of the appellants can withdraw from the appeal so far as his own interest in the appeal are concerned —*Gopala* v *Hira Singh*, 119 P W. R. 1908

When Permission Ought Not to be Granted.—Where all the evidence in the case have been adduced and the case almost finished, the Courts ought not to permit the plaintiff to withdraw from the suit with liberty to bring a fresh suit on the same cause of action more specially when it is not shown what defects there were in the plaint which necessitated such withdrawal —*Rajendra Nath* v *Baikunta Nath*, 34 I C. 934

On an application by plaintiff to withdraw a part of his claim with liberty to bring a fresh suit on the ground of misjoinder of parties and causes of action, the court found there was no misjoinder as alleged in the petition but still granted the leave without stating any grounds for allowing the same *Held* that the plaintiff ought not to have been allowed leave to withdraw a part of the claim; *Gopalchandra* v *Benodi Behary*, 64 I. C 82.

Permission Need Not be Express.—The permission mentioned in Or. XXIII, r 1, C P Code, need not be express and it is sufficient if the grant of permission can be implied from the order read with the applica-

tion on which the order was passed; *Banwari* v. *Kishen Devi*, 2 Lah L J 242: 87 I. C. 1002.

Where the Court gave permission to withdraw the suit, but did not in terms give the plaintiff liberty to bring fresh suit, it was held that the order ought to be read along with the petition and construed as granting permission to file a fresh suit; *Khudi Rai* v. *Lalu Rai*, 5 Pat. 23: 93 I. C 1001: A. I. R. 1926 Pat. 259.

After a suit has been referred to arbitration and a valid award has been made, it would be improper to allow withdrawal having regard to the provisions of para. 3 (2), Sch II. C .P. Code.—*Abdul Karim* v. *Muhammad Hussain*, 32 I. C. 347.

Form of Order Granting Permission to Withdraw.—Where leave is granted to the plaintiff to withdraw from the suit with liberty to bring a fresh suit, the order must not be one *dismissing* the suit with liberty to bring a fresh suit, but one granting permission to *withdraw* with liberty to bring a fresh suit —*Doucett* v *Wise*, 1 W. R. 322; *Banwari* v *Muhammad*, 9 A. 690 Where permission to withdraw with liberty to bring a fresh suit is refused, the Court should simply dismiss the application; *Vohast* v. *Purshotam Das*, 32 B 345

Dismissal of Suit Coupled with Liberty to Bring a Fresh Suit, Whether Permissible.—The Courts in India do not possess the power to dismiss a suit with liberty to the plaintiff to bring a fresh suit for the same matter; *Banwari* v *Muhammad*, 9 A 690; *Sukh Lal* v. *Bhikhi*, 11 A 187; *Fateh Singh* v *Jagannath*, 52 I A 100: 47 A. 158: A. I R. 1925 P C 55, *Watson* v *Collector of Rajshaye*, 13 M. I A. 160.

Right of Appellant to Withdraw his Appeal Where Cross-objections have been filed.—Where no cross-objections under s. 561, C P. Code, 1882 (Or XLI, r. 22), have been filed by the respondent, an appellant has an absolute right to withdraw his appeal at any time before judgment; but where such objection has been filed, the appellant, if he wishes to withdraw his appeal, must do so before the hearing of the appeal has commenced.—*Kalyan Singh* v *Rahmu*, 23 A. 130. But after the hearing of the appeal has commenced, the appeal cannot be withdrawn so as to prevent the cross-objections being heard and determined —*Dhondi Jagannath* v *The Collector of Salt Revenue*, 9 B 28. In *Jafar Husain* v *Ranjit Singh*, 17 A. 518, it has been held that if an appeal in which objections have been filed under Or. XLI, r. 22 is withdrawn the objections cannot be heard

Withdrawal of appeal by the appellant, by which a respondent loses his opportunity of having his cross-objections heard, does not afford sufficient reason for enlarging the time for the cross-appeal which he might have presented. *Chudasama Manabhai* v. *Mahant Isvargar*, 16 B 249 (10 B. 308 *referred to*).

Order under this Rule, If Subject to Appeal or Revision.—An order under this rule permitting withdrawal of a suit with liberty to bring fresh suit is not a decree within the meaning of s. 2, and is therefore not appealable —*Jugodindro Nath* v. *Sarut Sundari*, 18 C. 322; *Kalian Singh* v *Lekhraj*, 6 A. 211; *Dick* v. *Dick*, 15 A. 169; *Jogdesh Chaudhri* v. *Tulshi*, 16 A. 19; *Genda Lal* v. *Pirbhu Lal*, 17 A. 97; *Abdul Hossein* v. *Kasi Sahu*

27 C. 362: 4 C. W. N. 41 But see *Ganga Ram* v. *Data Ram*, 8 A. 82; *Sant Ram* v. *Mt. Sahib Kaur*, A. I. R. 1922 Lah. 267: 65 I. C. 719. But such an order is open to revision if it falls within s. 115 of the Code. An order under this rule is open to revision if the Court acted *illegally* or with *material illegality* in making the order; *Hira lal* v. *Udoy*, 16 C. W. N. 1027; *Hridoy* v *Akshay*, 25 C. L. J. 454; *Uchaut* v. *Basawan*, 6 Pat. L. J. 112; *Bai Kashi Bai* v. *Shidapa*, 37 B 682; *Isher Das* v. *Lal Singh*, 7 L. L. J. 290: 90 I. C. 632· A. I R. 1925 Lah. 497; *Aiya* v *Gopanna*, 27 M. L. J. 480. 26 I C. 57. The High Court can also interfere in revision if the lower Court has not applied its mind to the circumstances of the case and the provisions of this rule; *Ganga* v *Msst. Kishni*, 47 A. 319 87 I C 175· A. I. R 1925 All. 466.

An order under this rule allowing withdrawal is subject to revision.—*Dick* v. *Dick*, 15 A 169 (6 A. 211 *referred to*) *See* also, *Tirupathi* v. *Mutta*, 11 M 322.

Applicability of this Rule to suits in Revenue Courts.—This rule does not apply to suits before the revenue authorities under Act (X of 1859), that Act being a complete Code in itself —*Radha Madhab* v. *Lukhi Narain*, 21 C. 428; *Mokunda Ballav* v *Bhogaban Chunder*, 21 C. 514. *See* also, *Doyal Chunder* v *Dwarkanath*, Marsh. 143: W. R., F. B. 47; *Modhoo Soodun* v. *Panchcowree*, 7 W. R. 302; *Beer Chunder* v. *Tarinee Churn*, 11 W. R 46; *Rama Nath* v. *Jay Kishen*, 11 W R. 3 and *Golam Mahomed* v. *Shibendra*, 35 C. 990. 12 C W. N. 893 (28 C. 532 *distinguished*); *Sasi Kanta* v. *Salim Sheikh*, 50 C. 626: 27 C. W. N. 987.

Held, that the *procedure provided by sections* 43 and 373, C. P. Code, 1882 (Or. II, r. 2 and this rule), is applicable to suits under the North-Western Provinces Rent Act, 1881 —*Madho Prakash* v. *Murli Manohar*, 5 A. 406 (9 C 295 *followed*).

Applicability of this Rule to Execution Proceedings.—This rule does not apply to applications for execution of decrees —*Thakur Prasad* v. *Fakirullah*, 17 A 106, P. C. (18 C. 635 *approved*; 10 A. 71 *overruled*; and 12 A. 179 *reversed*). *See* also, *Wajihan* alias *Alijan* v. *Bishwanath*, 18 C. 462 (10 B. 62 *followed*; and 12 A. 392 *dissented from*); *Radha Kishen* v. *Radha Pershad*, 18 C 515 (18 C. 462 *followed*; 12 A. 392 *dissented from*); *Lakhmi Narasimha* v. *Atchanna*, 15 M. 240 (12 A. 392 *dissented from*; 18 C 462 and 11 B. 467 *approved*). From the above rulings it would appear that there was a difference of opinion between the Allahabad and the other three High Courts on this point—the former holding that s 647, C. P Code, 1882 (s. 141), makes this rule applicable to proceedings in execution of decrees; while the latter holding that s. 141 does not operate to extend the rule laid down in respect of a suit in this rule to an application for execution of a decree. But the matter has been set at rest by the Privy Council case reported in 17 A. 106, overruling 10 A. 71, reversing 12 A 179, and approving 18 C. 635. The Privy Council case has impliedly overruled *Sher Singh* v. *Daya Ram*, 13 A 564, and *Kishan Shahai* v *Aladad Khan*, 14 A. 64.

An application to withdraw a pending proceeding for execution, with leave to institute another at some future time, is not a step in aid of execution within the meaning of Art. 182 (5) of the Limitation Act.—

Tarak Chunder v. *Gayanada Sundari*, 23 C. 817; *contra in Ram Narain* v. *Bakhtu Kuar*, 16 A. 75.

This rule, read with s. 647, C. P. Code, 1882 (s. 141), applies to insolvency proceedings under the Civil Procedure Code.—*Haidar Shah* v. *Jamna Das*, 17 A. 156, p. 161.

Applicability of this Rule to Probate Proceedings.—This rule does not apply to probate proceedings, the provisions in s. 55 of the Probate and Administration Act being qualified by the words "so far as the circumstances of the case will admit."—*Banwari Lal* v. *Krishnea Devi*, 2 L. L. J. 242 (40 I. C. 345, 20 C. W. N. 986 and 21 B. 335, *relied on*; 33 B. 309, *distd.*). *See* also, *Sarada* v. *Gobinda*, 12 C. L. J. 91.

"On such terms as the Court thinks fit."—A plaintiff who is permitted to withdraw from his suit must pay the defendant's costs.—*Donnell* v. *Wise*, 4 W. R. 322, *Khemchand* v. *Sabhagchand*, 47 B. 559, 72 I. C. 321, A. I. R. 1923 Bom. 206.

It has been held by the High Court of Madras that where leave to bring a fresh suit is granted to the plaintiff on payment of the defendant's costs on or before a specified date, but no payment is made on or before that date, the plaintiff is precluded from bringing a fresh suit and if such suit is brought, it should stand dismissed.—*Fisher* v. *Nagappa*, 33 M. 258. The same High Court in another case has held that where leave to bring a fresh suit is given on payment of the defendant's cost, but no time is specified within which the payment is to be made, the plaintiff is similarly precluded from bringing a second suit unless the costs are paid before the institution of the second suit.—*Seshayya* v. *Subbaya*, 47 M. L. J. 646, 82 I. C. 499, A. I. R. 1924 Mad. 877. The Calcutta High Court, in *Abdul Aziz* v. *Ebrahim*, 31 C. 965, held that though payment of defendant's costs was a condition precedent to the institution of a second suit, non-payment of such costs before the institution of the second suit, did not render the suit *ab initio* void. The same High Court, in *Shital Prashad* v. *Gaya Prasad*, 19 C. L. J. 259, 23 I. C. 210, took the same view and held that before leave to withdraw a suit with liberty to bring a fresh suit, is given on payment of the defendant's costs within a fixed time, the non-payment of the costs within that time, does not operate as a dismissal of the suit or as a bar to the institution of a fresh suit, unless the order granting leave had itself provided that, on such non-payment, the suit should stand dismissed. It was also held that inasmuch as the permission to withdraw and bring a fresh suit was made conditional on a certain payment, the original suit could not be deemed to be withdrawn until those costs were paid, and it must therefore be deemed to be pending suit which became disposed of as soon as payment was made. The same view has been taken in *Deb Kumar* v. *Deb Nath*, 64 I. C. 738. The Patna High Court in *Syed Quazi* v. *Lachman Singh*, 5 Pat. 306: 96 I. C. 942: A. I. R. 1926 Pat. 109, in *Kuldip* v. *Kuldip*, 3 Pat. L. J. 63; 44 I. C. 79, and in *Ram Dayal* v. *Indra Sau*, 95 I. C. 875, A. I. R. 1926 Pat. 472, has followed the Calcutta High Court decisions.

Where leave to withdraw a suit with liberty to bring a fresh suit is given on payment of defendant's costs within a fixed time, the non-payment of the costs within that time does not operate as a dismissal of the suit or as a bar to the institution of a fresh suit, unless the order

granting leave had itself provided that on such non-payment the suit should stand dismissed

The only case in which a Court may, under this rule, impose any condition upon a plaintiff, who seeks to withdraw, is where that plaintiff asks the Court for permission, not only to withdraw, but also for liberty to bring a fresh suit for the same subject-matter But where he asks leave to withdraw without permission to bring a fresh suit, the Court cannot make the payment of costs a condition precedent to the granting of such permission —*Haidar Shah* v *Jamna Das*, 17 A. 156 (161). See *Syed Ali* v. *Adit*, 15 B. 160.

The High Court has no power under the Civil Procedure Code to award costs to the defendant where the plaintiff withdraws, not having asked leave to do so with liberty to bring another suit for the same matter —*Brass* v *Tiruvengada*, 1 Mad H. C 247, dissented from in 1 B. L R. O. C 45.

Effect of Withdrawal or Abandonment of Claim With or Without Permission to Bring Fresh Suit.—Permission to bring a fresh suit under Or. XXIII, r 1, must be given in express terms and cannot be implied.—*Jitu Singh* v *Hari Singh*, 97 P R 1916 (21 C 265 4 C W N 110 *distinguished*). But see, *Banwari Lal* v *Kishen Debi*, 2 L. L J 242. In the absence of permission to bring a fresh suit, Or XXIII, r. (1), sub-rule (3), precludes the plaintiff from instituting any fresh suit, in respect of such subject-matter or such part of the claim from which he has withdrawn.—*Aswini Kumar* v *Saradacharan*, 24 C L J 79, *Maung Mu* v. *Maung Kaw Gyi*, 1 R 618 A I R. 1924 Rang. 127

Where a plaintiff brought a suit for partition of joint-property from which he withdrew without permission to bring fresh suit, and subsequently being dispossessed from the same joint-property, brought a suit for recovery of joint-possession of the same *Held*, that the second suit was not barred by this rule The *mere fact of two suits being in respect of the same* property would not be sufficient to make the latter suit one for the *same matter* as the former, when the state of facts leading to the two suits and the reliefs claimed under them are different.—*Gopal Chandra* v *Purna Chandra*, 4 C W N 110 (*Juggobundho* v *Watson*, *Bourke* A. O. C. 162, *doubted*) S 97 of Act VIII of 1859 (this rule) only applied to cases where the plaintiff withdraws from the suit without the consent of the defendant —*Juggobundho* v *Watson & Co*, Bourke A. O. C. 162. *See* also, *Kamini* v *Ram Nath*, 21 C 265.

In a suit for ejectment on the ground that defendant was a trespasser and had no right whatever to the land, the defendant raised the defence that he had a tenancy right in the land, and could no be ejected. The suit was withdrawn without liberty to bring a fresh suit in respect of the same subject-matter *Held*, that Or. XXIII, r 1 did not operate as a bar to a subsequent suit for possession in which tenancy of the defendant had been determined by service of notice to quit; *Abdulla* v. *Akbal Chandra*, 59 I. C. 81.

The plaintiffs sued the defendant upon a balance order, dated 24th February 1882, to recover a certain sum of money. They had previously sued the defendant to recover the said sum of money, but that suit was

based upon a call order, dated 11th November, 1880, and they were permitted to withdraw it with liberty to bring fresh suit for the same cause of action Held, that the plaintiffs were not precluded from bringing the second suit upon the balance order.—*London, Bombay* and *Mediterranean Bank* v. *Burjorji Sorabji*, 9 B. 346.

An unsuccessful claimant brought a regular suit against a decree holder, who then released the property from attachment and the plaintiff withdrew his suit The same property was afterwards attached and sold in execution of the same decree *Held*, that the subsequent suit for possession of the property against the auction-purchaser was not barred by this rule.—*Mukhoda Soondury* v. *Ram Churan*, 8 C. 871 (11 M. I. A. 7 *cited*)

In 1893 the plaintiff sued to eject the defendants alleging that they were in occupation of the land under a lease of 1880 from the late Zamorin of Calicut The plaintiff's title rested on an instrument executed by him in 1892. It was objected that the instrument was not binding after the death of the grantor The plaintiff thereupon withdrew his suit without obtaining leave to sue again. He subsequenty obtained a like instrument from the present Zamorin and sued again to eject the defendants. *Held*, that the second suit was barred by this rule.—*Achuta Menon* v *Achuta Nayar*, 21 M. 35.

A Court after reference of arbitration cannot, pending the reference, grant permission to withdraw the suit with liberty to bring a fresh suit for same matter. Permission thus given to a plaintiff to withdraw, with liberty to bring fresh suit, is *ultra vires*, and does not save the fresh suit from being barred by this rule.—*Sheoamber* v *Deodat*, 6 A. 168

The dismissal of the former suit "in the form it was brought" does not amount to permission to sue againt as contemplated by this rule and such dismissal must be regarded as a "decision," thereof in the sense of s. 13, explanation iii, C. P. Code, 1882 (s. 11), and therefore as a bar to the fresh suit.—*Gonesh* v *Kalka Prasad*, 5 A. 595; *Muhammad Salim* v *Nabian Bibi*, 8 A 282; *Kudrat* v. *Dinu*, 9 A. 155: and *Banwari Das* v *Muhammad Masihat*, 9 A. 690 (13 B. L. R. 48, P. C., *referred to*)

A suit for possession was wholly dismissed, on the ground that the plaintiff had not made out his title to the whole of the property claimed though he had proved title to a one-third share of it, the decree containing a clause that a fresh suit might be brought for one-third share. Subsequently the plaintiff brought another suit for possession of the one-third share. *Held*, that the Court in the former suit had no power to include in its decree any such reservation or order; that the fact that the decree was not appealed against did not give the order contained in it, which was an absolute nullity, any effect —*Sukh Lal* v. *Bhikhi*, 11 A. 187, F B (5 A. 595, 8 A. 282, and 9 A. 155 *explained*).

In a suit for partition both the parties having arrived at a compromise, filed a joint petition praying that the suit might be struck off; the terms of the compromise were however not inserted in the decree and were never carried out. Subsequently the plaintiff brought a second suit for partition of the same property; *Held*, that the suit was barred by this rule.—*Gulkandi Lal* v. *Manni Lal*, 23 A. 219.

Where the former suit was withdrawn with permission to bring fresh suit the subsequent suit is not barred.—*Kunhan* v. *Sunkara*, 14 M. 78, p. 80

A redemption suit was dismissed for want of necessary parties. In the Appellate Court, the plaintiff put in a petition saying that he did not wish to prosecute his " appeal or claim," the other side having given up his costs. The plaintiff then brought a second suit to redeem. *Held*, that the suit was barred by the last para. of this rule, the consideration for withdrawal being that the respondents gave up their costs.—*Ram Prasad* v. *Dungar Singh*, 4 A. L. J. 201: (1907), A. W N. 91

Where in a suit for partition, a defendant has, by concession of the plaintiff, acquired rights, which otherwise, could not have existed, it is not open to the plaintiff, who has made that concession, afterwards to annul its effect, by withdrawing the suit in the Appellate Court. Sections 373 (Or. XXIII, r. 1) and 582 (Or. XXII, r. 11), C. P. Code, 1882, do not support the conclusion that rights actually vested and created by the decree of the first Court can be afterwards annulled by the plaintiff's withdrawal of the entire suit, of his own free will and without the permission of the Court.—*Satyabhamabai*, v *Ganesh Balkrishna*, 29 B. 13: 6 Bom L. R. 533.

" In respect of such subject-matter."—The expression used in the corresponding s. 373 of the old Code, was " *matter.*" It was held in *Kamini* v. *Ram Nath*, 21 C. 265 and *Gopal* v. *Purna*, 4 C. W. N. 110, that the word " *matter,*" as used in the old Code, did not mean *property*, but that it referred only to *right in the property*. The terms " subject-matter " and the " same matter," which occurred in the corresponding s. 373 of the old Code, have not been defined, and must, we think, be construed strictly in a penal provision of this character. Without attempting an exhaustive definition of all that may be included in the term " subject-matter " we are of opinion that where, as in the present case, the cause of action and relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit —(*Per* Wallis, C. J.) *Saiga Reddi* v. *Subba Reddi*, 39 M. 987. 35 I C. 185. A contrary view was taken by the Punjab Chief Court in *Jita Singh* v *Hari Singh*, 97 P R. 1916: 37 I. C. 128. *See* also, *Maung Mu* v *Maung Kan*, 1 Rang 618. A. I. R. 1924 Rang 127 The words " subject-matter " used in this rule are not to be identified with the " property " in the suit. They mean the cause of action for a claim A suit on a different cause of action though relating to the same property is not barred, if the suit is withdrawn without leave of Court; *Putto Khan* v *Ahmad Zaman Khan*, 9 O. & A L R. 978: 74 I. C. 56

Sub-rule (4)—Withdrawal by Co-plaintiffs.—Sub-rule (4) provides that nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.

One of several plaintiffs cannot withdraw from the suit without the consent of the others, *Mahomed Ilyas* v. *Faquira*, 10 O. and A.-L. R. 310: L. R. 5 A 78 (Rev.) Where the Court in contravention of this sub-rule, allows two out of four plaintiffs to withdraw from a suit without the

consent of the other two, it acts without jurisdiction, and a second s[uit] in respect of the same subject-matter is barred.—*Musst Ram Da[i] v. Musst Baku Kant*, 1 Pat 228 A. I. R. 1922 Pat. 489.

Notice.—An order under this rule without notice to the oppo[site] party is bad —*Rajendra v. Atal*, 25 C. L. J. 456: 44 C. 454.

Withdrawal of Suit by Next Friend of Minor.—When a suit is fraud[u]lently withdrawn by the next friend of a minor plaintiff, without leave [to] bring fresh suit, it is open to the minor to relieve himself from the cons[e]quences of fraud in one of the three ways, *viz.* (1) by an application to t[he] *Court in the suit in which the withdrawal took place;* (2) by a regular s[uit] to set aside the judgment founded upon the withdrawal; or (3) by bring[ing] a fresh suit for the same purpose, and setting up the fraud as an answer [to] the statutory bar.—*Eshan Chandra v. Nundamoni*, 10 C. 357. *In Ra[m] Sarup v. Shah Latafat Hossein*, 29 C. 735, the withdrawal of a suit by t[he] next friend was treated as gross negligence. *A withdrawal of a suit b[y]* the next friend of a minor in pursuance of an agreement or comprom[ise] entered into with the defendant without the leave of the Court, is void[able] at the instance of the minor, under Or. XXXII, r. 7.—*Dorasamy v. Thi[ru]gasami*, 14 M. L. J. 159: 27 M. 377.

Power of Court of Small Causes to Allow Withdrawal.—The Court [of] Small Causes at Calcutta has jurisdiction to pass an order under this ru[le] after granting a new trial.—*Jadu Mani v. Ram Kumar*, 29 C. 239, but t[he] Judge of a Small Cause Court cannot allow withdrawal without record[ing] reasons.—*Lachi v. Raghubir*, 2 Pat L. J. 682. But in *Yule and Co. v. Mahomed Hossein*, 24 C. 129, it has been held that the Small Cau[se] Court Judge after receiving the judgment of the High Court, on a referen[ce] had no jurisdiction to allow the plaintiff to withdraw the suit with libert[y] to bring fresh suit, but was bound to enter judgment according to t[he] decision of the High Court.

Limitation law not affected by first suit.

2. In any fresh suit instituted on permission granted unde[r] the last preceding rule, the plaintiff shall b[e] bound by the law of limitation in the sam[e] manner as if the first suit had not been instituted. [S. 374.]

COMMENTARY.

This rule corresponds to section 374, C. P. Code, 1882, with the modification that the word "*instituted*" has been substituted for th[e] word "brought" which occurred in the old section.

Limitation.—When a suit is withdrawn under Or. XXIII, r. 1 with permission to bring a fresh suit, the effect of this rule is, that limitation [is] to apply to the second suit, as if it was the first. *Held* also, that section 14 of the Limitation Act does not apply to such a case.—*Varadal v. Shomeshwar*, 29 B. 219: 7 Bom. L. R. 90 (12 B. 625, *followed*). Where leave to withdraw was granted erroneously by a Court which had no jurisdiction to entertain the suit, the case will be governed not by the provisions of this rule but by those of s. 14 of the Limitation Act, and

the term during which the first suit was prosecuted will be excluded in computing the period of limitation for the second suit, *Ramdeo* v. *Gonesh*, 35 C. 924: 12 C. W. N. 921.

The effect of withdrawal of a suit with permission to bring fresh suit, is to leave the parties in the same position as that in which they would have been if the suit had never been brought. A plaintiff, therefore, who has obtained permission under section 373, C. P. Code, 1882 (Or. XXIII, r. 1), will not be debarred by s. 43, C. P. Code, 1882 (Or. II, r. 2), from claiming in a subsequent suit a relief which he might have included, but did not, in the suit which he was permitted to withdraw.—*Behari Lal* v. *Baran Mai Dasi*, 17 A. 53. *See* also, *Venkata Chetti* v. *Ranga Nayank*, 10 M. 160. Followed in *Syed Hossain Ali* v. *Hari Nath*, 1 C. L. J. 29-*n*; *Elahi Buksh* v. *Imam Baksh*, 1 A. 324, *Mul Chand* v. *Bhikari*, 7 A. 624; and *Sobhapathi* v. *Lakshmee*, 24 M. 293.

Execution Proceedings.—The rule laid down in this rule does not apply to applications for executions.—*Tara Chand Megh Raj* v. *Kashi Nath*, 10 B. 62, *Thakur Prasad* v. *Fakirullah*, 17 A. 106, P. C. (10 A. 71 *overruled;* 12 A. 179 *reversed*, and 18 C. 635 *approved*); see *Eshan Chunder* v. *Pran Nath*, 22 W. R. 512. But see *Pirjade* v. *Pirjade*, 6 B. 681. *See* also, *notes, under Or. XXIII, r. 1*.

Withdrawal of appeal by the appellant, by which a respondent loses his opportunity of having his cross-objections heard, does not afford sufficient reason for enlarging time for the cross-appeal which he might have presented.—*Chudasama Manabhai* v. *Mahant Ishwargar*, 16 B. 219 (10 B. 398 *referred to*).

The effect of withdrawal of an appeal under a compromise estops the parties with regard to the points raised in the Lower Court's decision.—*Vythilinga* v. *Vijayathammal*, 6 M. 43.

Compromise of suit

3. Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit. [S. 375.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to section 375, C. P. Code, 1882, with some alterations and omissions.

The words "*where it is proved to the satisfaction of the Court that a suit has been adjusted*" have been substituted for the words "if a suit be adjusted," which occurred in the old section. The words "*the Court shall order*" have been added and the words "*and such decree shall be final so far as relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise, or satisfaction*" which occurred

in the concluding part of the old section, have been omitted, having regard to cl. (3) of s. 96, which provides that no appeal shall lie from a decree passed by the Court with the consent of parties. But on account of the omission of the words "*such decree shall be final*," a review of a consent decree may be granted. Under the old law, review was prohibited (see 5 W. R. 226).

"The Committee have considered it expedient to alter the language of s. 375 so as to recognize the power of a Court to enquire into and to record a disputed compromise."—*See the Report of the Special Committee.*

"Has been adjusted wholly or in part."—An adjustment which is not *bona fide* and on the basis of which the Court was not asked to record satisfaction and pass a decree in accordance therewith does not comply with the provisions of Or. XXIII, r 3; *Seth Kevaldoss* v. *Sanker Lal Bulakhidas* 45 M. L J 763: 33 M L. T (P. C) 424.

"By any lawful agreement or compromise."—The language of this rule is wide and general and does not preclude parties from settling their disputes on such lawful terms as they might agree to, without being restricted to such relief as one only of the parties had chosen to claim in the plaint. In a suit for money, where the plaint prays for a simple money decree, an agreement, by which the parties agreed that the decretal amount should be a charge on certain properties, is lawful and "relates to the suit," so as to be embodied in the decree.—*Joti Kuruvetappa* v. *Izri Sirusappa*, 30 M 478.

A Hindu Father has full authority to act on behalf of his adopted son and to enter into a compromise in a suit on mortgage of joint family property so as to bind the son to the compromise in respect of the son's interest in the property; *Saiyid Mehdi* v. *Chaudhri Ghanshiam*, A. I. R. 1927 P. C 204

A compromise signed by a pleader who was not specially authorized for the purpose is bad and a decree in accordance with it should be set aside—*Basangowda* v. *Churchigirigowda*, 34 B. 408.

Where the parties to a suit themselves effect a compromise and the fact of the compromise is conveyed to the Court by means of a petition presented by the pleaders appearing on both sides, it is not open to the parties to question the compromise on the ground that the pleaders had no authority to compromise.—*Pambayam Chetty* v. *Kandaswami*, 12 L. W. 562: 60 I. C. 22.

It is incumbent on a Court to pass a decree in terms of a compromise only if the same is lawful, *i.e.*, enforceable in law. One test to apply is, were the parties competent to enter into the agreement in order to achieve the purpose they had in view. When after a mortgage decree to which the puisne mortgagee was a party, the mortgagee and prior mortgagee put in appeal a petition of compromise which increases the amount payable to the latter, a decree cannot be passed in accordance therewith, as it undoubtedly prejudices the rights of the puisne mortgagee and hence cannot be said to be "lawful."—*Mal Chand Boid* v. *Osman Ali*, 38 C. L. J. 272.

The Court has no jurisdiction, under this rule, to pass a decree on a compromise, unless it is a lawful compromise. Any terms of a contract which are opposed to public policy, are invalid and will, therefore, not be enforced by the Courts and so far as a decree embodies unlawful terms of a compromise, it is inoperative and will not be enforced.—*Lakshmanaswami* v. *Rangamma*, 26 M 31 (24 M 265 *referred to*). No option is left to a Court to examine the terms of a compromise beyond seeing whether the agreement is lawful or not. An agreement which carries a penal clause such as may be covered by s. 74 of the Contract Act, is not in any sense of the term "unlawful" and hence it must be recorded and decree passed in terms thereof; *Kishen Prasad* v. *Kunj Behari*, 24 A. L. J. 210: 91 I. C. 790: A. I R. 1926 All. 278.

The legality of a provision for ejectment is to be tested in the light of the rules formulated in the Bengal Tenancy Act, even though the provision originally appearing in the petition of compromise has been incorporated in the decree. The Court will not in such circumstances, assist the decree-holder to achieve his illegal purposes in defiance of express statutory prohibition The circumstance, that a consent decree has been passed on the basis of a compromise, does not oust the jurisdiction of the Court to grant relief against forfeiture, and the Court must determine whether on equitable grounds, relief could have been granted against forfeiture if it had been called to enforce the agreement itself.—*Gopal Krishna* v. *Hari Nath*, 34 C L J. 157

A Court will not recognise any compromise of an action with the facts of which it is entirely unacquainted or if one of the terms of the compromise is a clear violation of a statutory rule.—*Mussammat Sakli* v. *Ram Kishun*, 55 I. C. 504.

A Court is not bound to pass a decree in accordance with a compromise which is shown to be fraudulent —*Asan Pandey* v *Rajamon Missir*, 52 I. C 105.

On an application to record an agreement, under Or XXIII, r. 3, C. P. Code, the Court has power to go behind the transaction and to enquire whether the admission is true and made by the debtor with a full knowledge of his legal rights as against the creditor.—*Goturam Radha Kishan* v. *Barku Dodhu*, 24 Bom. L R. 88: 46 B 560.

The plaintiff undertook to abide by the statement of a particular person and closed his case. The person was examined on solemn affirmation but denied any knowledge of the case, and plaintiff's suit was dismissed. *Held*, the proceedings were tantamount to a compromise of this suit; *Chet Ram* v. *Bhup Singh*, A. I. R. 1927 Lah. 99: 98 I. C 861.

An agreement between the parties to a suit that it should abide and follow the result of another suit between the same parties is a valid and binding agreement. As soon as a decision is given in the second suit, there is a lawful adjustment of the first suit within the meaning of Or. XXIII, r. 3.—*Sreenivasa Chariar* v. *Kumara Thatha Chariar*, (1918) M. W. N. 740 (37 M. 408 *distd.*).

Where the claim is beyond the jurisdiction of the trial Court, it is not competent to the Court to pass a compromise decree; *Govindasami* v *Kaliaperumal*, (1922) M. W. N. 83: 66 I. C. 837.

The plaintiff (respondent) after obtaining a decree in the first Court compromised the suit in the Appellate Court and asked that a decree should be made in favour of the defendants (appellants) *Held*, that the High Court on an application to make a decree in accordance with the compromise, had acted properly in adding as plaintiffs, members of the temple community who opposed the application, and in refusing the application on the ground that the compromise was a breach of trust on the part of the respondent and therefore unlawful under Or XXIII, r 3.—*Sankaralinga* v *Rajeswara Dorai*, 31 M 236, P C. : 8 C L J 230 12 C W N 916.

Agreement that a suit may be decided in a manner different from that prescribed by law is void.—*Raja of Venkatagiri* v. *Chinta Reddi*, 37 M 408.

Unless a will is proved in some form, no grant of probate can be made merely on the consent of parties Hence an agreement or compromise as regards the genuineness and due execution of a will, if its effect is to exclude evidence in proof of the will, is not lawful within the meaning of this rule.—*Monmohini* v. *Banga Chandra*, 31 C 357: 8 C. W. N. 197 (9 B 241 and 21 B 335 *followed*)

The terms of this rule are imperative and a Court cannot refuse to record a lawful agreement or compromise and to pass decree in accordance therewith, merely because in its view it is too favourable to one of the parties.—*Moti Ram* v *Yesu*, 22 B. 238. But the Court must see that the compromise is a lawful agreement before it is recorded and a decree is passed in accordance with the terms thereof and will look into the merits when necessary to determine its *bona fides*.

Where after the hearing of an appeal and when it is pending for want of a delivered judgment, a petition for compromise is presented, the Court has to receive the petition and pass the necessary orders thereon.—*Nagiah* v *Seshama*, 41 M. L. J 385: 14 L. W. 514.

Where a Compromise Set Up by One Party is Denied by the Other.—When the parties to a suit have by an agreement adjusted the subject matter of the suit, the Court can by an order made in the suit, order such agreement to be recorded and make a decree in accordance with it notwithstanding that one of the parties to such agreement objects to the compromise being accepted.—*Brojodurlabh* v. *Ramanath*, 24 C. 908, F B. ; 1 C. W. N 597, F. B. *See* also, *Karuppan* v. *Ramasami*, 8 M 482 ; *Ruttonsey Lalji* v. *Poonbai*, 7 B. 301 ; *Appasami* v. *Manikam*, 9 M. 103 ; and *Goculdas Bulabdas* v. *Scott*, 16 B 202 ; *Mahant Raghubir Singh* v. *Chanan Singh*, 69 I. C. 395.

There can be no doubt that when one party *alleges and* the other denies that a suit has been settled by a lawful *agreement* out of Court the Court has power to decide whether there has been such a settlement and if this question is decided in the affirmative, to grant a decree in accordance with the agreement. The Full Bench decision in 24 C 908 1 C. W. N. 597 (given above) has been now given effect to by the alterations made in Or. XXIII, r. 3 from the language of s 375 *of the old Code*.—*Anadi Krishna* v. *Priya Shankar*, 21 C. W. N. 366: 36 I. C 375—*Sital* v. *Lal Bahadur*, 38 A. 75, 80-81.

Any party to a suit has the right to repudiate the action of an agent compromising it without his knowledge and consent, *before* an order is

passed accepting the compromise as the final determination of the suit. —*Monmohini* v. *Banga Chandra*, 31 C. 357: 8 C. W. N. 197 (24 C. 908: 1 C. W. N. 597 *referred to*).

Where a party to a suit impugns an alleged agreement or compromise by which he would be bound, the Court must satisfy itself by evidence that the agreement or compromise is a lawful one, and that its terms have been consented to by the parties to the suit before it can proceed under this section, to record it and pass a decree in accordance therewith.—*Sridharan* v *Puramathan*, 28 M 101

The rule was intended to meet cases where the parties having agreed to compromise subsequently fall out The original Court has power to frame an additional issue to decide whether a lawful compromise has been effected between the parties subsequent to the institution of the suit.—*Appasami* v. *Varadachari*, 19 M. 419.

Held, that under this rule, the Court had jurisdiction to determine ether, as a fact, the alleged agreement adjusting the suit has been de, and if it was satisfied that it has been made, to record it. Whether it fact should be tried on affidavit or by oral evidence, is entirely in discretion of the Court —*Samibai* v *Premji Pragi*, 20 B. 304.

Compromise as Between Some of the Parties—Effect on Others.—The reement between the plaintiff and one set of defendants cannot affect position of the other defendants They can neither be prejudiced by nor can they take any advantage of that agreement. *Musst. Bhagu* v. *Jaydam Sahai*, 2 Pat. L T 471.

Submission and Award equivalent to " Adjustment of the suit by an reement " within the meaning of this Rule.—It was held by the Bombay gh Court, in two earlier cases decided under the old Code, that where e matters in difference in a pending suit are referred to arbitration witht the intervention of the Court and an award is made, the submission d the award may be treated as an "adjustment of the suit by agreeent " within the meaning of s. 373 of that Code, and it may be recordas an adjustment under that section., *Prag Das* v. *Girdhar Das*, 26 76, *Samibhai* v *Premji*, 20 B 304 The same High Court, in a case cided under this Code, took the same view and held that where in a pending suit the matters in difference are referred by the parties to arbitration ithout the intervention of the Court and an award is made, the provions of para 20 of Sch. II do not apply to the award, but that the subission and award may be recorded as an adjustment under this rule; *aralhbai* v *Jamnabai*, 37 B 639 19 I C 786. A contrary view was, wever, taken by Sir Norman Macleod, J, in *Shavakshaw* v *Tyab Haji*, B 386 37 I C 340, where it was held that, in view of the words any other law for the time being in force in s 89 of the Code and ving regard to the provisions of that section a submission and an award ade without the intervention of the Code could not be recorded as an ljustment under this rule and that the proper procedure was under ras 20 and 21 of Sch II, and that accordingly the matter should be ated as an application under those paragraphs and treated accordingly. ut in *Mani Lal Moti Lal* v *Gokul Das*, 45 B 245 A I. R 1921 Bom 10, Sir Norman Macleod and Mr Justice Fawcett reconsidered the atter and held that the submission and award could properly be recorded

suit fails by reason of some point of form. Such liberty should not be given where, after issue joined, the plaintiff has failed to make out his case.—*Watson* v. *Collector of Rajshahi*, 3 B. L R. 48, P. C.: 13 M. I. A. 160, P. C. *See* also, *Mona Bibee* v. *Oomed Ali*, 16 W. R. 276: and *Muddun Ram* v. *Israil Ali*, 21 W. R. 291. *See*, however, *Omesh Chunder* v. *Thakoor Dass*, 23 W. R. 345

The circumstances contemplated by Or. XXIII, r. 1 of the Code are confined to those cases mentioned in cls. (*a*) and (*b*) of r. 1, sub-rule (2) of the order, and do not include a case where the Court making the order is not satisfied that the circumstances mentioned in cls. (*a*) or (*b*) exist. If the Court is not satisfied that the circumstances contemplated in the rule exist then it has no jurisdiction to make the order as the jurisdiction is only conferred where the Court is so satisfied If this condition is not fulfilled, it is clear that the jurisdiction does not arise; *Raj Kumar* v. *Ram Khelawan*, 1 Pat. 1920: (1922) Pat. 17: 3 Pat. L. T. 80 F. B.

The words " other sufficient ground " in Or XXIII, r. 1 cl. (2) mean that the ground must be one *ejusdem generis* with the formal defect referred to in sub-cl. (*a*). Mere inability of a party to prove his case is not sufficient ground for permitting him to withdraw it with liberty to bring a fresh suit.—*Buratha Gunta* v. *Thurla patti*, 8 I. C. 868: 9 M. L. T. 204: (1911) M. W. N. 105; *Lala Punju Shet* v *Motiram*, 50 B. 192: 94 I. C. 777: A. I. R. 1926 Bom. 315.

Absence or incompleteness of evidence is no sufficient ground for permitting a plaintiff to withdraw with liberty to bring a fresh suit.—*Khub Chand* v. *Ajodhya*, 11 A L J. 733.

Where a plaintiff asked for permission to withdraw his suit, on the ground that it would be out of his power to adduce the evidence, which he pointed out as existing in certain records, within the period fixed by the Court for hearing the case, the Court was competent to grant him permission to withdraw the case.—*Paresh Narain* v. *Sarat Soonduree*, 16 W R. 100. But see, *Bai Keshibai* v *Shidappa*, 15 Bom. L R 823. 37 B 682.

In a suit for enhancement of rent, the plaintiff also, claimed additional rent on account of excess area under s. 52 of the Bengal Tenancy Act, but gave no evidence as was necessary under that section, *held*, that, under the circumstances of the case, the plaintiff could be allowed to withdraw the claim with regard to additional rent with respect to the additional area with liberty to bring a fresh suit in respect of the same subject-matter; *Indu Bhusan* v. *Jath Mallik*, 62 I C. 699

The fact that notices on the heirs of a deceased defendant could not be served is no ground for allowing plaintiff to withdraw a suit with liberty to file a fresh suit; *Lakshmibai Jagannath Joshi* v. *Yeshwant Vithal*, 24 Bom. L. R. 909.

Change in substantive law during progress of a suit—Application for withdrawal in order to get benefit of the alteration in the substantive law. *Held*, that permission should not be given by the Appellate Court.—*Prabhakar* v. *Khandera*, 10 Bom. L R 625.

The omission by the plaintiff to include in his plaint all his causes of action, which are inconsistent with each other, cannot be said to con-

stitute a formal defect in the plaint and is not a sufficient ground to allow withdrawal of the suit with liberty to bring a fresh one.—*Manbhan v Sumer Chand*, 12 A. L. J. 441 (7 M. L. J. 288 *referred to*).

Where according to one of the plaintiffs, a pedigree filed is incorrect in several particulars, there is no formal defect to allow the suit to be withdrawn, with liberty to bring a fresh suit.—*Gulab Dei* v. *Palam Das*, 30 I. C. 351.

Where a plaintiff brought a joint suit against three sets of defendants to set aside separate alienations made by a Hindu widow during her life time; and the suit was bad for misjoinder of parties and causes of action, the plaintiff was allowed to withdraw his suit against two sets of defendants with liberty to bring a fresh suit.—*Ganeshi Lal* v. *Khairati Singh*, 16 A. 279.

Where it would be difficult to execute the decree against the defendant on account of his absence, the plaintiff might be allowed to withdraw the suit with liberty to bring a fresh suit on the same cause of action.—*Syed Ali* v. *Adib*, 15 B. 160.

An order for withdrawal under Or. XXIII, r. 1, cannot properly be made on the ground that the plaintiff had failed to produce evidence in support of his claim. Cl. (*b*) of sub-rule (2) should be read in conjunction with cl. (*a*). Hence the grounds included in cl. (b) must be of the same nature as the ground specified in cl. (*a*).—*Hriday Nath* v. *Akshaylal*, 23 C. L. J. 454: 39 I. C. 963 (11 C. L. J. 45: 11 C. L. J. 512: 23 C. L. J. 489, *referred to*), *Munna Lal* v. *Chhabil Das*, 46 I. C. 181; *Mahendra Ram* v. *Singi Mal*, 3 Pat. L. J. 651: 48 I. C. 197.

Plaintiff's inability to produce important evidence is not sufficient ground within Or. XXIII, r. 1 (2) (*b*), C. P. Code, for permitting him to withdraw the suit with permission to bring a fresh suit in respect of the same subject-matter, *Uchant Ahir* v. *Basawan Ahir*, 6 Pat. L. J. 112: 2 Pat. L. T. 634.

Where a suit is brought for the interest due on a mortgage, it is not a sufficient cause for granting leave to withdraw the suit with liberty to sue afresh that a subsequent suit for the principal would be barred by Or. II, r. 2, C. P. Code: *Parduman Chand* v. *Gangaram*, 66 I. C. 235.

In order to succeed in an application for withdrawal, the plaintiff must specifically state the formal defect. A mere general statement that there are formal defects is not sufficient.—*Pundalik* v. *Chandrabhan*, 43 I. C. 846.

A special Judge appointed under s. 54 of the Dekkan Agriculturist Relief Act (XVII of 1879) is not competent in the exercise of his revisional powers to allow a plaintiff to withdraw his suit with liberty to bring a new one, merely on the ground that he has made some mistake in filing the suit.—*Muktaji Bhagoji* v. *Manaji*, 12 B. 684.

In a suit against a Ruling Chief, if the consent of the Governor-General in Council under s. 433, C. P. Code, 1882 (s. 86), has not been obtained before the commencement of the suit, the Court should allow the plaintiff to withdraw it with liberty to bring a fresh suit under this section.—*Chandu Lal* v. *Awad Bin*, 21 B. 351.

Effect of Erroneous Grant of Leave to Withdraw.—An order for withdrawal of a suit with leave to institute a fresh suit made under Or. XXIII, r. 1 but in circumstances not within the scope of the rule, cannot be treated as an order made without jurisdiction; such order is consequently not null and void. A fresh suit instituted upon leave so granted is not incompetent. The Court trying the subsequent suit is not competent to enter into the question, whether the Court which granted permission to the plaintiff to withdraw the first suit had properly made such order.—*Hriday Nath* v. *Ram Chandra*, 31 C. L. J. 482 (23 C. L. J. 489, 20 C. W. N. 1000, *overruled*), *Sammudi Shaikh* v. *Falbash*, 65 I. C. 701.

Assuming that a Court ought not, under Or. XXIII, r. 1 of the C. P. Code, to grant permission to a plaintiff to consolidate the claim in the suit which is withdrawn with that in another suit pending at the time, the order granting the permission is not a nullity and the plaintiff cannot without complying with the terms of the order, maintain a fresh suit in regard to the same subject matter, *Lakshmanan* v. *Muttaya Chetty*, 40 M. L. J. 126: 29 M. L. T. 189.

Where the Court allows some plaintiffs to withdraw with liberty to file a fresh suit without the consent of the others, the Court acts without jurisdiction and a fresh suit is barred, *Mt. Ram Dei* v. *Mt. Bahurrani*, 1 Pat. 228: A. I. R. 1922 Pat. 489.

Power to Allow Withdrawal of Appeal.—An Appellate Court has authority to permit an appeal to be withdrawn.—*Ram Pershad* v. *Bhurosa Koonwar*, 9 W. R. 328.

The High Court allowed the appellant to withdraw his second appeal after it had been argued, though not decided, in order that he might apply to the lower Court for a review of its judgment on the ground of discovery of new evidence.—*Pandu* v. *Devji*, 7 B. 287.

One of the appellants can withdraw from the appeal so far as his own interest in the appeal are concerned.—*Gopala* v. *Hira Singh*, 119 P. W. R. 1908.

When Permission Ought Not to be Granted.—Where all the evidence in the case have been adduced and the case almost finished, the Courts ought not to permit the plaintiff to withdraw from the suit with liberty to bring a fresh suit on the same cause of action more specially when it is not shown what defects there were in the plaint which necessitated such withdrawal.—*Rajendra Nath* v. *Baikunta Nath*, 34 I. C. 931.

On an application by plaintiff to withdraw a part of his claim with liberty to bring a fresh suit on the ground of misjoinder of parties and causes of action, the court found there was no misjoinder as alleged in the petition but still granted the leave without stating any grounds for allowing the same. *Held* that the plaintiff ought not to have been allowed leave to withdraw a part of the claim, *Gopalchandra* v. *Benodi Behary*, 61 I. C. 82.

Permission Need Not be Express.—The permission mentioned in Or. XXIII, r. 1, C. P. Code, need not be express and it is sufficient if the grant of permission can be implied from the order read with the applica-

tion on which the order was passed; *Banwari* v. *Kishen Devi*, 2 Lah L J 242 · 67 I. C. 1002.

Where the Court gave permission to withdraw the suit, but did not in terms give the plaintiff liberty to bring fresh suit, it was held that the order ought to be read along with the petition and construed as granting permission to file a fresh suit; *Khudi Rai* v. *Lalo Rai*, 5 Pat 23: 93 I C 1001: A. I. R. 1926 Pat 259.

After a suit has been referred to arbitration and a valid award has been made, it would be improper to allow withdrawal having regard to the provisions of para 3 (2), Sch. II. C .P. Code.—*Abdul Karim* v *Muhammad Hussain*, 32 I. C. 347

Form of Order Granting Permission to Withdraw.—Where leave is granted to the plaintiff to withdraw from the suit with liberty to bring a fresh suit, the order must not be one *dismissing* the suit with liberty to bring a fresh suit, but one granting permission to *withdraw* with liberty to bring a fresh suit —*Doucett* v. *Wise*, 1 W. R. 822; *Banwari* v. *Muhammad*, 9 A 690 Where permission to withdraw with liberty to bring a fresh suit is refused, the Court should simply dismiss the application, *Vokual* v. *Purshotam Das*, 32 B 345

Dismissal of Suit Coupled with Liberty to Bring a Fresh Suit, Whether Permissible.—The Courts in India do not possess the power to dismiss a suit with liberty to the plaintiff to bring a fresh suit for the same matter, *Banwari* v *Muhammad*, 9 A 690; *Sukh Lal* v. *Bhikhi*, 11 A. 187, *Fateh Singh* v. *Jagannath*, 52 I A 100 · 47 A. 158: A I. R. 1925 P C. 55. *Watson* v. *Collector of Rajshaye*, 13 M I A. 160.

Right of Appellant to Withdraw his Appeal Where Cross-objections have been filed.—Where no cross-objections under s. 561, C. P. Code, 1882 (Or XLI, r. 22), have been filed by the respondent, an appellant has an absolute right to withdraw his appeal at any time before judgment, but where such objection has been filed, the appellant, if he wishes to withdraw his appeal. must do so before the hearing of the appeal has commenced.—*Kalyan Singh* v. *Rahmu*, 23 A. 130. But after the hearing of the appeal has commenced, the appeal cannot be withdrawn so as to prevent the cross-objections being heard and determined —*Dhondi Jagannath* v. *The Collector of Salt Revenue*, 9 B. 28. In *Jafar Husain* v. *Ranjit Singh*, 17 A. 518, it has been held that if an appeal in which objections have been filed under Or. XLI, r. 22 is withdrawn the objections cannot be heard.

Withdrawal of appeal by the appellant, by which a respondent loses his opportunity of having his cross-objections heard, does not afford sufficient reason for enlarging the time for the cross-appeal which he might have presented. *Chudasama Manabhai* v. *Mahant Iswargar*, 16 B 249 (10 B. 308 *referred to*).

Order under this Rule, If Subject to Appeal or Revision.—An order under this rule permitting withdrawal of a suit with liberty to bring fresh suit is not a decree within the meaning of s. 2, and is therefore not appealable.—*Jugodindro Nath* v. *Sarut Sundari*, 18 C. 322; *Kalian Singh* v. *Lekhraj*, 6 A. 211; *Dick* v. *Dick*, 15 A. 109; *Jogdesh Chaudhri* v. *Tulshi*, 16 A. 19; *Genda Lal* v. *Pirbhu Lal*, 17 A. 97; *Abdul Hossein* v. *Kasi Sahu*.

27 C. 362: 4 C. W. N. 41. But see *Ganga Ram* v. *Data Ram*, 8 A. 82; *Sant Ram* v. *Mt. Sahib Kaur*, A. I. R. 1922 Lah. 267: 65 I. C. 719. But such an order is open to revision if it falls within s. 115 of the Code. An order under this rule is open to revision if the Court acted *illegally* or with *material illegality* in making the order, *Hira lal* v. *Udoy*, 16 C. W. N. 1027; *Hridoy* v. *Akshay*, 25 C L. J 454; *Uchaut* v. *Basawan*, 6 Pat. L J. 112; *Bai Kashi Bai* v. *Shidapa*, 37 B 682; *Isher Das* v. *Lal Singh*, 7 L. L. J. 290: 90 I. C. 632: A. I. R 1925 Lah. 497; *Aiya* v. *Gopanna*, 27 M L. J. 480: 26 I. C. 57 The High Court can also interfere in revision if the lower Court has not applied its mind to the circumstances of the case and the provisions of this rule, *Ganga* v. *Msst. Kishni*, 47 A. 319: 87 I. C. 175 A I. R 1925 All. 466

An order under this rule allowing withdrawal is subject to revision.—*Dick* v. *Dick*, 15 A 169 (6 A 211 *referred to*) *See* also, *Tirupathi* v. *Mutta*, 11 M 322.

Applicability of this Rule to suits in Revenue Courts.—This rule does not apply to suits before the revenue authorities under Act (X of 1859), that Act being a complete Code in itself —*Radha Madhab* v. *Lukhi Narain*, 21 C. 428; *Mokunda Ballav* v *Bhogaban Chunder*, 21 C. 514. *See* also, *Doyal Chunder* v *Dwarkanath*, Marsh. 143: W. R., F B 47; *Modhoo Soodun* v. *Panchcowree*, 7 W R. 302; *Beer Chunder* v. *Tarinee Churn*, 11 W. R. 46; *Rama Nath* v *Jay Kishen*, 11 W R. 3 and *Golam Mahomed* v. *Shibendra*, 35 C. 990 12 C. W N. 893 (28 C. 532 *distinguished*); *Sasi Kanta* v. *Salim Sheikh*, 50 C. 626. 27 C. W. N. 987.

Held, that the *procedure provided by sections* 43 and 373, C P. Code, 1882 (Or. II, r. 2 and this rule), is applicable to suits under the North-Western Provinces Rent Act, 1881.—*Madho Prakash* v *Murli Manohar*, 5 A 406 (9 C 295 *followed*)

Applicability of this Rule to Execution Proceedings.—This rule does not apply to applications for execution of decrees.—*Thakur Prasad* v. *Fakirullah*, 17 A. 106, P. C (18 C. 635 *approved*; 10 A. 71 *overruled*; and 12 A. 179 *reversed*). *See* also, *Wajihan* alias *Alijan* v. *Bishwanath*, 18 C. 462 (10 B 62 *followed*, and 12 A 392 *dissented from*); *Radha Kishen* v. *Radha Pershad*, 18 C. 515 (18 C. 462 *followed*; 12 A. 392 *dissented from*); *Lakhmi Narasimha* v *Atchanna*, 15 M. 240 (12 A. 392 *dissented from*, 18 C 462 and 11 B 467 *approved*) From the above rulings it would appear that there was a difference of opinion between the Allahabad and the other three High Courts on this point—the former holding that s 647, C P Code, 1882 (s. 141), makes this rule applicable to proceedings in execution of decrees; while the latter holding that s 141 does not operate to extend the rule laid down in respect of a suit in this rule to an application for execution of a decree. But the matter has been set at rest by the Privy Council case reported in 17 A. 106, overruling 10 A. 71, reversing 12 A 179, and approving 18 C. 635. The Privy Council case has impliedly overruled *Sher Singh* v. *Daya Ram*, 13 A. 564, and *Kishan Shahai* v. *Aladad Khan*, 14 A 64.

An application to withdraw a pending proceeding for execution, with leave to institute another at some future time, is not a step in aid of execution within the *meaning of* Art. 182 (5) of the Limitation Act,

based upon a call order, dated 11th November, 1880, and they were permitted to withdraw it with liberty to bring fresh suit for the same cause of action *Held*, that the plaintiffs were not precluded from bringing the second suit upon the balance order.—*London, Bombay and Mediterranean Bank* v. *Burjorji Sorabji*, 9 B. 346.

An unsuccessful claimant brought a regular suit against a decree holder, who then released the property from attachment and the plaintiff withdrew his suit The same property was afterwards attached and sold in execution of the same decree *Held*, that the subsequent suit for possession of the property against the auction-purchaser was not barred by this rule —*Mukhoda Soondury* v. *Ram Churan*, 8 C. 871 (11 M I. A 7 *cited*)

In 1893 the plaintiff sued to eject the defendants alleging that they were in occupation of the land under a lease of 1880 from the late Zamorin of Calicut. The plaintiff's title rested on an instrument executed by him in 1892 It was objected that the instrument was not binding after the death of the grantor The plaintiff thereupon withdrew his suit without obtaining leave to sue again He subsequently obtained a like instrument from the present Zamorin and sued again to eject the defendants. *Held*, that the second suit was barred by this rule.—*Achuta Menon* v. *Achuta Nayar*, 21 M. 35

A Court after reference of arbitration cannot, pending the reference grant permission to withdraw the suit with liberty to bring a fresh suit for same matter Permission thus given to a plaintiff to withdraw, with liberty to bring fresh suit, is *ultra vires*, and does not save the fresh suit from being barred by this rule —*Sheoamber* v. *Deodat*, 6 A. 168

The dismissal of the former suit " in the form it was brought " does not amount to permission to sue again as contemplated by this rule and such dismissal must be regarded as a " decision," thereof in the sense of s. 13, explanation iii, C. P. Code, 1882 (s. 11), and therefore as a bar to the fresh suit —*Gonesh* v. *Kalka Prasad*, 5 A. 595; *Muhammad Salim* v. *Nabian Bibi*, 8 A 282; *Kudrat* v. *Dinu*, 9 A. 155: and *Banwari Das* v. *Muhammad Mashiat*, 9 A. 690 (13 B. L. R. 18, P. C., *referred to*)

A suit for possession was wholly dismissed, on the ground that the plaintiff had not made out his title to the whole of the property claimed though he had proved title to a one-third share of it, the decree containing a clause that a fresh suit might be brought for one-third share. Subsequently the plaintiff brought another suit for possession of the one third share *Held*, that the Court in the former suit had no power to include in its decree any such reservation or order; that the fact that the decree was not appealed against did not give the order contained in it, which was an absolute nullity, any effect —*Sukh Lal* v. *Bhikhi*, 11 A. 187, F. B (5 A. 595, 8 A. 282, and 9 A. 155 *explained*).

In a suit for partition both the parties having arrived at a compromise, filed a joint petition praying that the suit might be struck off; the terms of the compromise were however not inserted in the decree and were never carried out. Subsequently the plaintiff brought a second suit for partition of the same property; *Held*, that the suit was barred by this rule —*Gulkandi Lal* v. *Manni Lal*, 23 A. 219.

Where the former suit was withdrawn with permission to bring fresh suit the subsequent suit is not barred.—*Kunhan* v *Sunkara*, 14 M. 78, p. 80.

A redemption suit was dismissed for want of necessary parties. In the Appellate Court, the plaintiff put in a petition saying that he did not wish to prosecute his "appeal or claim," the other side having given up his costs. The plaintiff then brought a second suit to redeem. *Held*, that the suit was barred by the last para. of this rule, the consideration for withdrawal being that the respondents gave up their costs.—*Ram Prasad* v. *Dungar Singh*, 4 A. L. J. 201: (1907), A. W. N. 91.

Where in a suit for partition, a defendant has, by concession of the plaintiff, acquired rights, which otherwise, could not have existed, it is not open to the plaintiff, who has made that concession, afterwards to annul its effect, by withdrawing the suit in the Appellate Court. Sections 373 (Or. XXIII, r. 1) and 582 (Or. XXII, r. 11), C. P. Code, 1882, do not support the conclusion that rights actually vested and created by the decree of the first Court can be afterwards annulled by the plaintiff's withdrawal of the entire suit, of his own free will and without the permission of the Court.—*Satyabhamabai*, v. *Ganesh Balkrishna*, 29 B. 13: 6 Bom. L. R. 533.

"In respect of such subject-matter."—The expression used in the corresponding s. 373 of the old Code, was "*matter.*" It was held in *Kamini* v. *Ram Nath*, 21 C. 265 and *Gopal* v. *Purna*, 4 C. W. N. 110, that the word "*matter*," as used in the old Code, did not mean *property*, but that it referred only to *right in the property*. The terms "subject-matter" and the "same matter," which occurred in the corresponding s. 373 of the old Code, have not been defined, and must, we think, be construed strictly in a penal provision of this character. Without attempting an exhaustive definition of all that may be included in the term "subject-matter" we are of opinion that where, as in the present case, the cause of action and relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit.—(*Per* Wallis, C. J.) *Saiga Reddi* v. *Subba Reddi*, 39 M. 987: 35 I. C. 185. A contrary view was taken by the Punjab Chief Court in *Jita Singh* v. *Hari Singh*, 97 P. R. 1916: 37 I. C. 128. *See* also, *Maung Mu* v. *Maung Kan*, 1 Rang. 618: A. I. R. 1924 Rang. 127. The words "subject-matter" used in this rule are not to be identified with the "property" in the suit. They mean the cause of action for a claim. A suit on a different cause of action though relating to the same property is not barred, if the suit is withdrawn without leave of Court; *Putto Khan* v. *Ahmad Zaman Khan*, 9 O. & A. L. R. 978: 74 I. C. 56.

Sub-rule (4)—Withdrawal by Co-plaintiffs.—Sub-rule (4) provides that nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.

One of several plaintiffs cannot withdraw from the suit without the consent of the others; *Mahomed Ilyas* v. *Faquira*, 10 O. and A. L. R. 210; L. R. 5 A. 78 (Rev.). Where the Court in contravention of this sub-rule, allows two out of four plaintiffs to withdraw from a suit without the

consent of the other two, it acts without jurisdiction, and a second suit in respect of the same subject-matter is barred.—*Musst. Ram Dei v. Musst. Bahu Rani*, 1 Pat 228. A I R. 1922 Pat. 489.

Notice.—An order under this rule without notice to the opposite party is bad.—*Rajendra v. Atal*, 25 C L. J. 456: 44 C. 454.

Withdrawal of Suit by Next Friend of Minor.—When a suit is fraudulently withdrawn by the next friend of a minor plaintiff, without leave to bring fresh suit, it is open to the minor to relieve himself from the consequences of fraud in one of the three ways, *viz.* (1) by an application to the Court in the suit in which the withdrawal took place; (2) by a regular suit to set aside the judgment founded upon the withdrawal; or (3) by bringing a fresh suit for the same purpose, and setting up the fraud as an answer to the statutory bar.—*Eshan Chandra v. Nundamoni*, 10 C 357. In *Ram Sarup v. Shah Latafat Hossein*, 29 C. 735, the withdrawal of a suit by the next friend was treated as gross negligence. A withdrawal of a suit by the next friend of a minor in pursuance of an agreement or compromise entered into with the defendant without the leave of the Court, is voidable at the instance of the minor, under Or. XXXII, r 7.—*Dorasamy v. Thangasami*, 14 M. L J 159. 27 M 377.

Power of Court of Small Causes to Allow Withdrawal.—The Court of Small Causes at Calcutta has jurisdiction to pass an order under this rule after granting a new trial.—*Jadu Mani v. Ram Kumar*, 29 C 239, but the Judge of a Small Cause Court cannot allow withdrawal without recording reasons.—*Luchi v. Raghubir*, 2 Pat L. J. 682 But in *Yule and Co. v. Mahomed Hossein*, 24 C. 129, it has been held that the Small Cause Court Judge after receiving the judgment of the High Court, on a reference, had no jurisdiction to allow the plaintiff to withdraw the suit with liberty to bring fresh suit, but was bound to enter judgment according to the decision of the High Court

Limitation law not affected by first suit.

2. In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted. [S. 374]

COMMENTARY.

This rule corresponds to section 374, C P. Code, 1882, with the modification that the word "*instituted*" has been substituted for the word "brought" which occurred in the old section.

Limitation.—When a suit is withdrawn under Or. XXIII, r 1 with permission to bring a fresh suit, the effect of this rule is, that limitation is to apply to the second suit, as if it was the first. *Held* also, that section 14 of the Limitation Act does not apply to such a case.—*Varajlal v. Shomeshwar*, 29 B. 219: 7 Bom. L. R. 90 (12 B. 625, *followed*). Where leave to withdraw was granted erroneously by a Court which had no jurisdiction to entertain the suit, the case will be governed not by the provisions of this rule but by those of s. 14 of the Limitation Act, and

the term during which the first suit was prosecuted will be excluded in computing the period of limitation for the second suit; *Ramdeo* v *Gonesh*, 35 C. 924: 12 C. W N 921.

The effect of withdrawal of a suit with permission to bring fresh suit, is to leave the parties in the same position as that in which they would have been if the suit had never been brought A plaintiff, therefore, who has obtained permission under section 373, C P Code, 1882 (Or. XXIII, r. 1), will not be debarred by s 43, C P Code, 1882 (Or. II, r. 2), from claiming in a subsequent suit a relief which he might have included, but did not, in the suit which he was permitted to withdraw.—*Behari Lal* v. *Baran Mai Dasi*, 17 A 53. *See* also, *Venkata Chetti* v. *Ranga Nayank*, 10 M. 160. Followed in *Syed Hossain Ali* v. *Hari Nath*, 1 C. L. J. 29-n; *Elahi Buksh* v *Imam Baksh*, 1 A. 321; *Mul Chand* v. *Bhikari*, 7 A. 624; and *Sobhapathi* v *Lakshmee*, 24 M. 293

Execution Proceedings.—The rule laid down in this rule does not apply to applications for executions.—*Tara Chand Megh Raj* v. *Kashi Nath*, 10 B. 62; *Thakur Prasad* v. *Fakirullah*, 17 A. 106, P. C. (10 A. 71 *overruled*; 12 A. 179 *reversed*, and 18 C. 635 *approved*); see *Eshan Chunder* v *Pran Nath*, 22 W. R. 512. But see *Pirjade* v. *Pirjade*, 6 B. 681. *See* also, *notes, under Or XXIII, r. 1.*

Withdrawal of appeal by the appellant, by which a respondent loses his opportunity of having his cross-objections heard, does not afford sufficient reason for enlarging time for the cross-appeal which he might have presented —*Chudasama Manabhai* v. *Mahant Ishwargar*, 16 B 249 (10 B. 398 *referred to*).

The effect of withdrawal of an appeal under a compromise estops the parties with regard to the points raised in the Lower Court's decision—*Vythilinga* v *Vijayathammal*, 6 M 43.

Compromise of suit

3. Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit. [S. 375.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to section 375, C. P. Code, 1882, with some alterations and omissions.

The words "*where it is proved to the satisfaction of the Court that a suit has been adjusted*" have been substituted for the words "if a suit be adjusted," which occurred in the old section. The words "*the Court shall order*" have been added and the words "*and such decree shall be final so far as relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise, or satisfaction*" which occurre

in the concluding part of the old section, have been omitted, having regard to cl. (3) of s. 96, which provides that no appeal shall lie from a decree passed by the Court with the consent of parties. But on account of the omission of the words "*such decree shall be final,*" a review of a consent decree may be granted Under the old law, review was prohibited (see 5 W. R. 226).

"The Committee have considered it expedient to alter the language of s. 375 so as to recognize the power of a Court to enquire into and to record a disputed compromise."—*See the Report of the Special Committee.*

"Has been adjusted wholly or in part."—An adjustment which is not *bona fide* and on the basis of which the Court was not asked to record satisfaction and pass a decree in accordance therewith does not comply with the provisions of Or. XXIII, r. 3; *Seth Kevaldoss v. Sanker Lal Bulakhidas* 45 M. L J 763 33 M L. T. (P. C) 424.

"By any lawful agreement or compromise."—The language of this rule is wide and general and does not preclude parties from settling their disputes on such lawful terms as they might agree to, without being restricted to such relief as one only of the parties had chosen to claim in the plaint. In a suit for money, where the plaint prays for a simple money decree, an agreement, by which the parties agreed that the decretal amount should be a charge on certain properties, is lawful and "relates to the suit," so as to be embodied in the decree—*Joti Kuruvetappa v. Izari Sirusappa*, 30 M. 478.

A Hindu Father has full authority to act on behalf of his adopted son and to enter into a compromise in a suit on mortgage of joint family property so as to bind the son to the compromise in respect of the son's interest in the property; *Saiyid Mehdi v. Chaudhri Ghanshiam*, A. I. R. 1927 P C. 204

A compromise signed by a pleader who was not specially authorized for the purpose is bad and a decree in accordance with it should be set aside—*Basangowda v. Churchigirigowda*, 34 B. 408

Where the parties to a suit themselves effect a compromise and the fact of the compromise is conveyed to the Court by means of a petition presented by the pleaders appearing on both sides, it is not open to the parties to question the compromise on the ground that the pleaders had no authority to compromise.—*Pambayam Chetty v. Kandaswami*, 12 L. W. 562: 60 I C. 22.

It is incumbent on a Court to pass a decree in terms of a compromise only if the same is lawful, *i e.*, enforceable in law. One test to apply is, were the parties competent to enter into the agreement in order to achieve the purpose they had in view. When after a mortgage decree to which the puisne mortgagee was a party, the mortgagee and prior mortgagee put in appeal a petition of compromise which increases the amount payable to the latter, a decree cannot be passed in accordance therewith, as it undoubtedly prejudices the rights of the puisne mortgagee and hence cannot be said to be "lawful."—*Mal Chand Boid v. Osman Ali*, 23 C. L. J. 272.

The Court has no jurisdiction, under this rule, to pass a decree on a compromise, unless it is a lawful compromise. Any terms of a contract which are opposed to public policy, are invalid and will, therefore, not be enforced by the Courts and so far as a decree embodies unlawful terms of a compromise, it is inoperative and will not be enforced.—*Lakshmanaswami* v. *Rangamma*, 26 M 31 (24 M. 265 *referred to*). No option is left to a Court to examine the terms of a compromise beyond seeing whether the agreement is lawful or not. An agreement which carries a penal clause such as may be covered by s. 74 of the Contract Act, is not in any sense of the term " unlawful " and hence it must be recorded and decree passed in terms thereof; *Kishen Prasad* v. *Kunj Behari*, 24 A. L. J. 210: 91 I. C. 790: A. I. R. 1926 All. 278.

The legality of a provision for ejectment is to be tested in the light of the rules formulated in the Bengal Tenancy Act, even though the provision originally appearing in the petition of compromise has been incorporated in the decree. The Court will not in such circumstances, assist the decree-holder to achieve his illegal purposes in defiance of express statutory prohibition. The circumstance, that a consent decree has been passed on the basis of a compromise, does not oust the jurisdiction of the Court to grant relief against forfeiture, and the Court must determine whether on equitable grounds, relief could have been granted against forfeiture if it had been called to enforce the agreement itself.—*Gopal Krishna* v. *Hari Nath*, 34 C L. J. 157.

A Court will not recognise any compromise of an action with the facts of which it is entirely unacquainted or if one of the terms of the compromise is a clear violation of a statutory rule.—*Mussammat Sakli* v. *Ram Kishun*, 55 I. C. 504.

A Court is not bound to pass a decree in accordance with a compromise which is shown to be fraudulent.—*Asan Pandey* v. *Rajamon Missir*, 52 I. C. 105.

On an application to record an agreement, under Or. XXIII, r. 3, C P. Code, the Court has power to go behind the transaction and to enquire whether the admission is true and made by the debtor with a full knowledge of his legal rights as against the creditor.—*Goturam Radha Kishan* v. *Barku Dodhu*, 24 Bom. L R. 88: 46 B. 560.

The plaintiff undertook to abide by the statement of a particular person and closed his case. The person was examined on solemn affirmation but denied any knowledge of the case, and plaintiff's suit was dismissed. *Held*, the proceedings were tantamount to a compromise of this suit; *Chet Ram* v. *Bhup Singh*, A. I. R. 1927 Lah. 99: 98 I. C. 864.

An agreement between the parties to a suit that it should abide and follow the result of another suit between the same parties is a valid and binding agreement. As soon as a decision is given in the second suit, there is a lawful adjustment of the first suit within the meaning of Or. XXIII, r. 3.—*Sreenivasa Chariar* v. *Kumara Thatha Chariar*, (1918) M. W. N. 746 (37 M. 408 *distd.*).

Where the claim is beyond the jurisdiction of the trial Court, it is not competent to the Court to pass a compromise decree; *Govindasami* v. *Kaliaperumal*, (1922) M. W. N. 83: 66 I. C. 837.

The plaintiff (respondent) after obtaining a decree in the first Court compromised the suit in the Appellate Court and asked that a decree should be made in favour of the defendants (appellants). *Held*, that the High Court on an application to make a decree in accordance with the compromise, had acted properly in adding as plaintiffs, members of the temple community who opposed the application, and in refusing the application on the ground that the compromise was a breach of trust on the part of the respondent and therefore unlawful under Or XXIII, r. 3 —*Sankaralinga* v *Rajeswara Dorai*, 31 M 236, P C · 8 C. L J 230 12 C W. N 916

Agreement that a suit may be decided in a manner different from that prescribed by law is void —*Raja of Venkatagiri* v. *Chinta Reddi*, 37 M. 408

Unless a will is proved in some form, no grant of probate can be made merely on the consent of parties Hence an agreement or compromise as regards the genuineness and due execution of a will, if its effect is to exclude evidence in proof of the will, is not lawful within the meaning of this rule —*Monmohini* v *Banga Chandra*, 31 C. 357: 8 C W. N 1[illegible] (9 B 241 and 21 B. 335 *followed*)

The terms of this rule are imperative and a Court cannot refuse to record a lawful agreement or compromise and to pass decree in accordance therewith, merely because in its view it is too favourable to one of the parties —*Moti Ram* v *Yesu*, 22 B. 238. But the Court must see that the compromise is a lawful agreement before it is recorded and a decree is passed in accordance with the terms thereof and will look into the merits when necessary to determine its *bona fides*.

Where after the hearing of an appeal and when it is pending for want of a delivered judgment, a petition for compromise is presented, the Court has to receive the petition and pass the necessary orders thereon *Nagiah* v *Seshama*, 41 M L J 385· 14 L W. 514.

Where a Compromise Set Up by One Party is Denied by the Other.— When the parties to a suit have by an agreement adjusted the subject matter of the suit, the Court can by an order made in the suit, order such agreement to be recorded and make a decree in accordance with it notwithstanding that one of the parties to such agreement objects to the compromise being accepted —*Brojodurlabh* v. *Ramanath*, 21 C. 908, F B. ; 1 C W N 597, F. B *See* also, *Karuppan* v. *Ramasami*, 8 M 482 ; *Ruttonsey Lalji* v *Pooribai*, 7 B 301 ; *Appasami* v *Manikam* ! M 103 , and *Goculdas Bulabdas* v. *Scott*, 16 B. 202 ; *Mahant Rajbir Singh* v *Chanan Singh*, 69 I C. 395.

There can be no doubt that when one party alleges and the other denies that a suit has been settled by a lawful agreement out of Court the Court has power to decide whether there has been such a settlement and if this question is decided in the affirmative, to grant a decree in accordance with the agreement. The Full Bench decision in 21 C 908 1 C. W. N 597 (given above) has been now given effect to by the alterations made in Or. XXIII, r 3 from the language of s. 375 of the old Code —*Anadi Krishna* v. *Priya Shankar*, 21 C. W. N. 366: 36 I C 375— *Sital* v. *Lal Bahadur*, 38 A. 75, 80-81.

Any party to a suit has the right to repudiate the action of an agent compromising it without his knowledge and consent, before an order is

passed accepting the compromise as the final determination of the suit. —*Monmohini* v. *Banga Chandra*, 31 C. 357: 8 C. W. N. 197 (24 C. 908: 1 C. W. N. 597 *referred to*).

Where a party to a suit impugns an alleged agreement or compromise by which he would be bound, the Court must satisfy itself by evidence that the agreement or compromise is a lawful one, and that its terms have been consented to by the parties to the suit before it can proceed under this section, to record it and pass a decree in accordance therewith.—*Sridharan* v. *Punamathan*, 28 M 101

The rule was intended to meet cases where the parties having agreed to compromise subsequently fall out. The original Court has power to frame an additional issue to decide whether a lawful compromise has been effected between the parties subsequent to the institution of the suit.—*Appasami* v *Varadachari*, 19 M. 419.

Held, that under this rule, the Court had jurisdiction to determine whether, as a fact, the alleged agreement adjusting the suit has been made, and if it was satisfied that it has been made, to record it. Whether that fact should be tried on affidavit or by oral evidence, is entirely in the discretion of the Court.—*Sambhai* v. *Premji Pragi*, 20 B. 304.

Compromise as Between Some of the Parties—Effect on Others.—The agreement between the plaintiff and one set of defendants cannot affect the position of the other defendants. They can neither be prejudiced by it, nor can they take any advantage of that agreement.—*Musst. Bhaguali* v *Jagdam Sahai*, 2 Pat. L T 471.

Submission and Award equivalent to " Adjustment of the suit by an agreement " within the meaning of this Rule.—It was held by the Bombay High Court, in two earlier cases decided under the old Code, that where the matters in difference in a pending suit are referred to arbitration without the intervention of the Court and an award is made, the submission and the award may be treated as an " adjustment of the suit by agreement " within the meaning of s. 373 of that Code, and it may be recorded as an adjustment under that section, *Prag Das* v. *Girdhar Das*, 26 B. 76, *Sambhai* v. *Premji*, 20 B 304. The same High Court, in a case decided under this Code, took the same view and held that where in a pending suit the matters in difference are referred by the parties to arbitration without the intervention of the Court and an award is made, the provisions of para 20 of Sch II do not apply to the award, but that the submission and award may be recorded as an adjustment under this rule; *Harakhbai* v *Jamnabai*, 37 B 639 19 I C 786. A contrary view was, however, taken by Sir Norman Macleod, J, in *Sharafshaw* v *Tyab Haji*, 40 B 386 37 I C 340, where it was held that, in view of the words " any other law for the time being in force " in s 89 of the Code and having regard to the provisions of that section a submission and an award made without the intervention of the Code could not be recorded as an adjustment under this rule and that the proper procedure was under paras 20 and 21 of Sch II, and that accordingly the matter should be treated as an application under those paragraphs and treated accordingly. But in *Mani Lal Moti Lal* v *Gokul Das*, 45 B 245 A. I. R. 1921 Bom 310, Sir Norman Macleod and Mr Justice Fawcett reconsidered the matter and held that the submission and award could properly be recorded

under Or XXIII, r. 23, and that the previous judgment of Mr Justice Macleod, in *Shavakshaw v. Tyab Haji*, 40 B. 386, was incorrect It has recently been held by a Full Bench of the Bombay High Court in *Channbasappa v. Basalingappa*, 29 Bom. L. R. 1254: A. I. R. 1927 Bom 567 (following *Mani Lal Moti Lal, v. Gokul Das*, 45 B. 245) that where in a suit, parties have referred their differences to arbitration without an order of the Court and an award is made, a decree in terms of the award can be passed by the Court under Or. XXIII, r. 23, but not otherwise The Allahabad High Court, in *Gajendra v. Durga Kunwar*, 47 A 637 A I. R. 1925 All 503 F B , and the Madras High Court, in *Chinnavenkatasami v Venkatasami*, 42 M. 625, have taken the same view as the Bombay High Court in *Mani Lal's case*. The Calcutta High Court in *Amar Chand v. Banwari*, 49 C. 608 A I. R. 1922 Cal. 404, has dissented from the decision in *Mani Lal's case* and held that the award can't be enforced under Or XXIII, r 3, or under paras. 20 and 21 of Sch II The Lahore High Court, in *Hari Prasad v. Soogni*, 3 L. L. J. 162, has followed the Calcutta High Court decision in *Amar Chand v. Banwari*

Reference to Arbitration does Not Preclude Parties from Compromising.—Even after a reference to arbitration is made in a pending suit, the parties are not precluded from settling the dispute amicably by mutual agreement, and it is not therefore necessary to cancel the reference before accepting the compromise ; *Mt Aishan v. Abdulla*, 99 I C. 1002. A I R. 1927 Lah. 156.

Power of Court to Pass Decree on Partial Award.—*Held* that, it was open to the court to record the decision of the arbitrator and pass a decree thereon even though the award was partial. There is no rule of law that a partial award is invalid and the question has to be decided on the intention of the parties, the matter being a subject of contract between them ; *Alagu-Pillai v Veluchmi*, 45 M L. J. 76: 32 M. L T. (H. C.) 369 74 I. C 609.

Compromise Extending Beyond Scope of Suit.—A decree passed on a compromise cannot be regarded as *ultra vires* simply because it goes beyond the subject-matter of the suit and contains other conditions ; if these other conditions are the considerations for the compromise of the subject matter of the suit, they must be incorporated in the decree —*Gobinda Chandra v Dwarka Nath*, 7 C L. J 492 *See also, Charu Chandra v Sambhu Nath* 3 Pat. L J. 255 ; *Hari Chand v. Maghi Mal*, 95 P. W R 1917 78 P R 1917· 12 P L R. 1917 ; *Purna Chandra v. Nilmadhab* 5 C W. N 785, *Anantha Narayana v. Abdul Karim*, 30 M 421: 17 M L J. 255 and *Joti Kururetappa v. Izari Sirusappa*, 30 M. 478, where it has been held that a compromise decree containing reliefs not covered by suit is valid

When the compromise has been effected between the parties, the proper course to follow is not to recite the compromise in the decree in its entirety but to pass a decree in accordance there with only in so far as it relates to the suit ; *Jiban Krishna v. Ramesh Chandra*, 38 C L J 72 95 I. C. 47

The words " so far as it relates to the suit " in Or. XXIII, r. 3 show that the terms which form the consideration for the adjustment of the suit or matter in dispute, whether they form the subject-matter of the suit or

not, become related to the suit and can be embodied in the decree.—*Karu Mian v. Tejo Mian*, 3 Pat. L. J. 43. 43 I C 282 (30 M. 478, 20 A. 78 referred to).

The only compromise which a Court can in any case be bound to enforce under this rule is one which adjusts, wholly or in part, the suit; matters going beyond the suit cannot, if included in a compromise, be so enforced. A Court, refusing to grant a decree on a compromise going beyond the suit, cannot however, grant a decree modifying the terms of the proposed compromise, but must leave the parties to proceed with the suit as they may be advised.—*Fajaleh Ali Miah* v *Kamaruddin*, 13 C 170. *See* also, *Venkatappa* v *Thimma Nayaniam*, 18 M 410. *Purna Chandra* v. *Panchkori*, 5 C L J 15; and *Muthuvejaya Raghunatha* v. *Thandaaraya*, 22 M 214.

By consent of parties and the leave of the Court, a suit may be amended to recover an increased claim, and there is nothing in the law which prevents the parties to a suit enlarging, by consent or compromise, the original claim, and getting or allowing a decree for a greater amount of money or land than that originally asked for —*Monibullah* v. *Imami*, 9 A. 229.

The terms of a *solenama* decree in so far as they cover matters not involved in the suit, cannot be enforced in execution of the decree but the decree is evidence of the agreement entered into as regards those matters *Jagabandhu* v *Hari Mohan*, 62 I. C. 653.

Compromise of Doubtful Claims.—An agreement entered upon a supposition of a doubtful right, though it afterwards comes out that the right was on the other side, shall be binding and the right shall not prevail against the agreement of the parties: for the right must always be on one side or the other and therefore the compromise of a doubtful right, is a sufficient foundation of an agreement.—*Stapilton* v. *Stapilton*, 2 White and Tudor's Leading Cases, 836 and 920, reported in I Atk. 2 (1739). *See*, *Moidin Kutti* v *Beevi Kutti*, 18 M. 38, in which compromise of doubtful claims by adult members was held binding on minor members. *See* also, *Helan Dasi* v. *Durga Das*, 4 C. L. J. 323; *Rameshwar* v. *Lachmi Parasad*, 31 C. 111; 7 C. W. N. 688: *Auidh Sarju Parasad* v. *Sitaram*, 37 A. 37; *Pulliah Chetti* v. *Varadarajulu*, 31 M. 474 and *Ram Nirunjun* v. *Prayag Singh*, 8 C. 138 (141-142): 10 C. L. R. 66.

Compromise made by Hindu Widow or Daughter.—A compromise made by a Hindu widow or daughter is not binding on the reversioners.—*Gobind Krishna* v. *Kunni Lal*, 29 A. 487: *Mahadie* v. *Baldeo*, 30 A. 75; *Asharam* v. *Chandi Churn*, 13 C. W. N 147; *Imrit Kunwur* v. *Roopnarain*, 6 C. L. R. 76; *Shew Narain* v. *Bishen Prosad*, 10 C. L. R. 337. But in *Sankar Nath* v. *Bejoy Gopal*, 13 C. W. N. 201, a different view seems to have been taken.

In addition to the cases noted above, see the rulings in 18 C. W. N LXXXVI (86-n).

Authority of Counsel or Pleader to Compromise.—It is not comp[illegible] to a counsel or pleader to enter into a compromise on behalf of his cl[illegible] without his express authority to do so.—*Jagapati* v. *Ekambara*, 21 [illegible]

Carrison v *Rodrigues*, 13 C. 115 ; and *Nunda Lal Bose* v *Nutan Dassi*, 27 C. 428 4 C. W. N. 169. But a counsel has, by virtue of his retainer, and without further authority, full power to compromise a case on behalf of his client —*Jang Bahadur* v. *Sankar Rai*, 13 A 272 (F B).

When a case is compromised by a counsel or vakil on the instruction of a person who watches the case on behalf of the party: *Held* that, even if the person instructed has no authority to bind the party, the com*promise is binding on the latter if he ratifies and acts on the compromise*. The appointment of a counsel or a vakil by a party to conduct a case does not necessarily authorize him to make a binding compromise on behalf of his client unless there is express authority for it.—*Bhut Nath* v. *Ram Lall*, 6 C W. N. 82.

See notes under section 2, and the cases collected in 13 C W N *at p.* 86-n

Compromise by Minor's Guardian.—A compromise by a guardian *ad litem* without the express sanction and approval of the Court will not bind the infant, and will be set aside at his instance —*Sharat Chunder* v *Kartick Chunder*, 9 C 810 12 C L R. 455 ; *Rajagopal* v *Subramanya* 3 M 103 *See* also, *Karmali* v *Rahimbhoy*, 13 B. 137 ; *Mani Sirdar* v *Bibi Muli*, 12 B. 686 ; and *Virupakshappa* v. *Shiddappa*, 26 B 109 In order to make a compromise binding on the minor, the guardian must ask and obtain the express permission of the Court.—*Kalarati* v *Chet Lal*, 17 A 531 It must be proved that the attention of the Court was directly called to the fact that a minor was a party to the compromise and it ought to be shown by an order on petition or in some way not open to doubt that the leave of the Court was obtained —*Monohar Lal* v *Jadu Nath*, 28 A 585, P C 4 C L J 8 10 C W N 898 16 M L J 292 8 Bom L R 489 *See* also, *Govindaswami* v. *Alagirisami*, 29 M 104 (26 B 199 *followed*) and *Krishna Pershad* v. *Ramesh Chander*, 8 C L J 274 13 C W N 163 *See*, however, *Amar Singh* v *Narain Singh* 20 A 98 *Sital Das* v *Bult Nath*, 62 I C. 688

A guardian or manager appointed by the Court of wards or by the Civil Court under any local law on behalf of infants has power to compromise proceedings in a Civil Court to which the infants are parties, *though the* guardian entered into the compromise without the leave of the Court and such compromise has to be registered by the Court without the necessity of the Court examining and assenting to the terms. *Nakimo Dewan* v *Musammat Pemba Dichen*, 27 C. W N 707 : 33 C L J 211 28 C 469 48 I A 27 P C

A certificated guardian can compromise a suit without obtaining the sanction of the District Judge, under s. 29 of the Guardians and Wards Act (VIII of 1890).—*Biku Halwai* v *Mohesh Halwai*, 8 C. L. J. 266

Held that, the agreement to refer to arbitration had not been lawfully entered into, as the submission related to the rights of minors, who were parties to the suit, and leave of the Court had not been obtained under s 462, C P Code, 1882 (Or. XXXII, r. 7), either before the submission to arbitration or after the award; and that adjustment was in consequence not binding on the minors.—*Lakshmana* v. *Chinathambi*, 24 M. 326

Consent by the guardian of a minor defendant to accept the oath of the plaintiff *Held* that, the minor defendant was bound by the consent of his guardian, since there was no evidence of fraud or negligence on the part of the latter, although the Court had not sanctioned the agreement under s 462, C P Code, 1882 (Or XXXII, r 7)—*Chenglreddi* v *Venkatareddi*, 12 M 483

Where a compromise of a suit is made, it ought to be carried out by proper deeds and filed in Court, particularly where infants are concerned, so as to have the assent of the Court at the time, instead of its being totally concealed from them —*Abdool Ali* v. *Muzuffar Hossein*, 16 W. R 22, P C

Where a suit was compromised by the next friend of a minor plaintiff and it appeared that the infant had no separate interest from the adult members of the family, who took part in the compromise and assented to it and the Court having had its attention drawn to it, approved of it. *Held* that, the compromise cannot be set aside—*Rameswar Pershad* v. *Ram Bahadur*, 34 C 70, P. C 11 C W N 178 5 C L. J 175 ; 17 M L J. 59

Besides the cases noted above, see also the cases noted under Or XXXII, r 7

Agreement to be Bound by Oath is not Compromise.—The mere agreement of one of the parties to a judicial proceeding to be bound by oath of the other, is in itself no adjustment of the suit.—*Konnapalen* v. *Perotta*, 4 M. H. C 422 and Ap. 3 ; *Vasudeva Shanbog* v. *Naraina*, 2 M. 356 ; and *Muhammad Zahur* v *Cheda Lal*, 14 A 141 *See* also, *Thoyi Ammal* v *Subbaroya*, 22 M 234

Consent Decree—Its Effect and Admissibility in Evidence.—When a state of facts is accepted as the basis of a compromise, whereby a suit pending decision is amicably adjusted, and when the compromise is not vitiated by fraud, those who are parties to it and their privies should not afterwards be heard to say, for the purpose of reviving the controversy, that the real state of things was otherwise —*Nilakandhen* v. *Padmanabha*, 18 M. 1, P C, page 7 (6 B. L R 202· 13 M I A. 497, *referred to*). *See* also, *Nicholas* v. *Asphar*, 24 C. 216, where it has been held that a consent decree is as binding on the parties to the proceedings in which it is made as a decree made after a contentious trial (18 M. 1, P. C., *followed*, and 6 B L R. 202. 13 M I A. 497, *referred to*) ; and *Lakhshmishankar* v *Vishnuram*, 24 B. 77.

A consent decree does not stand on a higher footing than a contract between the parties ; and the Court has jurisdiction to set aside a consent decree upon any ground which would invalidate an agreement between the parties, and as it is essential to the validity of a contract that all contracting parties should be competent to contract, and as a person, who by reason of infancy is incompetent to contract, cannot make a contract within the meaning of the Contract Act, it follows that a compromise entered into with a minor is entirely void and cannot be given effect to in a Court of law ; *Gangan and* v. *Rameshwar Singh*, 6 Pat. 388 : 102 I. C. 419· A. I. R. 1922 Pat. 271.

Where the parties to a suit have by mutual agreement, made certai terms, and informed the Court of them, and the Court has sanctioned th agreement, and made an order in conformity with it, and the agreeme has been acted upon, neither party is at liberty to resile from it.—*Sh Golam* v *Beni Prosad*, 5 C 27 4 C. L R 29

A consent decree in a previous suit to which the parties in a subseque suit are parties, being a decree of a Court having jurisdiction over th subject-matter of the suit and over the parties, is admissible in eviden in the latter suit —*Lala Shib Lal* v. *Lala Gouri Prasad*, 2 C W N 17

In a suit for rent, the plaintiff landlords are entitled to rely upon compromise decree in a previous title suit brought by a third party again the tenants and to which the landlords were parties Such a comprom cannot be said to have been beyond the scope of the former suit merel because the money was payable to a third party and not to the plaintif in that suit—such a decree is *inter parties* and is admissible in evidence —*Ramdhari Koer* v *Ramakanta*, 9 C L J. 16· 13 C. W N 217

A *bond-fide* purchaser *pendente lite* is not bound by the consent decre —*Kishory Mohun* v *Mahommed Muzaffar*, 18 C 188 (8 B. L R 474 and 8 C 79 *referred to*)

A tenant compromised a case with his landlord agreeing to pay ren at a certain rate The *jote* was sold in execution of the consent decre and purchased by the defendant In a suit by the landlord against th auction-purchaser,—*held*, that the *solehnama* was binding upon the defend ant, and he was liable for rent under its terms irrespective of any questio as to whether the quantity of land mentioned therein was correct or not —*Satyendra Nath* v *Nilkantha*, 21 C 383.

A compromise decree in so far as it gives effect to the settlemen touching properties in suit operates as *res judicata*.—*Gurdeo Singh* v *Chandrika Singh*, 5 C L J 611 36 C 193 But any thing which form part of the compromise, but which is not part of the subject-matter of the suit, cannot be regarded as finally settled between the parties —*Pur Chandra* v *Panchkowri*, 5 C. L J. 15

Petition of Compromise, If Admissible In Evidence Without Registra tion.—*Held* that, it was not necessary that the deed of compromise should be registered in order to make it admissible in evidence —*Gupta Nara* v *Bijoya Sundari*, 2 C W N 663 ; *Chellaram* v. *Seth Kimatram*, 14 S L R 245 61 I C 118

Held that the *razinama*, in so far as it was submitted to and was acted upon judicially by the Court, was itself a step of judicial procedure not requiring registration, and any order pronounced in terms of it, constitu ted *res judicata* binding upon the parties.—*Pranal Anne* v. *Lakshi Ann*, 3 C. W N 485, P C 22 M. 508, P. C. *See* also, *Kali Charan* v. *Ram Chandra*, 30 C 783, *Muthayya* v. *Venkataratnam*, 25 M 553; *Birbhala* v. *Kalpataru*, 1 C L. J. 388; and *Bindesri Naik* v. *Ganga Saran*, 2 A. 171, P. C., where it has been held that section 17 of the Registrat Act (III of 1877) does not apply to proper judicial proceedings, wheth consisting of pleadings filed by the parties or orders made by the Court Followed in *Govinda Chandra* v. *Dwarka Nath*, 7 C. L. J. 402 35 C 837· 12 C W. N 840 *See* also, *Jasimuddin* v. *Bhuban*, 34 C. 456

where it has been held, that if a compromise goes beyond the subject-matter of the suit and a decree is made on the basis of it, the terms of the compromise are binding upon the defendant, although the decree in respect of the surplusage cannot be enforced in execution.

A petition of compromise, in so far as it relates to the properties in suit, does not require registration But if it relates to extraneous properties, the parties must fall back upon the petition itself, which without registration cannot declare or create title to immoveable properties.—*Gudeo Singh*, v. *Chandrika Singh*, 36 C 193 · 5 C. L J. 611 (22 M 508, 1 C L J. 388, 30 C. 783, 20 M 365, 25 M. 7 and 553, *referred to*, and 28 A 78, *disapproved*)—*Sashi Bhusan* v *Hari Narayan*, 25 C W N 890

A *razinama* does not require registration only in regard to such of its stipulations and provisions as are incorporated with and given effect to by the order of the Judge.—*Patha Muthammal* v. *Esup Rawthu*, 29 M 365 (22 M. 508, P. C., *followed*) But see, *Raghubans* v *Mahabir*, 28 A 78, where it has been held that a compromise relating to the land in suit as well as relating to other lands, which had been incorporated in the decree of the Court in the previous suit, does not require registration.

When a suit is properly compromised but the adjustment consists of an agreement relating to matters outside the scope of the suit and the Court is invited in consequence to dispose of the suit and the Court does dispose of the suit accordingly, the agreement is exempt from registration although the decree deals only with the subject-matter of the suit and does not deal with the portion of the compromise which lies outside the suit —*Musst. Arunbati* v *Ram Niranjan*, 2 Pat L. T. 38: 58 I C. 299

An unregistered compromise petition, which was the root of the plaintiff's claim to an increased rent and was filed in previous criminal proceedings, was not incorporated in the order in such proceedings Held, it was not admissible in evidence in a latter civil suit —*Biraj Mohinee* v. *Kedar Nath*, 35 C. 1010 · 12 C W N 854

Where a petition of compromise merely contained a recital of a previous oral agreement to lease, it does not require registration or stamp It is evidence of oral agreement but not an agreement in itself —*Pitambar Gain* v *Uddhab Mondal*, 12 C W N. 59

Compromise entered into between the parties to mutation proceedings before the Court of Revenue, purporting to vary the terms of a registered mortgage deed is inadmissible in evidence.—*Sadaruddin* v. *Chajju*, 31 A. 13.

Stamped Paper, Whether Necessary.—When the parties to a suit compromise, all that the Court is required to do under Or XXIII, r. 3 is to ascertain that the suit has been adjusted by a lawful compromise, and to put the fact on record. It is not necessary that a *solehnama* on stamped paper should be filed —*Mahadeo Prasad* v *Basdeo Tewari*, 29 I. C. 511.

Mode of Enforcing Compromise Decree.—Where a compromise is filed in Court and a decree is passed in accordance therewith, the remedy is by execution and not by a fresh suit.—*Ram Mohan* v. *Lakhi Narayan*, 4 B. L. R. A. C. 207; 13 W. R. 151.

A compromise must be treated as a new and positive contract breach of its stipulations may be a ground in a suit for its enforcement, but not for a revival of the original right.—*Ram Sahai v. Dhunookdharee*, W R 266, *Bishun Coomar v. Hurish Chunder*, 2 W R 209 *See also* *Ameer Begum v Noor Begum*, 1 Agra F B. 1.

Where a plaintiff in seeking to enforce by original suit a right of forfeiture contained in a consent decree passed under s. 375, C. P. Code 1882 (Or. XXIII, r 3), whereby the status of a landlord and tenant is established between the plaintiff and the defendant, the Court is not precluded from granting such relief against forfeiture, as it might have granted had the status arisen from contract or custom. The difference between a consent decree and the agreement of the parties themselves, where the one or the other is sought to be enforced, goes no further than this, that in the former case it would not be open to a party to question the accuracy of the decree, as expressing what at the time was the contract which had been made.—*Krishnabai v Hari Govind*, 31 B 15 F B . 8 Bom L R. 813· 1 M L T 370 (10 B. 435 *dissented from*)

Mode and Effect of Setting Aside a Consent Decree.—For the purpose of setting aside a consent decree on the ground that it was obtained by fraud and misrepresentation, there are two available modes of procedure (1) by suit, (2) by review of judgment sought to be set aside; the latter being the more regular mode of procedure.—*Ashootosh v. Taraprasanna*, 10 C. 612 (6 B L R 649, and 13 B L. R. Ap 11 *followed*) *See also* *Biraj Mohini v Chinta Moni*, 5 C W N. 877 Followed in *Rakhalmoni v Adoitya Prosad*, 30 C 613 7 C W. N. 419· *Foolcoomary v. Woodoy Chunder*, 25 C. 649, *Mirali Rahimbhoy v. Rehmoobhoy*, 15 B 594 (affirming 13 B 137), and *Virupakshappa v. Shidappa*, 23 B 629 *See also*, *Surendra Nath v. Hemangini*, 34 C. 83, and *Barhamdeo Prasad v Baranasi Prasad* 3 C L J 119 (13 B. 137 *followed*, 6 C. 687· 10 C 357 13 B L R. Ap 11, *dissented from*). Where a decree is passed on adjudication, no separate suit lies to set aside the decree except on the ground of fraud, but where it is passed simply upon compromise, a suit lies upon ground other than fraud —*Bihu Halwar v. Mohesh Halwar*, 8 C L J 266 (34 C. 83 *followed*)

Principles upon which the Court acts in setting aside compromise considered.—*Ram Niranjan v Prayag Sing*, 8 C. 138· 10 C. L R 66

Held that, the effect of setting aside a compromise was to remit both parties to their original rights and if the plaintiff was allowed to be heard against so much of the original judgment as was unfavourable to her, the defendant must similarly be heard against so much of the same judgment as was unfavourable to him —*Khajooroonnissa v. Roushan Jehan*, 2 C 184, P. C.: 26 W. R. 36.

A suit will lie to set aside a compromise sanctioned by the Court under a misapprehension of material facts, and when the compromise is set aside the parties are restored to their original rights in the former suit at the time it was effected.—*Solomon v Abdool Azeez*, 6 C 687· 8 C. L R 169

The mode of setting aside a compromise decree is either by an application for review or by a suit to set it aside. (10 C. 612, *referred to*) When however, a party has elected to proceed by way of review and the

matter has been decided against him, he cannot be allowed to have recourse to the remedy by way of suit. The decision in the review proceedings is *res judicata*.—*Ram Gopal* v. *Prasanna Kumar*, 2 C. L. J. 508: 10 C. W. N. 529 (5 C. 571 and 28 C. 78 *relied on*).

Appeal.—An order under this rule recording or refusing to record a compromise is appealable under Or. XLIII, r 1, cl. (*m*).

An appeal lies from an order recording an agreement, on the ground that (*a*) there was no compromise at all, *Gocul Das* v *James Scott*, 16 B 202; *Talamand* v. *Fateh Din*, 88 P. R. 1918; (*b*) the compromise was not lawful, *Gocul Das* v. *James Scott*, 16 B 202; *Shridharan* v *Puramathan*, 23 M. 101; or (c) the compromise contains matters extraneous to the suit; *Venkatappa* v. *Thimma*, 18 M. 410; *Pragdas* v *Girdhardas*, 26 B 76, *Manager of Sri Meenakshi* v. *Abdul Kasim*, 30 M 421. The fact that a decree has been passed in terms of the compromise does not preclude an appeal from the order recording the compromise; *Megh Raj* v. *Tulsi Ram*, 6 L. L. J. 187: 80 I. C. 696: A. I R. 1924 Lah 466; *Satyanarayana* v. *Butchayya*, 48 M L. J. 249: 87 I. C. 124: A. I. R 1925 Mad. 606. But the Calcutta High Court *held* that an appeal is incompetent after the passing of the decree, *Bengal Coal Co.* v. *Apcar Collieries*, 29 C. W. N. 928

An order passed by the lower Court holding that there has been no compromise is not an order under Or. XXIII, r 3, and is not appealable; *Shanti Sarup* v. *The Firm of Jahangir Lal Bansi Mal*, 73 I. C. 177.

Review and Amendment of Consent Decree—No review can be admitted of a judgment passed on a compromise.—*Purmessuree Narain* v *Rameezooddeen*, 5 W. R. 226.

Amendment of consent decree after 18 years disallowed—*Rameshwar Prosad* v. *Chandreshwar Prosad*, 7 C W. N 880.

Proceedings in execution of decrees not affected.

4. Nothing in this Order shall apply to any proceedings in execution of a decree or order. [S. 375-A]

COMMENTARY.

Alteration in the Rule.—This rule corresponds to s. 375-A of the C. P. Code, 1882, with material alterations and omissions. The explanation attached to section 375-A has been omitted. The old section is reproduced below for the purpose of comparison and to mark the distinction between the present and the past law:—

"*Nothing in this chapter shall apply to any application or other proceeding in any suit subsequent to the decree.*"

"**Explanation.**—*An application to the Appellate Court pending on appeal is not application subsequent to the decree appealed from within the meaning of this section.*"

Proceedings in Execution.—The present rule expressly provides that nothing in this order shall apply to proceedings in execution of a decree or order; or in other words, that there may be successive applications for

execution of decrees within the prescribed period of limitation and any such subsequent application for execution will not be barred by rule 1 of this order on the ground that the previous application was withdrawn or dropped without express leave of the Court It was to prevent this hardship caused by the Allahabad rulings that the present rule has been framed adopting the law as laid down in the Privy Council case of *Thakur Prasad* v *Fakirullah*, 17 A. 106, which *overruled* 7 A. 359 10 A. 71: 2 A. 179 and 892 and 6 B 681 and approved 18 C. 635. It is worthy of note that the old section contained the word "*suit*" and hence there were conflicting rulings, but in the present rule, the word "*suit*" has been omitted In *Pragdas* v *Girdhardas*, 26 B 76 (81), the old s. 375-A was explained in this way It must be admitted that the first clause of s 375-A may be read in two ways, (1) that no application is to be made after a decree under ss 373 to 375; (2) *that if any other application is made or proceeding* taken after a decree, the provisions of ss. 373 to 375 are not to be applicable to that application or proceeding

Rule (3) of its own force applies to suits only and *not to* execution proceedings. It refers to compromise of *suits* and the passing of a decree in accordance therewith. If a decree is once passed in a suit, no compromise of that suit can again be made in the execution proceedings superseding the previous decree Hence rule (3) is not applicable to execution proceedings. In this connection *Pragdus* v. *Girdhardas*, 26 B. 76, may be consulted In this case it has been held that if any petition of compromise superseding the previous decree be filed in execution proceedings, *it can only* be enforced by a fresh suit and not in execution See, *Hari Raghunath* v. *Krishnaji*. 19 B. 546

The provision as to withdrawl of a suit with permission to bring a fresh suit did not permit the withdrawal of an application for execution with permission to make a fresh application.—*Mata Palat* v. *Beni Madhab*. 36 A. 172.

Order XXIII, r. 1, C. P. Code, does not in terms apply to withdrawal and abandonment of execution proceedings but there is nothing to prevent a decree-holder from withdrawing his execution application; *Chaudhury Ram Prasad* v *Mahesh Kant*, 1 Pat 232: 3 Pat. L. T. 415

A proceeding under Order XXI, r. 90, is not a proceeding in execution and a compromise relating to it does not come under s. 47 and Or XXI, r. 2, but is covered by Or. XXIII, r. 3 and the Court has power to record or inquire into an alleged compromise entered into privately between the parties; *Chaudhury Jagadish Misser* v. *Chaudhury Sureswar Misser*, 6 Pat. L. J. 253 · 2 Pat. L T. 273.

Order XXIII, r. 4 is explicit in its terms and declares Or. XXIII to be inapplicable to proceedings in execution of a decree or order. Consequently an arrangement entered *into after decree* for payment of the sum decreed in instalments is not binding and limitation for execution of the decree runs nevertheless; *Banarsi Das* v. *Ramzan*, 72 C. 747.

According to the clear wording of *rule* (4) the explanation attached to the old section has become unnecessary and hence it has been omitted

ORDER XXIV.

PAYMENT INTO COURT.

Deposit by defendant of amount in satisfaction of claim.

1. The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim. [S. 376.]

COMMENTARY.

This rule exactly corresponds to s 376, C P Code, 1882

" Suit to recover a debt or damages."—A suit for injunction for obstruction to light and air is not a suit " to recover a debt or damages " within the meaning of this rule —*Luxmon Nana* v *Moraba*, 21 B 502

" May deposit in Court."—A deposit in Court, before due date, of money due upon a bond, is not a valid tender of the debt —*Eshahuq Molla* v. *Abdul Bari*, 31 C. 183 A mere allegation of willingness to pay, made in the written statement, is not equivalent to payment in Court, and it does not stop interest from running; *Haji Abdul* v *Haji Noor*, 16 B 141 The provisions of Or XXIV contemplate an unconditional deposit of a sum of money in Court by defendant, which sum of money is at the disposal of the decree-holder if he desires to withdraw it, *K M Bose & Co.* v *Allen Bros.*, 97 I. C 479

Order in execution directing defendant to pay money into Court—Appeal by plaintiff against the order—Payment into Court by defendant—Refusal of plaintiff to take money out of Court pending appeal—Attachment of the money so paid by another creditor of the defendant and payment of the money to him—Subsequent application by plaintiff in execution for payment of the money. *Held*, that the plaintiff's refusal to take money out of Court did not justify the Court in treating the money as the defendant's, and in ordering it to be paid to another creditor of the defendant.—*Lakshman Dadai* v *Damodar*, 15 B. 681.

Notice of deposit.

2. Notice of the deposit shall be given through the Court by the defendant to the plaintiff and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application. [S 377.]

COMMENTARY.

This rule corresponds to section 377, C. P. Code, 1882, with the omission of the words " *in writing* " which occurred in the old section after the word ' notice.'

The omission seems to have been made in view of s. 142 of the present Code which requires that all orders and notices under the Code shall be in writing. Form of notice is given in schedule I, Appendix II, Form No. 8.

"Unless the Court otherwise directs."—The words "*unless the Court otherwise directs*" mean that the Court has a discretion to refuse to allow the plaintiff to withdraw the money deposited by the defendant and it should be exercised only when there are conflicting claims. But where the defendant admits liability in part and deposits the money, the money cannot be kept in Court.—*Dwarka Dass* v. *Girish Chunder*, 26 C 766 3 C. W N cclxii (262-n). *See* also, *Haji Abdul Rahaman* v. *Haji Noor Mohamed*, 16 B 141

3. No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof. [S. 378.

Interest on deposit not allowed to plaintiff after notice.

COMMENTARY.

This rule exactly corresponds to section 378, C. P. Code 1882

Tender and Payment—Effect of Refusal to Accept.—A mere offer by a debtor by letter to pay an amount cannot be treated as a tender either in law or in equity In order to stop interest, a strict tender should be proved —*Kamaya* v *Devapa*, 22 B. 440.

A plea of tender before action must to stop interest be accompanied by a payment into Court after action, otherwise the tender is ineffectual—*Haji Abdul Rahaman* v *Noor Mahomed*, 16 B. 141

If rent is tendered and not accepted, then deposit should be made under s 61 of the B. T. Act, otherwise the defendant will be liable for interest—*Raja Ranjit Singh* v *Bhagbutty Charan*, 7 C W. N. 720 But see, *Jagat Tarini* v. *Nabagopal*, 34 C. 305. 5 C. L. J. 270, where it has been held that valid tender if improperly refused, stops payment. In this case the question of valid tender has been fully discussed.

Deposit in Court, before due date, of money due upon a bond, is not a valid tender of the debt.—*Prayaga* v *Shyam Lal*, 31 C. 138

Payment to one of several co-mortgagees, who gives a discharge without the knowledge of the other mortgagee, is a full discharge of the entire mortgage debt.—*Barber Maran* v *Rama Gounden*, 20 M 461· 7 M. L J. 269 But this case has been doubted in *Ahinsa Bibi* v. *Abdul Kader*, 25 M. 26, where it has been held that the principle is not applicable to the case of co-heirs, who are not joint promisees

Execution Proceedings.—A decree-holder is not bound to accept a sum tendered to him in part satisfaction of his decree He is entitled to require payment of the principal and interest in full, and the refusal to receive a part of what is due to him will not deprive him of his right to interest.—*Kanhya Singh* v. *Tooydun Singh*, 7 W. R 20 But when money is paid into Court by the judgment-debtor in satisfaction of decree, interest on the decree will cease from the date of payment in proportion to the amount paid, although such payment may not in fact be the whole amount due under the decree, *Amtul* v. *Muhamad Yusuf*, 40 A. 125

Or. XXIV, rr. 1, 2 and 3 do not apply to proceedings in execution. Primarily they would seem to apply to original suit in which, in order to save costs, an opportunity in given to the defendant to deposit so much of the claim as he admits in Court, and in such a case, the plaintiff will not be allowed costs; *K. M. Bose & Co., v. Allen Bros, & Co.*, 97 I C 479

Procedure where plaintiff accepts deposit as satisfaction in part.

4. (1) Where the plaintiff accepts such amount as satisfaction in part only of his claim, he may prosecute his suit for the balance; and, if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, as far as they were caused by excess in the plaintiff's claim.

Procedure where he accepts it as satisfaction in full.

(2) Where the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall pronounce judgment accordingly; and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation. [S. 379.]

Illustration.

(*a*) A owes B Rs. 100 B sues A for the amount, having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, A pays the money into Court. B accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part.

(*b*) B sues A under the circumstances mentioned in illustration (*a*). On the plaint being filed, A disputes the claim. Afterwards A pays the money into Court. B accepts it in full satisfaction of his claim. The Court should also give B his costs of suit, A's conduct having shown that the litigation was necessary.

(*c*) A owes B Rs. 100, and is willing to pay him that sum without suit. B claims Rs. 150 and sues A for that amount. On the plaint being filed A pays Rs. 100 into Court and disputes only his liability to pay the remaining Rs. 50 B accepts the Rs. 100 in full satisfaction of his claim The Court should order him to pay A's costs.

COMMENTARY.

Alterations in the Rule—This rule corresponds to s. 379, C P. Code 1882, with some verbal changes only.

The word "*where*" has been substituted for the word "if," the word "*only*" has been added in sub-rule (1) after the words, "in part, and the word "*shall*" has been substituted for the word "must," which occured in the old section

In sub-rule (2) the words "*where*" *and* "*pronounce*" have been substituted for the words "if" and "pass" respectively

"Prosecute his suit for the balance."—Under this rule, the plaintiff is entitled to draw out the money paid into Court by the defendant as part satisfaction of his claim, and may prosecute the suit for the balance, notwithstanding the objection of the defendant —*Dwarka Dass* v *Girish Chunder*, 26 C 766 3 C W N cclxii. (262)

Apportionment of Costs.—At the settlement of issues the defendant paid money into Court, which plaintiff took out in part *satisfaction of his* claim and raised an issue as to damages' The plaintiff subsequently accepted *the sum paid in full satisfaction*, and *withdrew the suit*. *Held* that, the plaintiff was entitled to his costs up to and including those of the settlement of the issues.—*Ardesir Limji* v. *Sorabji*, 1 Bom H C 70

In cases, not being suits to recover a debt or damages, where money is paid into Court, the principle underlying this rule ought to regulate the discretion of the Court in directing the payment of costs —*Luxmon Nana* v. *Moroba*, 21 B. 502

Under sub-rule (2) the Court must, before making an order as to costs, *distinctly find as to which of the parties* is most to blame for the litigation, *Jayantin* v *Yayanthi*, (1912) M. W. N 38: 13 I C 188

ORDER XXV.

SECURITY FOR COSTS.

When security for costs may be required from plaintiff.

1. (1) Where, at any stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are, residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immoveable property within British India other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant. [S. 380, Para. 1.]

Residence out of British India.

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub-rule (1). [S. 382.]

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India. [S. 380 Para. 2.]

COMMENTARY.

Alterations in the Rule.—Sub-rule (1) corresponds to para. 1 of s. 380. C. P. Code, 1882, with the following alterations:—The words "*where at any stage of a suit*" have been substituted for the words "if at the institution or at a subsequent stage of a suit," the words "*other than the property in suit,*" have been substituted for the words "independent of the property in suit," and the words "*within a time fixed by it,*" have been substituted for the words "within a time to be fixed by the order," which occurred in the old section.

Sub-rule (2) exactly corresponds to section 382, C. P. Code, 1882.

Sub-rule (3) corresponds to para. 2 of section 380, C. P. Code, 1882, with some verbal changes only.

The words "*suit for payment of money*" have been substituted for the words "suit for money" which occurred in the old section; and the words "*independent of the property in suit,*" which stood after the w..' "British India" in the old section have been omitted.

" The Committee have deleted the last words of this sub-rule because the nature of the suit excludes the possibility of the property in suit being immoveable "—See, *the Report of the Special Committee.*

Except the change of some words and phrases, no change seems to have been made in the meaning.

Object of the Rule.—The object of the rule is to provide for the protection of the defendants in cases specified in the rule where, in the event of success, they may have difficulty in realizing their costs from the plaintiff; *Prem Chand, In the goods of*, 21 C. 832.

When Security for Costs may be Required from Plaintiff.—A plaintiff may be required to give security for the costs of a defendant: (1) *where the plaintiff is residing out of British India*, or, where there are more plaintiffs than one, all the plaintiffs are residing out of British India and none of the plaintiffs has sufficient immoveable property within British India other than the property in suit; (2) *where the plaintiff is a woman* and where her suit is for the payment of money, and she does not possess sufficient immoveable property within British India.

Meaning of the Words " Immoveable property " in this Rule.—Leasehold property is " immoveable property " within the meaning of this rule— *Ullaman v. Justices of the Peace of Calcutta*, 7 B. L. R. Ap 60.

The provisions of s. 34, Act VIII of 1859 (this rule), were not intended to apply to a case where the plaintiff brought a suit for administration and partition of property in which they were entitled to a share, the extent of the share being in dispute.—*Russick Lall v. Jadub Ram*, 10 B. L. R. Ap 25.

" Resides."—The " residence " intended in this rule, is residence under such circumstances as will afford a reasonable probability that the plaintiff will be forthcoming when the suit is decided—*Mahomed Shuffi v. Laldin Abdula*, 3 B. 227.

When an inhabitant of foreign territory sues within British territory, it is imperative on the Court to demand security from him for the payment of all costs that may be incurred by the defendant in the suit, even though the defendant also is a resident of foreign territory.—*Koroonamoyee v. Ooma Churn*, 12 W. R. 465.

The plaintiff who resided in a Native Indian State arrived in January 1921 in Bombay to file a criminal complaint against the defendants. In July of the same year he filed a suit in the Bombay High Court against the defendants. The defendants having applied in October 1921, under O. XXV, r. 1, C. P. Code, for security for their costs from the plaintiff. Held making the order, that inasmuch as the plaintiff was staying in Bombay only for the purpose of taking proceedings against the defendants, such residence of his would not enable him to escape the application of O. XXV, r. 1 of the C. P. Code.—*Hanif Maula Baksh v. Kulsum*, 23 Bom. L. R. 1253: 64 I. C. 703: A. I. R. 1922 Bom. 290.

" British India."—For the purposes of this rule, Aden is within British India; *Aden Laws Regulation*, 1891, s. 2; but the cantonment of Secunderabad is not within British India; *Hossain Ali v. Abid Ali*, 21

C. 177; nor is the Civil Station at Rajkot, *Queen-Empress* v. *Abdul*, 10 B. 186; nor is the cantonment of *Wadhwan*, *Emperor* v *Chimanlal*, 14 Bom. L. R. 87, dissenting from *Triccam* v. *B B & C I. Ry. Co.*, 9 B 244; nor are the Kathiawar States, *Hem Chand* v *Azam*, 33 I. A 1 8 Bom L R. 129.

Leaving British India.—Where a plaintiff leaves the country before the case is decided, the proper course for the defendant is to apply to the Court to take security for costs before the case is decided, and if no security be furnished, the Court will pass judgment against the plaintiff by default But if the defendant neglects, the Appellate Court cannot call for security for the costs of the lower Court —*In the matter of the petition of Calcutta S E Ry Co*, 8 W. R 217.

In a Suit for Money where the Plaintiff is a Woman.—Sub-rule (3) has been enacted in view of the provisions of s. 56 of the Code, which provides that no woman can be arrested or detained in the Civil prison in execution of a decree for the payment of money.—*Prem Chand, In the goods of*, 21 C. 832 Suits which are not exclusively for money, but which will result in a decree for money on the relief sought, come within the purview of this rule —*Sonabai* v. *Tribhawan Das*, 32 B. 602: 10 Bom. L. R. 337

A suit to recover certain specified articles and money or to recover the value thereof, is a suit for money within the meaning of this rule. The term " suit for money " as there used being wider than a suit for debts.—*Digambari* v. *Aushootosh*, 17 C. 610.

A suit for dissolution of partnership and account and for the recovery of the stridhanam property belonging to a female plaintiff is not a suit for payment of money within Or. XXV, r. 1 (3), C. P. Code —*Amulyasundari* v. *Syama Sundar*, 68 I. C. 607.

A suit for recovery of ornaments or in the alternative for their value is a suit for payment of money.—*Ananda* v. *Gokul*, 16 C. W. N. 763.

The power given to the Court under this rule, to order security for costs, is [illegible] the Court ought, or ought not to exercise [illegible] each case, and unless it is shown that the [illegible] y for the protection of the defendant, the Court ought not to interfere. In a suit by a female plaintiff against the executors for amount of legacy under a will, the Court would not order the plaintiff to give security for costs, although she was not in possession of any immoveable property within British India. The meaning of the words " may " and " shall " explained.—*Bidhatree Dassee* v. *Mutty Lall*, 21 C. 832. In *Shama Sundary* v. *Rash Behary*, 3 C. W. N. 753, it has been held that the Court has a discretion in exercising the powers conferred by this rule, and it will not order the plaintiff to give security for costs unless grounds are shown tending to shew that the defence is true. In *Bai Porebai* v. *Debji Meghji*, 23 B. 100, it has been held that unless in exceptional cases, neither an infant female plaintiff nor her next friend ought be required to give security for costs. Followed in *Mani Bai* v. *I. Govind Das*, 18 M. L. J. 155. In *Bomanji* v. *Nussernanji*, 27 B. the Court distinguishing (23 B. 100) directed the plaintiff to give for defendant's costs But in the exercise of its discretion, the

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s 381, with some alterations and omissions.

The words " *under the provisions of s. 373, or shown good cause why such time should be extended, in which case the Court may extend it* " which occurred in the concluding portion of para. 1 of the old section have been omitted. The reasons for the omissions are that the words "*under the provisions of s 373,*" are superfluous ; and the remaining words have been omitted in view of section 148 of the present Code by which the Courts are authorized in their discretion, to enlarge time.

Sub-rule (2) exactly corresponds to para 2 of the old section

Sub-rule (3) corresponds to para 3 of the old section with the omission of the words " *in writing* ' which occurred in the old section after the word " notice " in view of section 142 of the present Code, which provides that all orders or notices shall be in writing

Para 4 of the old section which contained the provision for limitation for an application to set aside a dismissal for default to furnish security for costs, has been omitted, as art. 163 of the present Limitation Act IX of 1908, contains the period of limitation (30 days).

Res Judicata.—Dismissal of a suit on default of plaintiff to give security for costs, does not operate as *res judicata.*—*Rungrav Ravji* v *Sidhi Mahomed*, 6 B. 482 *See* also, *Hariram* v. *Lalbi*, 26 B. 637.

Notice.—No order affecting a party should be made without notice to him, calling upon him to show cause why the order should not be made —*Sirajul Haq* v *Khadim Husain*, 5 A 380. *See* also, *Timmu* v. *Deva Rai*, 5 M. 265.

Appeal.—*Held* by the Full Bench, that an appeal lies from an order passed under this rule, dismissing a suit for failure of the plaintiff to furnish security for costs as ordered, such order being the " decree " in the suit.—*Williams* v *Brown*, 8 A. 108, F. B. *See* also, Or XLIII, (a)

Limitation.—An application by a plaintiff for an order to set aside a dismissal for failure to furnish security for costs must be made within 30 days from the day of dismissal —Limitation Act, 1908, Art 163

The Court has power to enlarge time for furnishing security —*In the matter of the petition of Soorjmukhi*, 2 C. 272 ; *Burjore* v. *Bhagwan*, 13 C. 557, P. C. ; *Fazulunissa* v. *Mulo*, 6 A. 250 ; *Badri Narain* v *Sheo Koer*, 17 C. 512, P C. (1 A 687 *overruled*). *See* however, *In the matter of Lalla Gopeenath*, 2 C. 128, and *Foneendro Deb* v. *Jogendro Deb*, 22 W. R. 220.

ORDER XXVI.

COMMISSIONS.

COMMISSIONS TO EXAMINE WITNESSES.

Cases in which Court may issue Commission to Examine witness.

1. Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.

[S. 383.]

COMMENTARY.

This rule exactly corresponds to s. 383, C. P. Code, 1882. The rule contained in this Order are to be read with the provisions of sections 75, 76, 77 and 78 of the Code, which are subject to the conditions and limitations prescribed by the rules of this Order.

Meaning of the words " May issue " in Rules 1 and 4.—Ordinarily, in the case of a witness not under the control of the party asking for a commission, who resides beyond the limit fixed under Or XVI, r. 19 (b), a commission should issue as a matter of right, unless the court is satisfied that the party is merely abusing the Court's authority to issue process It is not for the Court to decide whether the party will be benefited or not, that is a matter entirely for the party.—*Jagannatha Sastry* v. *Sarathambal Ammal*, 46 M. 574: 44 M. L. J. 202: 71 I. C 530: A. I. R. 1923 Mad 321.

When Court may Issue a Commission.—The Courts should not allow witnesses to be examined on commission without adequate reason. The grounds upon which Courts can issue commission to examine witnesses are ordinarily those specified in Or. XXVI, [illegible] *Panchand* v. *Manoharlal*,

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s. 381, with some alterations and omissions.

The words "*under the provisions of s. 373, or shown good cause why such time should be extended, in which case the Court may extend it*" which occurred in the concluding portion of para. 1 of the old section have been omitted. The reasons for the omissions are that the words "*under the provisions of s. 373,*" are superfluous ; and the remaining words have been omitted in view of section 148 of the present Code by which the Courts are authorized in their discretion, to enlarge time.

Sub-rule (2) exactly corresponds to para. 2 of the old section

Sub-rule (3) corresponds to para 3 of the old section with the omission of the words "*in writing*" which occurred in the old section after the word "notice" in view of section 142 of the present Code, which provides that all orders or notices shall be in writing.

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Notice.—No order affecting a party should be made without notice to him, calling upon him to show cause why the order should not be made —*Sirajul Haq* v *Khadim Husain*, 5 A 380. *See* also, *Timmu* v. *Deva Rai*, 5 M 265

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[S. 383.]

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This rule exactly corresponds to s 383, C. P. Code, 1882 The rule contained in this Order are to be read with the provisions of sections 75, 76, 77 and 78 of the Code, which are subject to the conditions and limitations prescribed by the rules of this Order

Meaning of the words " May issue " in Rules 1 and 4.—Ordinarily, in the case of a witness not under the control of the party asking for a commission, who resides beyond the limit fixed under Or XVI, r 19 (b), a commission should issue as a matter of right, unless the court is satisfied that the party is merely abusing the Court's-authority to issue process. It is not for the Court to decide whether the party will be benefited or not, that is a matter entirely for the party.—*Jagannatha Sastry* v. *Sarathambal Ammal*, 46 M 574 44 M L J 202 71 I. C 530. A. I. R. 1923 Mad. 321.

When Court may Issue a Commission.—The Courts should not allow witnesses to be examined on commission without adequate reason. The grounds upon which Courts can issue commission to examine witnesses are ordinarily those specified in Or XXVI, r 1.—*Panchand* v *Manoharlal*, 42 B. 136 · 20 Bom L. R 1. 43 I C 729

The issue of a commission for the examination of a witness is discretionary with the Court, and where it appeared that the lower Court in the proper exercise of its discretion refused to issue commission for the examination of a *pardanashin* lady, the defendant in the suit, and where it also appeared that the refusal to issue the commission did not affect the merits of the case, both the High Court and the Judicial Committee declined to interfere with the discretion exercised by the lower Court.—*Akikunnissa Bibi* v *Ruplal Das*, 25 C 807, P. C. *See* also, *Mouji* v. *Nemchand*, 23 B 626

A commission should not be issued for the examination of the head of a *mutt*, though it may be alleged by him that it is derogatory to a person in his position to appear personally in Court as a witness; *Veerabadram* v. *Nataraja*, 28 M 28.

The Court can issue a commission for the examination of witnesses though the matters in dispute in the suit have been referred to arbitration under Sch. II of this Code.—*Robiabai* v. *Rahimabai*, 7 Bom. L. R. 560.

"Who is exempted under this Code."—Amongst those exempted from personal appearance are women who according to the custom and manners of the country, ought not to be compelled to appear in public (see s. 132). Such women should be examined on commission, even though they may have appeared in public before.—*Mohesh Chunder* v. *Manick Lall*, 26 C. 650; *Chamatkar* v. *Mohesh*, 26 C. 651, *Balakeshwari* v. *Jnanananda*, 41 C. 697, 41 I. C. 610 and though an allegation of immorality is made against them.—*Benodini* v. *Kala Chand*, 5 C. W. N. ccxxxii (232). A lady belonging to a high family, who has entirely abandoned the protection of the *purdah* and who has no intention of resuming it, ought not to be compelled, having regard to her social position and the feelings of her class, to appear in the witness-box, but should get the privilege of being examined on commission; *Solomon* v. *Jyotsna*, 44 C. 492; 44 I. C. 157. But a *purdanashin* woman has no right to be examined on commission as a witness at a place of her own choice or where she happened to be at the time of the issue of the commission, *Kshitipati* v. *Dharani*, 48 C. 418.

"Sickness or Infirmity."—If sickness or infirmity is alleged, the character and gravity of that sickness or infirmity have got to be assessed and the risk consequent upon a refusal to issue a commission will have to be taken into consideration. At the same time the importance of having the witnesses present before the Court, the advantages that would follow from their examination and cross-examination in the presence of the Court and the emergency which might arise of having them confronted or identified, should not be altogether lost sight of, *Panch Kari* v. *Panchanan*, 39 C. L. J. 598, 84 I. C. 9, A. I. R. 1924 Cal. 971.

Arbitration.—It is competent to the Court to issue a commission for the examination of witnesses, even in cases referred to arbitration under Sch. II, *Rabiabai* v. *Rahimabai*, 7 Bom. L. R. 560.

Order for commission

2. An order for the issue of a commission for the examination of a witness may be made by the Court either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined. [S. 384.]

COMMENTARY.

This section corresponds to s. 384, C. P. Code, 1882, with some alterations. The words "an order for the issue of a commission for the examination of a witness" have been substituted for the words "such order" which occurred in the old section. No other change has been made.

It is competent to a Court acting under Or. XXVI, r. 2, C. P. Code, to issue a commission for the examination of witnesses acting *suo motu*. *Nanhu* v. *Abdus Samud Khan*, 4 A. 81 (Rev.).

An application for the issue of a commission should be supported by some reason other than the mere distance of place of residence of the

witness. If the witness is a stranger, a commission will be right and reasonable, but not if he is a servant of the party applying.—*Amrit Nath v. Dhunput Singh*, 20 W. R. 253.

When the party obtains a commission for the purpose of examining a witness on interrogatories, he is entitled to get a copy of the cross-interrogatories filed by the opposite party before such commission issues. It is reasonable that each side should know the questions the other proposes to put.—*Application by Bibi Saran*, 10 S. L. R. 210: 30 I. C. 944.

Where witness resides within Court's Jurisdiction.

3. A commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute it. [S. 385.]

COMMENTARY.

This rule corresponds to section 385, C. P. Code, with some verbal changes. The words "*the same*" which stood after the words "to execute" in the old section have been omitted.

A Deputy Collector is competent to depute an officer of his Court to take evidence on commission if the place where the witness is examined is within his jurisdiction.—*Ram Chan v. Kaminee Debea*, 10 W. R. 236.

Where the examination of a witness was taken *de bene esse* pursuant to an order of Court and the examination took place before the Deputy Registrar, though no commission was issued to him under Or. XXVI, r. 3 of the Code of Civil Procedure, and no objection, though in form one of jurisdiction, was taken before the examination commenced. *Held*, that the objection was capable of being waived: *Dina Nath v. Metharam Navalrai & Co.*, 33 C. L. J. 577.

Persons for whose examination commission may issue.

4. (1) Any Court may in any suit issue a commission for the examination of—

(*a*) any person resident beyond the local limits of its jurisdiction;

(*b*) any person who is about to leave such limits before the date on which he is required to be examined in Court; and

(*c*) any Civil or Military Officer of the Government who cannot, in the opinion of the Court, attend without detriment to the public service.

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court. [S. 386.]

COMMENTARY.

This rule corresponds to s. 386, C. P. Code, 1882, with some alterations and omissions.

The alterations made in sub-rule (1) are merely verbal.

In sub-rule (2) some important alterations have been made. The words "*or the Court of the Recorder of Rangoon*" and the words "*subject to any rules of the High Court in this behalf,*" which occurred in para 2 of the old section, have been omitted. The other changes are merely verbal.

"May."—For the meaning of the word "may," *see* notes under Or. XXVI, r. 1.

"Court may issue a commission."—The issue of a commission to examine a witness or witnesses in a suit is a matter of judicial discretion. An application for the examination of a witness on commission will not be granted unless the Court is satisfied: *first*, that the application is made *bona fide; secondly*, that the issue in respect of which the evidence is required is one which the Court ought to try; *thirdly*, that the witness to be examined would give evidence material to the issue; and *fourthly*, there are some good reasons why the witness cannot be examined in Court.—*A. E. Saleji* v. *A. Musaji Saleji*, 19 I. C. 643; *Huree Das* v. *Meer Moozum* 15 W. R. 447; *Mowji* v. *Nem Chand*, 23 B. 626: *Panchkari* v. *Panchanan* 89 C. L. J. 598. 84 I. C. 9: A. I. R. 24 Cal. 971. The words "may issue a commission" are used in this rule in the same sense in which they are used in r. 1, and mean "is given authority to issue a commission."—*Jagannatha* v. *Sarathambal*, 46 M. 574: 71 I. C. 530: A. I. R. 1923 Mad 321.

The provisions of this rule are exhaustive and where the conditions enumerated therein exist, it is competent to the Court to issue the commission. But the Court has power to prevent abuse of its process. Order under this rule is appealable.—*Veerabadran* v. *Nataraja*, 28 M. 28 (7 W. R. 349 *referred to*).

An order under this rule for the examination of a witness on commission, can only be made on one of the grounds mentioned in the Code, and a Court usurps a jurisdiction not vested in it by law when *it orders* such examination in the absence of any such ground. The High Court can interfere with such order.—*Somasundaram* v. *Manikaravaka*, 31 M. 60.

A commission will be granted as a matter of course to examine a material witness who is out of the jurisdiction of the Court if the witness cannot be brought into Court by its ordinary process. *But the commission* will not be granted for the examination of a party, except under very strong circumstances, such as serious illness.—*Doucett* v. *Wise*, Ind. Ju. N. S. 957.

A party to a suit has a legal right to apply to a Court for a commission to examine a witness The Court should grant the application as a matter of course, without considering whether the applicant can derive any advantage therefrom.—*Hari Das* v. *Moozam Hossein*, 8 B L. R. Ap 16: 15 W. R 447.

A *de bene esse* examination of a witness about to leave the jurisdiction of the Court must be taken by the Court, unless the parties consent to the evidence being taken under a commission.—*Edwards* v *Muller*, 5 B. L R. 252.

Discretion as to Granting of Commission, How should be Exercised.— A Court of appeal should exercise great caution when invited to interfere with an order of the trial Court made with jurisdiction in the exercise of its discretion as to granting a commission. Each case depends on its own circumstances and no rule as to the exercise of that discretion could be laid down If the appellate Court deems that the discretion was wrongly exercised, if it deems that the case in all its bearings was not laid before the Court below, if it sees that the Court below misapprehended an important part of the case, the Court will interfere. The High Court in revision set aside the order of the lower Court, where that Court overlooked the distinction which should be observed in the treatment of an application by the defendant as distinguished from a similar application by the plaintiff and ordered the defendant to be examined on commission on payment of costs to the plaintiff for cross-examination; *Kumar Sarat Kumar Roy* v *Ramchandra*, 35 C. L J 78

The plaintiff and the defendant in a suit instituted in the court of the District Munsif of Devakottah were both residents of Rangoon, and the defendant was served with summons at Rangoon. The plaintiff was allowed to examine himself on commission at Rangoon An application by the defendant to examine himself on commission at Rangoon was, however, disallowed by the Munsif on the ground that his demeanour could not be watched by the Court. *Held*, that the Munsif acted with material irregularity in disallowing the application and that his order was liable to be set aside in revision.—*Visvanatha* v. *Somasundaram*, 46 M. L. J 131.

Commission to Examine Plaintiff or Defendant as his Own Witness.— The Court will refuse the application of a plaintiff asking for a commission to examine himself unless a very strong case is made out; *Ross* v. *Woodford*, (1894) 1 Ch. 38; *Nawab Saiyid* v. *Herbert*, 8 Pat. 603: 84 I. C. 993: A. I. R. 1925 Pat, 125. But where an application is made by a defendant, and specially by a defendant who lawfully resides out of the jurisdiction of the Court, according to the ordinary course of his life and business, the Court will not regard the case with the same strictness as the case of the plaintiff who has instituted his suit in *a forum* of his choice; *Ross* v. *Woodford*, (1894) I Ch. 38; *New* v. *Burns*, (1894) 64 L. J. Q. B. 104; *Sarat* v. *Ram*, 35 C. L. J. 78: 68 I. C. 9: A. I. R. 1922 Cal. 42; *Visvanatha* v. *Somasundaram*, 46 M. L. J. 131: 78 I C 407: A. I. R. 1924 Mad. 541

Appeal.—It has been held by the Bombay High Court that an order directing the issue of a commission for the examination of a witness, is not a "judgment" but an interlocutory order, and therefore no appeal lies

from such order; *Miya* v. *Zorabai*, 11 Bom. L. R. 241: 2 I. C. 157 On the other hand, it has been held by the Madras High Court that an order refusing to issue a commission or directing issue of the same for the examinations of a witness is a "judgment" within the meaning of Cl. 15 of the Letters Patent, and is therefore appeable; *Marutha Muthu* v. *Krishnamachariar*, 30 M 143, *dissented from* in *Tuljaram* v *Alagappa*, 35 M. 1

Commission or Request to examine witness not within British India.

5. Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request. [S. 387.]

COMMENTARY.

This rule corresponds to section 387, C. P. Code, 1882, with some verbal alterations The words "*or a letter of request,*" in the concluding part of this rule, have been added

A Commission for the examination of a witness in Chandernagore (French territory) was rightly issued under this rule—*Kadambini* v *Kumudini*, 30 C 934; 7 C W. N. 806

Where the application of a party to have the evidence of witness residing beyond the British territories taken under a commission failed owing to circumstances beyond his control a subsequent application to have other witnesses examined within British territories ought to have been complied with—*Mulluk Ali* v. *Meher* Banoo, 8 W. R. 418

A commission may be issued to England to examine a witness, and the bill should be taxed on the same scale and principle, as would be adopted in England—*Goculdas Bulabdas* v. *Scott*, 15 B 209

" Or a letter of request."—These words are new. For form of letter of request, *see* App. 4 Form No. 8.

Court to examine witness pursuant to commission.

6. Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto. [S. 388.]

COMMENTARY.

This rule corresponds to section 388, C. P. Code, 1882, with the addition of the words "*cause him to be examined*" which did not occur in the old section.

A Magistrate is not bound to execute a commission of a Small Cause Court, directing him to take the evidence of prisoners in jail in a case in which none of the circumstances existed authorising that Court to issue the commission—*Gopal Chunder* v. *Kurnodhar*, 7 W. R. 310

7. Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto and the evidence taken under it shall (subject to the provisions of the next following rule) form part of the record of the suit.

Return of commission with depositions of witnesses.

[S 289.]

COMMENTARY.

This rule corresponds to section 389, C P. Code, 1882, with some alterations of a verbal character.

" Duly executed."—The examination of witness under a commission is of the same nature as an examination in open Court. The return should show on the face of it that the oath was administered to the Commissioner as well as to the interpreter —*Pran Krishna* v. *Bisso Nath*, 8 B. L. R. Ap. 101.

It is the duty of the party obtaining a commission for the examination of witnesses to take such steps as may be necessary to secure the attendance before the Commissioner of the witnesses he desires to examine.—*Lekhraj* v. *Palee Ram*, 2 N. W P 210.

A party who has not joined in a commission is entitled to cross-examine the witnesses who are examined under the commission.—*Gregory* v. *Dooley Chund*, 14 W R. O. C 17.

Evidence taken on commission, though not read over and signed by the witness, is not alone sufficient to make it inadmissible ; but evidence taken on commission without full opportunity for effectual cross-examination is inadmissible in evidence.—*J. Boisagomoff* v *The Nehapiet Jute Company*, 5 C W N (N.) cexxx

" Shall form part of the record."—Evidence taken on commission shall subject to rule 8, form part of the record in the suit and any party is entitled to refer to such evidence as a matter of record —*Man Gobinda* v. *Sashindra Chandra*, 35 C 28

8. Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless—

When depositions may be read in evidence.

(*a*) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is a civil or military officer of the Government

who cannot, in the opinion of the Court, attend without detriment to the public service, or

(b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (a), and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same [S. 390.]

COMMENTARY.

This rule corresponds to section 390, C P Code, with the addition of the words *"or is a civil or military officer of the Government who cannot, in the opinion of the Court, attend without determent to the public service"* in clause (a), which did not occur in the old section

" Shall not be read as evidence."—The evidence taken on commission on behalf of the defendant was allowed to be read on behalf of the plaintiff without the deposition being put in as part of plaintiff's case, as being part of the record —*Nistarini Dassi* v. *Nundo Lall*, 26 C. 591. 3 C W N 239-n (*Dwarka Nath* v *Gunga Dayi*, 8 B. L. R. Ap 102, *followed*) *See* also, *Man Govinda* v *Shashindra Chandra*, 35 C 28 and *Dhanram* v *Murli Lal*, 13 C W N 525, 36 C. 566. According to the practice prevailing on the original side of the High Court of Calcutta, evidence taken on commission is not treated as evidence in the suit until the same has been tendered and read as evidence in the suit by the party on whose behalf it has been taken. *Kusum* v *Satya Ranjan*, 30 C. 799: 7 C W N 784, *Hemanta Kumari* v *Banku Behari*, 9 C W. N. 794

The practice in the mofussil Courts of treating the deposition of a witness examined on commission as evidence in the case even though it has not been formally tendered is not only consistent but also in strict accordance with the provisions of rules 7 and 8—*Nistarini* v. *Nundolal*, 26 C. 591, *Man Govinda* v *Sashindra Chandra*, 35 C 28, *Dhanuram* v. *Murli*, 36 C 566 13 C W N 525.

Where the defendant did not consent to the evidence of the plaintiff taken on commission being read against him, but on the contrary insisted all along upon the presence of the plaintiff in Court, it is for the plaintiff to show that he was beyond the jurisdiction of the Court at the time when the evidence was going to be read in Court; *Mahim* v *Naba Chandra*, 44 C. L J 288 A I R 1927 Cal 43.

A Court may legally refuse to hear the deposition of a defendant taken by commission read in evidence, where there is no evidence to prove that the defendant was from sickness unable to attend personally at the time of the trial, or the Court declines to dispense with the proof of such circumstances —*Prittee Bullubh* v *Haradhun*, 22 W. R. 331.

Evidence taken in the absence of the other side is not enough to make the deposition of a witness taken on commission inadmissible—*Ram Chand* v *Kaminee*, 10 W. R. 236.

Commissioners appointed by the Court are officers of the Court—*Rajendra* v. *Ram Narain*, 2 B. L. R. Ap. 3

Admissibility of Documents.—Where a document is produced before a Commissioner and no objection is taken as to its admissibility, no such objection can be taken before the Court hearing the suit to which the commission is returned—*Struther* v. *Wheeler*, 6 C. L. R. 109. But if the admissibility of the documents is objected to before the Commissioner on any ground, the party so objecting is not precluded from objecting to its admissibility at the trial on any other ground—*Ralli* v. *Gaukim Swee*, 9 C. 939

"Unless the Court in its discretion dispenses."—The Court has a discretion under clause (*b*) of r. 8 to dispense with proof of any of the circumstances mentioned in cl. (*a*) and allow evidence on commission being read as evidence in the suit, but it is necessary that the Court must have applied its mind to the matter and exercised its discretion; *Mahim* v. *Nabu Chandra*, 44 C. L. J. 288. A. I. R. 1927 Cal 43.

COMMISSIONS FOR LOCAL INVESTIGATIONS.

Commissions to make local investigations.

9. In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profit, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.

Provided that, where the Local Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules. [S. 392.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s. 392 of the C. P. Code, 1882, with some alterations and omissions

The words "*or proceeding*" which stood after the words "in any suit" and the words "*and the same cannot be conveniently conducted by the Judge in person*" which occurred in the old section after the words "annual net profits" have been omitted. The word "*proceeding*" has been omitted in view of s. 141 of the Code, which covers proceedings; and the words "*and the same cannot be conveniently conducted by the Judge in person,*" have been omitted probably to enlarge the Court's power, as they imposed upon the Court a condition precedent to the issuing of a commission

Commission to Make Local Investigation.—A Commission for the purpose of local investigation is to issue only when such investigation cannot be conveniently conducted by the Judge in person.—*Raikishori* v. *Kumudiny*, 15 C. L. J. 138

*Order XXVI, r 9, gives no power to a Court to itself hold a local in*vestigation A Judge can hold such inspection for the purpose of understanding the evidence and for no other purpose. He must decide the case on the evidence adduced before him, and, if he finds that complete justice cannot be done without a local investigation, he has power, under the rule above quoted, to appoint a Commissioner for this purpose ; the fact that the plaintiff had not applied for this to be done, does not relieve the Judge of the duty imposed upon him of having before him all the materials available which is necessary for the determination of the point at issue between the parties.—*Dwarka Prasad* v *Makhulal*, 52 I. C. 241 ; *Ananta Lal Saha* v. *Gokul Sahu*, 35 I C. 344 *See* also, *Raikishori* v. *Kumudiny*, 15 C L J 138.

It is within the discretion of a Judge to order or refuse local enquiry — *Rash Beharee* v. *Saheb Roy*, 12 W R. 76 ; and *Graham* v. *Lopez*, 1 W R. 141.

When neither of the parties desire to have a local investigation, the Court has no power to direct investigation, nor can the Appellate Court remand the case for that purpose, but is bound to decide the case upon the evidence before it —*Jatinga Valley Tea Company* v. *Chera Tea Company*, 12 C. 45.

In a suit for possession of land, the boundaries of which were disputed, the Sub-Judge directed a local investigation, but the District Judge refused to allow the investigation to proceed *Held*, that the District Judge had no authority to stay an investigation. All that the District Judge was entitled to do under Circular Order No 25, dated 25th August 1870, was to express his opinion as to the propriety or otherwise of the Sub-Judge's order The Subordinate Court should record a proceeding according to the H C Circular Order, and forward a copy of the proceeding to the District Judge —*Nirod Krishna* v *Wooma Nath*, 4 C 718: 3 C. L R. 234

In suits for enhancement of rent, it is a proper course of procedure to appoint an Amin to make a local investigation in order to enquire as to the description of the land and as to the rates paid in the neighbourhood for similar land —*Gaur Chandra* v. *Rash Behari*, 1 B. L. R. S N 1; 10 W. R 43

A Commission for local investigation cannot be issued after the evidence is closed and the case is ready for judgment.—*Sundar Lal* v. *Sita Ram*, 51 I. C. 399.

Necessity and Object of Local Investigation.—The object of local investigation is not so much for the purpose of collecting evidence which can be taken in Court, as to obtain evidence which, from its peculiar nature can only be obtained on the spot.—*Bhawanee Dutt* v. *Beer Singh*, 2 N W. P. 196.

An Amin should be appointed to hold a local investigation only when it is necessary to inspect the land which is the subject of dispute, to take maps of localities, to obtain information with regard to the physical features of the place, to identify the land in maps with parcels which are the subject of the suit, and to identify the maps with one another with the aid of objects to be found on the land When, however, any fact can be

proved by evidence taken otherwise than on the spot, that evidence ought to be taken by the Court itself in a regular manner and not by an Amin. —*Brindabun Chunder* v *Nobin Chunder*, 17 W. R 282

The local investigation referred to in this rule presupposes the existence on the record of independent evidence which requires to be elucidated, but it does not authorise a Court to delegate to a Commissioner the trial of any material issue which it is bound to try—*Sangili* v. *Mookan*, 16 M. 350.

Local Investigation by Judge.—A judgment based on knowledge gained by the Judge during local inspection is illegal An inspection which a Judge makes should be used by him only to test the accuracy and value of the evidence let in He should not without submitting himself to the test of cross-examination, make his knowledge the sole evidence for determining the question raised before him.—*Syed Ahmed Sahib Shustari* v. *Magnesite Syndicate Ltd*, 28 M L J 598: 17 M L. T. 387 2 L. W. 460: 29 I C 60

Order XXVI, r 9 gives no power to a Court to itself hold a local inspection. A Judge can hold a local inspection for the purpose of understanding the evidence and for no other purpose, *Dwarka Prasad* v. *Makhulal*, 52 I C 241 It is doubtful whether under the provisions of the present C. P. Code it is legal for the Court in person to hold any local investigation In case the court holds any local investigation, the result of such investigation should be made a matter of record and should be used only for the purpose of enabling the judge to understand the evidence; *Anant Lal* v. *Gokul Sahu*, 35 I C 344 See, *Sabapathy* v. *Perumal*, 44 M. 640: 62 I C. 790, where it was held that a Judge has power to make a local investigation in person in any case in which he sees fit to do so.

Order XXVI, r 9, does not prohibit a local inspection by the Judge himself in person The effect of the omission, in r. 9 of the present Code, of the words "and the same cannot be conveniently conducted by the Judge in person," which occurred in the old section is that, under the new Code, the issue of the commission is not restricted to cases where the Judge is unable conveniently to make the investigation himself. It therefore follows that a Judge has power to make a local investigation in person in any case in which he sees fit to do so, or he can issue a commission for local investigation if he thinks fit, irrespective of the question whether it is convenient for himself to conduct the investigation in person; *Sabapathy* v. *Perumal*, 44 M. 640. 62 I C. 790: 40 M. L. J. 554.

Appeal from Orders Directing Local Investigation and Power of Appellate Court to Interfere.—No appeal lies from the order of a Judge directing a local investigation by an Amin.—*Bahadur Ali* v *Bhabo Soondurec*, 7 W. R. 425.

Directing a local investigation or not is a mere discretion in which no special appeal will lie of right—*Graham* v. *Lopez*, 1 W. R. 141; *Poorna Pershad* v *Chunder Nath*, 1 W. R. 249; *Bykunt Nath* v. *Pearcemonee*, 1 W R 196; and *Raj Kishen* v. *Huro Mohun*, 5 W. R. 248

An Appellate Court should not interfere with the result of a local investigation or enquiry except upon very clearly defined and

grounds.—*Sarat Sundari* v. *Prasanno Coomar*, 6 B. L. R. 677, 15 W. R. 20, P. C.; *Monkee Dumbar* v. *Monkee Bhullunder*, 15 W. R. 423

Interference by a Court with a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated (13 M. I. A. 607: 15 W. R. 423: 60 I. C. 434 *relied on*). It is not safe for a Court to act as an expert and to overrule the elaborate report of a Commissioner for local investigation whose report is unquestioned whose careful and laborious execution of his task was proved by his report and who had not blindly adopted the assertions of either party; *Ram Amrita Sundari* v. *Munshi Serajuddin*, 28 C. W. N. 318.

An Appellate Court ought not to reverse the decision of a first Court based upon a very careful inspection of the land in dispute, except under a very clear and strong opinion upon the evidence, and upon recording sufficient and satisfactory reasons for such opinion.—*Brindabun* v. *Dunnunjoy*, 18 W. R. 452

The deputation of an Amin to ascertain the respective liability of several judgment-debtors is not an improper course for a Court to pursue, and at all events is not a ground for interfering in special appeal.—*Kristo Chunder* v. *Brojo Mohun*, 22 W. R. 183

Commission Report.—In a suit as to a right of way, a Commissioner was appointed under this rule, to prepare a map of the locality in question. *Held*, that the statements of the village officers made to him with regard to the right of way were inadmissible in evidence.—*Shittwa* v. *Bhimappa*, 34 B. 43

The report of a Commissioner appointed by a Court of Revenue to ascertain the amount of actual collection in a suit for profits under s. 164 of the Agra Tenancy Act, is admissible in evidence; *Bakhtawar Lal* v. *Sheo Prasad*, 39 A. 694. 15 A. L. J. 766. 42 I. C. 720

10. (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

Procedure of Commissioner.

(2) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit, may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

Report and depositions to be evidence in suit.

Commissioner may be examined in person.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit [S. 393.]

COMMENTARY.

This rule corresponds to section 393 C P Code, 1882, with some additions and alterations.

The words " *or as to his report* have been added in the concluding part of sub-rule (2)

Sub-rule (3) is new There was no similar provision in the old section

Functions and Powers of Commissioners Appointed to Hold Local Investigation.—The functions of an Amin appointed to hold a local investigation under the Civil Procedure Code discussed —*Iswar Chandra* v *Jugul Kishore*, 4 B L R Ap 33, 21 W R 281-*note*

It is the duty of the Amin to return his report to the Court ordering the investigation —*Lalliec Sahoo* v *Rajender Pertab*, 14 W. R 418

It is not the intention of the Legislature to allow witnesses to be examined out of Court by Amins, except with reference to points for the determination of which local investigation is required.—*Sadhoo Singh* v *Ramanoograha*, 9 W. R 83

A Civil Court is not warranted in deputing its functions to an Amin, and an Amin is bound not to go beyond the points referred to him for inquiry.—*Ram Dhun* v *Ram Monee*, 21 W R 280 , *Iswar Chandra* v *Jugal Kishore*, 4 B L R Ap 33, 21 W R 281-*note*; and *Buroda Churn* v. *Ajoodhya Ram*, 23 W R. 286.

Where an Amin was improperly deputed to inquire into the facts of possession *Held*, that even if the Court's order was improper, the deputation of the Amin was legal, and the evidence taken by him was legal evidence to be considered on its own merits.—*Ram Churn* v. *Surabjit*, 9 W R. 491

An Amin deputed to make a measurement under the provisions of the Bengal Rent Act, 1869, is bound to record the state of things as actually existing, and has no business to record what he thinks ought to be the rates —*Bala Thakoor* v *Meghburn Singh*, 14 W. R. 269.

An Amin, when directed to make an inquiry as to mesne-profits, ought not, in the execution stage of the suit, to enter into inquiries as to the dates of possession, which must be taken to have been determined by the decree —*Bejoy Gobind* v *Kali Prosonno*, 16 W R. 291.

Report of Local Investigation and its Evidentiary Value.—(*a*) *Report of a Commissioner appointed by the Court.*—When a Court Amin is appointed a Commissioner under the Civil Procedure Code, his report is only evidence on the points to which the commission refers ; any report he chooses to make on any other point is no legal evidence in the case —*Abdool Ali* v. *Mullick Sudderoodeen*, 14 W. R. 493 ; and *Door[illegible]* v. *Nem Chand*, 24 W. R. 298.

Report of a Commissioner not challenged in the first Court and acted upon by it without further corroborative evidence, should be accepted as correct by the Appellate Court. The Appellate Court ought not to go behind that report and examine materials on which the report was founded and come to a different finding.—*Govinda Priya* v. *Ratan Dhupi*, 4 C. L. J. 37: 10 C. W. N. 88-*n*.

The report of an Amin upon a local investigation is sufficient evidence to support a decree, if it is believed by the Court, and considered sufficient without further evidence to corroborate it.—*Seetaram* v. *Ram Narain*, 6 W. R. 51.

The report of the Civil Court Amin and the depositions taken by him are admissible as evidence under the provisions of this rule.—*Nathoo* v. *Ghunessam*, 8 W. R. 267; *Abdool Ghunnee* v. *Buttoo Sheikh*, 22 W. R. 350; *Bhyrub Roy* v. *Nobin Roy*, 9 W. R. 601; *Dole Gobind* v. *Chamee Singh*, 10 W. R. 312; *Sarat Chandra* v. *Collector of Chittagong*, 2 B. L. R. Ap. 3. But depositions of the witnesses without the report of the Amin are not admissible in evidence.—*Debnarayan* v. *Kali Das*, 6 B. L. R. A. P. 70: 14 W. R. 397 (*affirming* on appeal, 13 W. R. 412)

When the local inquiry is ordered by a lower Court, and evidence is taken by an Amin and a report made, the return made by the Amin becomes legal evidence which the appellate Court is not justified in refusing to consider.—*Rajnath* v. *Doorga Lall*, 12 W. R. 186; and *Sheo Doyal* v. Hodgkinson, 24 W. R. 324

An Amin's report is evidence without any specific documents corroborating his finding.—*Eshan Chunder* v. *Huree Churn*, 2 W. R. 278; and *Gouree Narain* v. *Modho Soodun*, 2 W. R. Act X, 1.

The report of an Amin under section 73 of Act X of 1859 is receivable as evidence, and a decision can be legally based upon it.—*Sujan Koer* v. *Heithoo* 1 N. W. P. 165, Ed (1873), 224

Where an order for a local investigation is not objected to by the opposite party at the time it is made, the Court is justified in receiving as evidence the report of the Commissioner, and the depositions taken by him, being a part of the record.—*Ram Rugha Roy* v. *Gobind Dass*, 15 W. R. 291

The report of an Amin as to local inquiry upon a matter which no personal inspection on his part could decide, and in regard to which the depositions of parties acquainted with the place could afford proper information, was held to be in no way irregular, simply by reason of his having examined witnesses on the spot.—*Sheo Narain* v. *Budh Singh*, 11 W. R. 423.

The report of an Amin, and the depositions of parties and witnesses examined by him, must be considered, even though the Court exercised its discretion unwisely and wrongly in giving him too extensive powers.—*Umbica Churn* v. *Coluck Chunder*, 9 W. R. 596.

Unless there be good grounds for dissenting and differing from reports made upon local investigations, the Courts, even in India, and, *a fortiori*, the Privy Council in England, in dealing with boundary questions, ought

to give great weight to, and be guided by them.—*Ram Gopal* v. *Gordon, Stuart & Co*, 17 W. R. 285, P C 14 M I A. 453; *Portap Chunder* v. *Surnomoyyce*, 19 W. R. 361.

As to the value of a local inquiry report made by a competent official See, *Sarut Sundari* v. *Prossono Coomar*, 6 B L R 677, P. C.: 15 W R 20, P. C.; *Kalee Doss* v. *Khetro Pal*, 17 W R 472; and *Chunder Coomar* v. *Joy Chunder*, 19 W. R. 213.

It is necessary that oral testimony should be taken in order to effect a measurement, or that an Amin's report must have depositions attached to it to make it legal evidence.—*Chundermonee* v. *Nilambur*, 7 W. R. 43.

When an Amin's map is received in evidence by consent and admitted by both parties to be topographically correct, the Court is entitled to look at the Amin's report as explanatory of the map.—*Mahomed Anwar* v. *Raj Chunder*, 17 W. R. 522

It is not compulsory on the Appellate Court to direct a fresh investigation when it is dissatisfied with the map and report of the Amin No error of law is committed in deciding on the other evidence before it.—*Maharajah Sir Manindra Chandra Nandi Bahadur* v. *Kumar Saradindu Ray*, 27 C. L J 509: *45 I. C. 408 (30 C. 291 referred to).*

A lower Appellate Court was held to have erred in law in taking an Amin's report and map as its sole guide, and making them the sole basis and foundation of its decision to the total disregard of the other evidence on the record.—*Bustee Sahoo* v. *Jeo Narain*, 24 W. R. 338.

In a suit for rent upon a *jungleburi* lease, which provided that the area of land brought under cultivation should be ascertained by measurement, the only evidence of measurement was a report of an Amin in a previous suit, the accuracy of which was not proved in the present suit. *Held*, that the report itself was not admissible in evidence.—*Denobundhu* v. *Nistarini*, 12 C. L. R. 50

Amin giving credit to local rumour.—*Held*, that the Judge had no right to take the report of an Amin who gave credit to defendant's witnesses on account of something he heard in the neighbourhood, but that he ought himself to have examined those witnesses.—*Tweedie* v *Poorno Chunder*, 12 W. R. 136.

(*b*) *Report of Amin on question of possession*.—The report of Amin, however valuable in clearing up difficulties as to the identity and position of land, is, generally speaking, of no value in determining questions connected with the possession of land in dispute in past times.—*Pran Nath* v. *Mrinmoyee*, W. R. (F B.) 39. *Amin's report held not sufficient of itself to prove possession*.—*Ameenooddeen* v. *Asgar Ali*, 8 W. R. 464. A Judge is bound to take notice of and pronounce an opinion upon evidence taken by an Amin as to possession.—*Jannobee Chowdhrain* v. *Collector of Mymensingh*, 8 W. R. 287.

(*c*) *Report of local investigation by Judicial Officers*.—Under the present Code, the Court has power to inspect any property or thing at any stage, *see* Or. XVIII, r. 18.

A Munsif's report of a local investigation, when not shown to be substantially erroneous in its data or reasoning, should convey the greatest weight as evidence of the facts it sets forth.—*Wise* v. *Ameeroonissa* [illegible] W. R. 219

Facts observed by a Judge, but not proved by any evidence, should be taken notice of, and the Judge should put the result of his investigation upon paper.—*Joy Coomar* v *Bundhoo Lall*, 9 C 363: 12 C L R 4[illegible]

The information derived from a local investigation by a Judge, though not evidence as defined in the Evidence Act, is a matter which he can take into consideration, in order to determine whether a fact is "proved" within the meaning of the Act —*Dwarka Nath* v. *Prosonno Kumar*, 1 C W. N. 682 (9 C. 363 *referred to*)

A Judge is at liberty himself to inspect the property in dispute and inform himself by the observation of his senses of matters which may help him in understanding the evidence and in deciding the case, and specially such matters which do not require scientific knowledge. He can do so without giving notice to the parties It is generally desirable that a Judge should place upon record the result of his investigation.—*Moran* v *Bhagbat Lal*, 33 C 133 2 C L J. 100-*n* (9 C. 363; 1 C. W N 682, *referred to*)

At the desire of the parties, the Judge proceeded to the spot, made inspection and examined witnesses on the spot. The depositions of the witnesses were taken by a clerk in vernacular. *Held*, that the procedure was not illegal *Ramaya* v *Derappa*, 30 B. 109: 7 Bom. L. R 812

(d) *Report of investigation by Ministerial Officers.*—The report of a Nazir deputed to inquire into the condition of property in dispute is admissible in evidence, although he was not an Amin appointed under Act XII of 1856 —*Buzlal Rohim* v. *Latfat Hossein*, W. R (1864) 171

The report of a Sheristadar, after local investigation, cannot be legal evidence unless it is shown that no Civil Court Amin was available for the duty in the district —*Goluck Chunder* v. *Dookhee Ram*, 12 W. R 29; *Byjnath Singh* v. *Indurjit Kooer*, 8 W. R 331.

The proviso to r. 9 has made it imperative on a Court to employ in the first instance the regular officer of the Court to hold a local inquiry—*Ern Doss* v. *Nil Kant*, 8 W R 6; *Byjnath* v. *Indurjit*, 8 W. R. 331; *Bahadur Ally* v. *Doomnun*, 7 W R. 27 But since the repeal of the Civil Court Amin's Act (XII of 1856) by Act II of 1899, B. C., the Courts are not bound to employ the Civil Court Amins for the purpose of local investigation.

"**May examine the Commissioner personally.**"—A Court cannot arbitrarily withhold permission to examine a Commissioner for accounts asked for by one of the parties to the suit. The *object* of the Legislature in enacting r. 10 (2) of Or XXVI is to afford protection to the Commissioner who is a *quasi*-judicial officer. Such protection is afforded on grounds of public policy, so as to make it impossible for either of the parties to subject the Commissioner to a vexatious examination —*Sitaram* v *Ramprosad Ram*, 19 C L. J. 87-18 C. W. N. 697-22 I. C 858

It is within the discretion of a Judge to accept the Commissioner's Report. A Court is bound to see that there is some real ground for examining a gentleman who had undertaken the duty of a Commissioner. It has a discretion in such matter to permit or refuse a party to examine the Commissioner.—*Chowdhury Jadavendra* v *Gajendranarain*, 28 C. L. J 203-47 I C. 650.

Objections to Commissioner's Report.—A Court is bound to inquire into charges against a Civil Court Amin (such as can be readily inquired into and their truth either disproved or proved).—*Abdool Kureem* v *Campbell*, 8 W R 172

Objections to the Amin's report should be inquired into if taken within a reasonable time from the return of the report, even when the case has been struck off the file —*Issur Chunder* v *Syam Khan*, 11 W. R. 95.

When clear instructions as to a local inquiry ordered by the Court are given to an Amin in the presence of both the parties, and no objection is made to them by either party then and there, they have no ground of complaint, after the Amin has carried out his instructions, if the Court acts upon his report —*Bissessur Roy* v *Kanchun Roy*, 11 W. R. 155.

A party who refuses to appear before an Amin at the time he holds his local inquiry is not at liberty afterwards to take any objection to the Amin's report.—*Ramun Das* v *Brojo Kishore*, 6 W. R. 130

Reasonable notice must be given of the time fixed for hearing objections to the report —*Ram Narain* v. *Goverdhan Lall*, 21 W R 2.

Report of the Commissioner is Not Binding.—A Commissioner's report is only evidence in a case, but it is no way binding on the Court If such report is not satisfactory, it is in Court's discretion to order another Commissioner to be appointed; 7 Pat L T. 795 96 I. C. 327: A I. R. 1926 Pat 462.

" Where the Court is for any reason dissatisfied with proceedings of the Commissioner."—It is not compulsory on the Appellate Court to direct a fresh investigation when it is dissatisfied with the map and report of the *Amin*. No error of law is committed in deciding on the other evidence before it; *Mahárajah Sir Manindra Chandra* v. *Kumar Saradindu Roy*, 27 C. L J 599· 23 C W N. 593 (30 C 291 *refd. to*) Where the result of a local investigation is unsatisfactory, the Court is not bound to order another inquiry. It can decide the case or the evidence; *Goribullah* v. *Madhu*, 50 I. C 301; *Jadavendra* v *Gajendra*, 28 C. L J. 203: 47 I. C. 650.

Further Evidence after Commissioner's Report.—Under Or. XXVI, rr. 9 and 10 there is no absolute right in any party to a local investigation, to adduce evidence before the Court after a Commissioner's report, and the question of adducing further evidence must be decided on general principles according to the facts of each case —*Girish Chunder* v. *Soshee Shekhareswar*, 27 C. 951, P. C.: 4 C. W. N. 631 P. C (17 W. R. 270, *commented on*).

Disregard of report on local investigation is not any error or defect in the procedure within the meaning of s. 584, C. P. Code, 1882 (s. 100)—*Lakhi Narain* v. *Jadu Nath*, 21 C. 504, P. C.

COMMISSIONS TO EXAMINE ACCOUNTS.

Commission to examine or adjust account.

11. In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment. [S. 394.]

COMMENTARY.

This rule exactly corresponds to s. 394, C. P. Code, 1882

"Is necessary."—The words of this rule clearly show that no order can be made for the appointment of a Commissioner unless the examination or adjustment of accounts is considered necessary; *Bharat Chandra v. Kiran Chandra*, 52 C. 766 · 90 I. C. 944: A. I. R. 1925 Cal 1069.

Commissioner to Take Accounts—Procedure on Taking Accounts.—Commissioner appointed to examine accounts—Duty of Commissioner pointed out—Commissioner when to take evidence—Commissioner is not a Judge or an arbitrator—Value of the decision of the Commissioner—*Tincowri Debi* v. *Suttya Doyal*, 6 C L. J. 105.

As a general rule, it is better for the Court itself to settle the exact terms of the order to the Commissioner, that is, not to make him a sort of inferior Judicial officer It is generally the business of the Court to ascertain which books are true or false, which party is or is not keeping back the books, what documents are relevant and the like and it is as a general rule desirable that these matters should be decided before a commissioner is appointed; *Assarmal* v. *Handomal*, 91 I. C. 706: A. I. R. 1925 Sind 265.

A question whether a certain contract is authorized *or not* cannot be referred to a commissioner for taking accounts under Or. XXI, r. *11. C.* P. Code The report of a Commissioner is only to be treated as evidence in the case and is not a decision which has to be accepted; *Firm of Seth Vishindas Nihal Chand* v. *Nazarali Samji*, 75 I. C. 1014.

In a suit by a principal against his agent for account and for recovery of money that may be found due: *Held*, that no decree could be made for the sums mentioned, or any other sum, until an account had been taken and the amount due from the defendant ascertained. *Method to* be followed on taking accounts in the mofussil stated —*Annoda Pershad* v. *Dwarka Nath*, 6 C. 754: 8 C. L. R. 321.

In a suit for an account by a principal against his agent, *the procedure* prescribed by ss. 394 and 395, C. P. Code, 1882 (Or. XXVI, rr. 11, 12) should be followed. If the defendant is found liable to render *account* for a certain period, the Court should make an interlocutory *decree declaring* that he is so liable and direct him to file an account *within a fixed* period. This decree may be enforced under s. 260, C. P. Code, 1882 (Or. XXI, r. 32). When the accounts have been taken the *Court must determine* the amount due, and the final decree should be *for the payment of*

this amount, and also, if necessary, for the delivery of any papers, vouchers or other documents which have come into the hands of the agent in the course of his employment —*Degamber* v *Kaley Nath*, 7 C. 654 9 C. L. R. 265.

In a suit against a *gomasta* to obtain accounts of moneys which had come into his hands, it was held that it was not enough for the lower Courts to make a decree ordering the defendants to render *nikash* papers to plaintiff; it was the business of the Court to have these papers brought before it and examined, and to determine whether they were correct and fair accounts between the parties —*Shushee Shekhur* v. *Suleem Biswas*, 22 W. R. 191.

Where a decree requires an agent to render accounts, he can only discharge himself, by accounting for all the moneys that have come into his hands, and it is always open to the decree-holder to show that this has not been done —*Wooma Nath* v. *Sree Nath*, 15 W. R 260

Suit by principal against his agent for account—Object of a decree for an account as distinguished from a decree made upon the hearing—Method to be followed in taking accounts.—*Hurri Nath* v. *Krishna Kumar*, 14 C. 147, P. C.

Observations on the procedure to be adopted and the burden of proof on the taking of the account.—*Thiru Kumaresan* v. *Subbaraya*, 20 M. 313.

Where a defendant refused to render accounts and there was evidence of the destruction of the account-books, the Court charged him with the principal sum for which he was accountable, with interest at 12 *per cent*, *per mensem* in lieu of the profits he failed to account for.—*Ram Pershad* v. *Sheo Churn*, 10 M. I. A. 490.

Where the plaintiff had filed his account books in Court, and did not allege that they had been falsified, he should have balanced the account himself, and the lower Court should not have deputed an Amin to investigate the accounts.—*Chand Ram* v. *Brojo Gobin*, 19 W. R 14.

Form.—For form of commission to examine accounts, *see*, App. H. form No. 9.

Court to give Commissioner necessary instructions.

12. (1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry or also to report his own opinion on the point referred for his examination.

Proceedings and report to be evidence, Court may direct further inquiry.

(2) The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit. [S. 395.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s. 395, C. P. Code, with some additions and alterations

The only change made in sub-rule (1) is the omission of the word "*detailed*" which stood before the word "instructions" in the third line.

In sub-rule (2) the word "report" has been added after the word "proceedings," and the words "*but where the Court has reason to be dissatisfied with them, it may direct such further enquiry as it shall think fit,*" have been substituted for the words "unless the Court has reason to be dissatisfied with them, in which case the Court shall direct such further inquiry as is requisite." By this substitution no change has been made in the meaning, but provisions have been made more clear. Under the provisions of this sub-rule, the proceedings and report of the Commissioner shall be only evidence in the suit if the Court has no reason to be dissatisfied with it; but his report cannot be considered as a decision.

Report of Commissioner to Examine Accounts and its Value.—Duty of Commissioner appointed to examine accounts—Value of his report—Commissioner is not a Judge or arbitrator.—*Tincouri Devi* v. *Sattya Dyal*, 6 C. L. J. 105.

Although a Commissioner's report should have very great weight attached to it, it is not absolutely binding.—*Kanketala* v. *Pobshetti*, 6 Mad. H. C. 36 (*Venkata Reddi* v. *Venkataramaiya*, 1 Mad. H. C. 418, *dissented from*).

An error in the principle on which an account is taken is not the only ground on which a Court should enquire into the correctness of the report of a Commissioner. It is competent to an Appellate Court to examine the accounts even if no exception has been taken to them in the Court appointing the Commissioner.—*Ahmad Valad* v. *Khasaji Valad*, 6 B. H. C. 849 (*Sarapu* v. *Malai* 1 Mad. H. C. 1; and *Venkata Reddi* v. *Venkataramaiya*, 1 Mad. H. C. 418, *dissented from*).

The report of the Commissioner, if accepted by the Court, is only evidence in the suit of facts found by him, but is not a decision upon it. It requires affirmation by an order of Court to make it operative as a judgment of a Court. In an appeal from an order confirming the report of the Commissioner, it is open to the Appellate Court to deal with the report on matters of fact, and its powers are not limited to questions of principle when examining such report.—*B. M. S. Chetty* v. *Mohamed Esa*, 5 C. W. N. 692.

The nature of a certificate or report of the Commissioner appointed to examine accounts and what it should contain, considered.—*Rustomji* v. *Kessowji*, 3 B. 161.

Quaere.—Whether it would be competent to the Court to reopen a question of account against a clear finding upon a question of fact relating to the account, and made by the Commissioner upon the evidence properly before him.—*Watson* v. *Mehedee*, L. R. 1 I. A. 346.

Motion to vary or discharge Commissioner's Report.—In moving to discharge or vary the report of the Commissioner for taking accounts, the right practice is to move on a memorandum of objections filed in the Prothonotary's office, and upon the evidence taken by, and the proceedings before the Commissioner, and not on affidavit made for the purpose of the motion. In such a motion, affidavits should only be filed (*a*) when ordered by the Court if it desires fresh evidence, or (*b*) by special leave of the Court for the purpose of advancing a fact which does not appear on the face of the proceedings before the Commissioner.—*Sumar Ahmed* v. *Ismail Haji*, 1 B 158

A party desiring to move to vary a report made by the Commissioner must not only file his exceptions to such report, but must also make his motion to vary it within 20 days after the filing of the report, or, if the Court have allowed him further time for such application, then within further time so allowed.—*Narottam* v *Hari Chand*, 13 B. 368

In making an application to discharge or vary a report, it is necessary that notice should be given within the time required by Rule No. 565 of the Rules of the High Court, and that such notice should be accompanied with the grounds of exceptions relied on by the party objecting to the report.—*Lutchmee Narain* v *Byjnauth*, 24 C. 437.

Appeal against Order directing Accounts to be Taken.—In a suit for dissolution of partnership and an account, an order directing accounts to be taken is a decree within the meaning of s 2, Civil Procedure Code, and is therefore appealable.—*Biswa Nath* v *Banikanta*, 23 C. 406. *See* also, the observations of Maclean, C. J., in *Khadem Hossein* v *Emdad Hossein*, 5 C W N 617, F. B ; p. 619 But an order directing an account in an administration suit is not an order in the nature of a final decree and is therefore not appealable.—*Siee Nath* v. *Radha Nath*, 9 C. 773.

Order of a Judge confirming the report of the Commissioner for taking accounts by which he refused to require the defendants to give inspection of certain books, is not appealable as a decree.—*Rustomji Burjorji* v. *Kisowji*, 8 B 287.

During the pendency of an appeal against a preliminary order directing accounts to be taken, the High Court has jurisdiction to make an order staying the carrying out of such order.—*Balkishen* v. *Khungu*, 31 C. 722, F. B : 8 C. W. N 572, F. B.

As for costs of Commission, see, notes under rule 15.

COMMISSIONS TO MAKE PARTITIONS.

Commission to make partition of immoveable property.

13. Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree. [S. 396, para. 1.]

COMMENTARY.

This rule corresponds to para. 1 of s. 396, C. P. Code, 1882 The language of the present rule is quite different from that of the old section; but no change seems to have been made in the meaning. In the old section the word "person" was used in the plural number and hence there was diversity of judicial opinion regarding its meaning The old section ran as follows:—

"*In any suit in which the partition of immoveable property not paying revenue to Government appears to the Court to be necessary, the Court after ascertaining the several parties interested in such property and their several rights therein, may issue a commission to such persons as it thinks fit to make a partition according to such rights.*"

"Issue a commission to such person as it thinks fit."—The singular "person" has been substituted for the plural "persons" which occurred in the corresponding s. 396 of the old Code. Under the old section it was held that the use of the plural "persons" showed that the Court could not issue a commission to make partitions to a single commissioner; *Mul Chand* v. *Muhammad Ali*, 29 A 235; *Bhimaji* v. *Narayan*, 6 Bom L R. 586; *Kanshi Nath* v *Balaki Das*, 124 P. R. 1893. The present rule makes it clear that a commission to make a partition may be issued to a single commissioner

Procedure of Commissioner.

14. (1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports, it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports, it shall either issue a new commission or make such other order as it shall think fit. [S. 396, paras. 2 & 3.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to paras. 2 and 3 of s 396 of the C. P. Code, 1882, with some additions and alterations.

In sub-rule (1), which corresponds to para. 2 of the old section, the words "*after such enquiry as may be necessary*" have been substituted for the words "ascertain and inspect the property" which occurred in the old section. The other changes are merely verbal.

In sub-rule (2), which corresponds to para. 3 of the old secion, the words "*or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports*" have been added; and the words "*shall confirm, vary or set aside the same,*" have been substituted for the words "shall either quash the same." Under the wording of the old section it was held that the Court must either accept the report or reject the report and that it had no power to *vary* it; *Janki* v. *Gouri*, 28 A. 75. The word "vary" has been added into sub-rule (2) to enable the Court to modify the report in a proper case.

Sub-rule (3) is almost new with the exception of the words "*pass a decree in accordance*" and the words "*either issue a new commission*" which occurred *in the concluding part of para. 3 of the old section.* The object of the above amendment is to meet the case of *Janki Prasad* v. *Gouri Sahai*, 28 A. 75: 2 A. L. J. 709; A W. N. (1905) 188, where it has been held that in a suit for partition of immoveable property where a Commissioner has been appointed to ascertain the shares of the parties, the Court when passing its final decree must either accept or reject the report of the Commissioner *in toto*, but is not competent to modify it. The old section was rather defective and in order to remedy the defect, sub-rule (3) has been inserted.

Resistance to Commissioner.—*Where a Commission has been issued* to make a partition, the circumstance that the plaintiff or his agent resists the Commissioner is not sufficient to justify the dismissal of a suit.—*Masumunissa* v. *Latifan*, 32 A. 319: 5 I. C. 872.

Partition of Non-revenue Paying Immoveable Property.—The intention of this rule is that, upon the first hearing of a suit, the Court shall determine whether the plaintiff is entitled to a partition, and shall ascertain the several persons interested in the property, and their rights therein, and shall direct by a preliminary decree or order that Commissioners be appointed *to make the partition.* The word "*Commissioners*" *in this rule* may be read in the singular number. *Gyan Chunder* v. *Durga Churn*, 7 C. 318; 8 C. L. R 415. In the present rule (r. 14) the word "Commissioner" has been used in the singular and thereby 29 A. 235; 4 A. L. J. 76, in which a contrary view was taken has been rendered obsolete.

Mode of Effecting Partition.—In making partition of joint family property, if it appears that some of the members have enhanced the value of a portion of the lands of the joint estate and that other lands of similar description are not available, compensation should be allowed to each co-sharer for any private expenditure — *Kallian Banerji* v. *Modhu Sudan Banerji*, 8 C. L. R. 259.

It is a well-known principle of equity, which must be adopted in all partition cases that where it is inconvenient, it must be left in the possession of the person in occupation, and the other person who cannot conveniently get actual possession, compensated.—*Basanta Kumar* v. *Mati Lal*, 6 C. L. J. 8-n.

Where, in a suit for partition, possession was sought of a definite share of a property consisting of a number of houses: *Held*, that the principle in such cases is, that if a property can be partitioned without destroying the intrinsic value of the whole property or of the shares, such partition ought to be made; but where partition cannot be made without destroying the intrinsic value of the property, then a money compensation should be given.—*Ashanullah* v. *Kali Kinkur*, 10 C. 675.

The casting of lots by a Commissioner appointed to make a partition for the purpose of allotting shares to the parties, is not opposed to the provisions of Or. XXVI, r. 14, and is the most equitable way of assigning properties to co-parceners in a division.—*Ananta* v. *Subraya*, 2 L. W. 430: 29 I. C. 245.

In execution of a decree for partition of family dwelling-house, the Court, with the consent of all the co-parceners, is competent to order that any part of the property should remain joint.—*Raj Coomaree* v. *Gopal Chunder*, 3 C. 514.

In a suit for partition, the land in dispute being in the exclusive possession of a single co-sharer, should fall as a whole in the share of one or other of the co-ownears, and not be sub-divided among them.—*Ful domonee* v. *Dwarka Nath*, 25 W. R. 335.

Where a party concerned objects to a partition of land fairly allotted according to value, as not having consulted convenience, it is not enough to show that his own convenience would have been better consulted by a different arrangement. He is bound to show some arrangement which would better satisfy all parties and be more equitable for all.—*Summun Jha* v. *Bhooput Jha*, 18 W. R. 498.

Where *A* mortgaged to the plaintiff his undivided share in certain land which he held jointly with *B*, and subsequent to the mortgage, by a decree in a partition suit, to which the plaintiff was not a party, the mortgaged property was allotted to *B*, other property in substitution being allotted to *A*. *Held*, in a suit to recover the sum due on the mortgage by sale of the mortgaged property, that the plaintiff could not proceed against the mortgaged property, which had been allotted on partition to *B*, but should be allowed to proceed against that which had been allotted in substitution to *A*, his mortgagor.—*Hem Chunder* v. *Thako Moni*, 20 C. 533, (*Byjnath* v. *Ramoodin*, 21 W. R. 233, P. C., *followed*).

Partition Act IV of 1893—Partition of Joint Family Dwelling-house—Muhammadans are not excluded from the benefit of s. 4 of the Partition Act IV of 1893.—*Sultan Begam* v. *Debi Prasad*, 30 A. 324, F. B.: 5 A. L. J. 352 (29 A. 308, *overruled;* 13 A. 282, *referred to*).

Where, in a suit for partition, a Commissioner appointed under this rule to make a partition after the preliminary decree had been passed.

submitted a report and the Court, in consideration of the report, was of opinion that the land in suit was very small and could not be conveniently partitioned, and then passed an order for sale of the property under s 2 of Act IV of 1893 *Held*, that the Court could pass an order under s 2 of the Act for sale of the property, and the fact that a preliminary decree had been passed was no bar to his proceeding under that section —*Hiramoni Dosi* v. *Radha Churn*, 5 C. W. N 128.

Section 2 of the Partition Act applies not only where a Court has to pass a decree for partition, but also where, after the Court has passed such a decree directing the partition to be effected in a particular mode, it is found that that mode is impracticable or inexpedient and one of the parties asks the Court to modify the decree by passing an order under this rule.—*Bai Hira Koer* v *Trikamdas*, 32 B. 103 · 10 Bom. L R. 23 (24 M 639: 5 C W. N 153, *followed*)

Section 2 of the Partition Act (IV of 1893), which empowers a Court to order a sale of property instead of a division, in partition suits, may be applied though a preliminary order defining the share of a plaintiff and directing partition has been passed.—*Kadir Bacha Saheb* v. *Abdul Rahiman Saheb*, 24 M. 639.

It is only in the event of a suit being one for partition, and the person desirous of buying being a member of the family, that the privilege conferred by s 4 can be rendered available —*Kali Kumar* v. *Brahmandee*, 7 C. L. J. 98. 12 C W N. XVI (16-*n*)

Section 4 of the Partition Act (IV of 1893), applies only where the transferee sues for partition. Where the suit is brought by the sharer against the transferee, s. 2, must be applied. In cases where the section applies the Judge should make a valuation of the share of the transferee only, and direct its sale *Balshet* v *Miranshet*, 23 B. 77

Section 4 of Act IV of 1893 applies to a dwelling-house belonging to undivided joint family; but re-acquisition by members of such family after it has been sold to a stranger, does not give any right under that section as against such stranger.—*Vaman* v *Vasudev*, 23 B 73.

Held, that section 10 of Act IV of 1893 would apply to a suit for partition in the stage where an interlocutory decree for partition has been made, but that decree had not become final by the Court's acceptance of the lots prepared by the officer appointed for that purpose.—*Abdus Samad* v. *Abdur Razzaq*, 21 A. 409.

Partition Decree is Pending Litigation—Final Decree to be Engrossed on Stamped Paper.—It is not obligatory, but discretionary with the Court in a partition suit to appoint a Commissioner under r. 13; and such a decree is not, in all cases, to be considered pending till action is taken under that rule.—*Krishnama Chariar* v. *Kuppammal*, 31 M. 510.

A suit for partition is a pending litigation, until the Court signs the final decree A decree for partition to be operative must be engrossed on stamped paper, as required by the Stamp Act (II of 1899), s. 2 (15), Sch. I, Art. 45, and until the Judge signs the decree so engrossed, it cannot be said that the suit has terminated; and an order directing a party

to be added under s 32, C. P. Code, 1882 (Or. I, rr. 8, 10, 11) can be made in such a suit before it has actually terminated —*Jotindra Mohan* v. *Bejoy Chand*, 32 C. 483.

A decree for partition must be stamped as an instrument of partition under sec. 2 (15) of the Indian Stamp Act (II of 1899).—*Balaram* v. *Ram Krishna*, 29 B. 366; 7 Bom. L. R. 508

Preliminary Decree in a Partition Suit—Appeal.—Where a preliminary decree in a partition suit not followed by action under rule 13, is treated by the Court and by the parties as a final decree in execution proceedings, it is not open to a party subsequently to contend that the decree had not become final —*Krishnamachariar* v. *Kuppammal*, 31 M 540.

Order declaring the rights of parties to a partition suit in certain specific shares is a decree within the meaning of s. 2 of the C. P. Code, and is therefore appealable.—*Dulhin Golab Koer* v. *Radha Dulari*, 19 C 463; followed in *Boloram Dey* v. *Ram Chundra*, 23 C. 279, F. B. See also, *Bhola Nath* v. *Sonamoni*, 12 C 273; *Bipin Behari* v. *Lall Mohun*, 12 C. 209; *Krishna Sami* v *Rajpala*, 18 M. 73; and *Khadem Hossein* v *Emdad Hossein*, 5 C. W. N. 617, F B.: 29 C. 758, F. B.

Where in a partition suit an order was made in the course of such proceedings by which the position of some of the parties to the suit was determined, but no declaration was made of the exact rights of each of the parties: *Held* that it was a mere interlocutory order and no appeal would lie from it —*Bhoobun Moyi* v. *Sharut Sundary*, 12 C. 275

An order passed in a suit for partition, subsequent to the preliminary decree appointing a commissioner to make the partition, is an interlocutory order pending the suit which has not been finally decided, and is not an order in execution, and is therefore, not appealable under s. 244, C P. Code, 1882 (s. 47). In an appeal against the final decree the appellant can take objection to such an order.—*Jogodishury* v. *Kailsh Chundra*, 24 C. 725, F. B : 1 C. W. N. 374 (16 C. 203 *followed*; 23 C. 679 *overruled*)

The definition of the expression " preliminary decree " is given in the explanation attached to s. 2. Section 97 of the present Code provides that if no appeal is preferred against the preliminary decree, the party aggrieved by such a decree shall be precluded from disputing its correctness in an appeal preferred against the final decree —*See notes under s* 97.

Objection to Commissioner's Report.—An Appellate Court has the same powers in dealing with objections to the report of a Commissioner as the Original Court, and a party cannot be heard in the Appellate Court unless he had filed his objections before the Original Court.—*Ma Dwe* v *Ma Tin Lun*, 12 Bur. L T. 228 (5 C. W. N. 692 *followed*)

In a partition suit, the Court has inherent power to fix a time within which objections to the Commissioner's report are to be filed, and if the order is not complied with, the Court is justified in refusing to hear the objections.—*Sheikh Serajuddin* v. *Sheikh Sharfuddin*, 17 A. L. J 483. 50 I. C. 152.

Appeal.—No appeal lies against an order of Court confirming or varying report of a Commissioner made in a partition suit under Or. XXVI, r. 14 (3); *Pirthipal* v. *Bhaskor*, 91 I C. 317: A. I. R. 1926 Oudh 195.

GENERAL PROVISIONS.

Expenses of Commission to be paid into Court.

15. Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued. [S. 397.]

COMMENTARY.

This rule exactly corresponds to s 397, C. P Code, 1882.

Expenses of Commission—Mode of Payment and Realization.—The Court will not order the costs of a commission to examine a defendant, who is a *pardanashin* lady, to be paid by her, or order the estimated cost of the commission to be paid into Court, although the application for the commission is made by the lady herself.—*Monindro Bhoosun* v. *Shoshee Bhoosun*, 5 C. 866.

When after the issue of a commission it is found that the work is in excess of the amount paid in for the costs of commission, and the party at whose instance the commission was issued is not willing to pay, the only way in which the additional costs can be realized is by making the amount of costs of the suit and entering the same in the decree.—*Tadhun Proshad* v *Sardar Coomar*, 10 C. W. N 234.

The Commissioner's fee in a partition suit should be realised from the decree-holder and the decree should not be drawn up until such sum had been deposited.—*Nanda* v. *Benode*, 15 C. W N 221

Where a Commissioner was appointed to take accounts at the request of the plaintiffs and his costs were not prepaid· *Held*, in a suit by the Commissioner against the plaintiffs for remuneration of his labour, that the plaintiffs were liable.—*Gopalaratnamayyar* v. *Bupala Narasimma*, 4 M. 399.

Where, in a suit in India, a commission to take evidence has been issued in England, costs of such commission to be taxed on the same scale, and on the same principle as would be adopted in England.—*Goculdas Bulabdas* v. *Scott*, 15 B. 209.

A Court cannot refuse to use the Amin's reports and the evidence taken by him as evidence in the suit for failure of a party to pay the Amin's fees, inasmuch as a commission issued to an Amin to hold a local investigation is not a process within the meaning of s. 20 of the Court Fees Act; and, therefore, the rules framed by the High Court under that section regarding process fees are *ultravires*, and cannot be enforced.—*Jugal Kishore* v. *Dina Nath*, 17 C. 281.

The Code of Civil Procedure does not authorize the dismissal of on refusal or failure of a party to deposit the amount ordered by the as remuneration to a Commissioner appointed under s 391, C. P 1882 (Or. XXVI, r. 11), to examine accounts. The remuneration Commissioner, appointed by the Court to examine accounts should, rule, be a definite amount and not at a monthly allowance.—*R Chariar* v. *Vedanta Chariar*, 3 M. 259

Under s. 36 of the present Code, the order of the Court regarding ment of Commissioner's costs may be executed as a decree There no such express provision in the old Code.

Reduction of Commissioner's Bills, When Justified.—There mu some confidence reposed in the Commissioners, who are pleaders officers of the Court, and their report as to the amount of work don them can only be set aside on substantial and definite grounds, *Bha Sahai* v. *Brijbhusan Prasad*, 1 Pat L T. 171 : 57 I. C. 291.

The District Judge has no power t tion claimed by a Commissioner for k a suit pending in the Court of the one which must be dealt with by the Subordinate Judge in whose C the suit is pending —*Panchanan* v *Madhu Sudan*, 44 I. C. 496

Powers of Commissioners.

16. Any Commissioner appointed under this Order m unless otherwise directed by the order appointment.—

(*a*) examine the parties themselves and any witness wh they or any of them may produce, and any ot person whom the Commissioner thinks proper call upon to give evidence in the matter referred him;

(*b*) call for and examine documents and other things re vant to the subject of enquiry;

(*c*) at any reasonable time enter upon or into any land building mentioned in the order. [S. 39[cut off]

COMMENTARY.

This rule exactly corresponds to section 398, C. P. Code, 1882

Powers of Commissioner.—There are no limits to the powers conf by the Code on a Commissioner for the purpose of making an inve tion.—*Mohun Lall* v. *Urnopoorna*, 9 W. R. 566. He has the [illegible] power and discretion to enquire into the matters referred to him for i vestigation unless limited by the wording of the commission; *Shib Soo duree* v. *Ram Chunder*, 17 W. R. 469; but he cannot go beyond the p referred to him for enquiry; *Ram Dhun* v. *Ram Monee*, 21 W. R. 2[cut off] *Bustee Sahoo* v. *Jeo Narain*, 24 W. R. 338.

An Amin appointed to hold a local investigation has power to examine witnesses relative to the matter he has to enquire into, but Court has no power to direct the Amin to try the whole case.—*Raghu Nath* v *Raj Krishna*, 1 B. L R. S N 2 A Commissioner has power under this rule to take evidence in the matter referred to.—*Tincowri* v *Suttya Doyal*, 6 C. L. J. 105.

It is the duty of the party obtaining a commission for the examination of witnesses to take such steps as may be necessary to secure the attendance before the Commissioner of the witnesses he desires to examine —*Lekhraj* v. *Palee Ram*, 2 N W P 210

Attendance and examination of witnesses before Commissioners.

17. (1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this Order whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of British India, and for the purposes of this rule the Commissioner shall be deemed to be a Civil Court

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper.
[S. 399.]

COMMENTARY.

Alteration in the Rule.—Sub-rule (1) corresponds to s 399, C P. Code, 1882, with some verbal changes only

Sub-rule (2).—Sub-rule (2) is new There was no similar provision in the old section. It has been framed to meet the case reported in 23 C. 404, noted below. Under the old section although the Commissioner had all the powers of a Civil Court to summon witnesses and to examine them, he had no machinery to cause the service of processes, etc , and hence sub rule (2) has been inserted

On an application to the High Court to authorize a Commissioner to issue process for the purpose of compelling the attendance of witnesses before him: *Held*, that the Commissioner should return the commission to the High Court. The High Court may then send the commission to a Civil Court within the limits of whose jurisdiction the witnesses to be examined reside.—*Mohomed Ali* v. *Wazid Ali*, 23 C. 404.

Where statements recorded on commission were not read over to the witness they are admissible in evidence and it is open to the Court to grant sanction for perjury in respect of such statements; *Mt Feroza Jan v. Mian Amir Ali*, 9 O. L. J. 593: 74 I. C. 445.

18. (1) Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

Parties to appear before Commissioner.

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence. [S. 400.]

COMMENTARY.

This rule corresponds to s. 400, C. P. Code, 1882, with some verbal alterations.

In sub-rule (2), the words "*where all or any of the parties*" have been substituted for the words "if the parties," and the words "*in their absence*" have been substituted for the word "*ex parte*" which occurred in the old section

Parties to Appear before the Commissioner.—Though there is no express provision in the Code to that effect, yet it is necessary to give notice to parties of the time when a local investigation ordered by the Court is to be held.—*Kistomonee v. Bglinton*, 12 W. R. 139.

A party who refuses to appear before an Amin at the time he holds his local investigation, is not at liberty afterwards to take any objection to the Amin's report.—*Bamun Dass v. Brojo Kishore*, 6 W. R. 199

A party who has not joined in a Commission is entitled to cross-examine the witnesses who are examined under the commission—*Gregory v. Dooley Chund*, 14 W. R. O. C 17.

Evidence taken in absence of other side.—*Held, that the evidence* given in the absence of other side is not enough to make the deposition of a witness taken on commission inadmissable.—*Ram Chand v. Kamini Debea*, 10 W R 236

When the Commissioner examined the witness *ex parte* in the absence of the defendant, the Court ordered the issue of a fresh commission for the examination of the witness, on conditions that the costs of such commission and the costs of the plaintiff attending the commission are to be borne by the defendant.—*Khan Mohammed Kassim v. Bridhi Chand*, 9 C W N cclxviii (268-n.).

Non-attendance at a local investigation.—The Judge's order should contain a distinct direction to the Commissioner to proceed *ex parte* in the event of the non-attendance of the parties.—*Essan Chunder v. Soorjo*, 1st. W. R. (F. B.) 1: 1 Ind. Jur. O. S. 3; Marsh 139.

In a suit to recover possession of some land in which a local enquiry was ordered to ascertain the boundaries of the land in dispute, the judgment of the High Court, upholding the decision of the lower Court which dismissed the suit, because the plaintiff failed to appear or take proper steps before the Amin at the local investigation, and because he omitted to give formal proof of his deed of purchase, confirmed.—*Mahomed Tuque* v. *Judonath Jha*, 16 W. R. 29, P. C.

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This rule corresponds to s. 400, C. P. Code, 1882, with some verbal alterations.

In sub-rule (2), the words "*where all or any of the parties*" have been substituted for the words "if the parties," and the words "*in their absence*" have been substituted for the word "*ex parte*" which occurred in the old section

Parties to Appear before the Commissioner.—Though there is no express provision in the Code to that effect, yet it is necessary to give notice to parties of the time when a local investigation ordered by the Court is to be held.—*Kistomonee v. Bglinton*, 12 W. R. 139.

A party who refuses to appear before an Amin at the time he holds his local investigation, is not at liberty afterwards to take any objection to the Amin's report.—*Bamun Dass v. Brojo Kishore*, 6 W. R. 139.

A party who has not joined in a Commission is entitled to cross-examine the witnesses who are examined under the commission.—*Gregory v. Dooley Chund*, 14 W. R. O. C. 17.

Evidence taken in absence of other side.—*Held, that the evidence* given in the absence of other side is not enough to make the deposition of a witness taken on commission inadmissable.—*Ram Chand v. Kamini Debea*, 10 W. R. 236.

When the Commissioner examined the witness *ex parte* in the absence of the defendant, the Court ordered the issue of a fresh commission for the examination of the witness, on conditions that the costs of such commission and the costs of the plaintiff attending the commission are to be borne by the defendant.—*Khan Mohammed Kassim v. Bridhi Chand*, 9 C. W. N. cclxviii (268-n.)

Non-attendance at a local investigation.—The Judge's order should contain a distinct direction to the Commissioner to proceed *ex parte* in the event of the non-attendance of the parties.—*Essan Chunder v. Soorji* ... W. R. (F. B.) 1: 1 Ind. Jur. O. S. 3; Marsh. 139.

pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government and may extend the time at its discretion. [S. 420.]

Attendance of person able to answer questions relating to suit against Government.

6. The Court may also, in any case in which the Government pleader is not accompanied by any person on the part of the the Secretary of State for India in Council, who may be able to answer any material questions relating to the suit, direct the attendance of such a person. [S. 421.]

Extension of time to enable public officer to make reference to Government.

7. Where the defendant is a public officer and, on receiving the summons, considers it proper to make a reference to the Government before answering the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel.

(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary. [S. 423.]

Procedure in suits against public officer.

8. (1) Where the Government undertakes the defence of a suit against a public officer, the Government pleader, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits. [S. 426.]

(2) Where no application under sub-rule (1) is made by the Government pleader on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties:

Provided that the defendant shall not be liable to arrest nor his property to attachment, otherwise than in execution of a decree. [S. 427.]

These rules are almost similar to the corresponding sections of the old Code. The changes introduced in these rules are of a mere verbal character.

ORDER XXVIII.

SUITS BY OR AGAINST MILITARY MEN.

1. (1) Where any officer or soldier actually serving the Government in a military capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorize any person to sue or defend in his stead.

Officers or soldiers who cannot obtain leave may authorize any person to sue or defend for them.

(2) The authority shall be in writing and shall be signed by the officer or soldier in the presence of (*a*) his commanding officer, or the next subordinate officer, if the party is himself the commanding officer, or (*b*) where the officer or soldier is serving in military staff employment, the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority, which shall be filed in Court.

(3) When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer or soldier by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person

Explanation.—In this Order the expression "commanding officer" means the officer in actual command for the time being of any regiment, corps, detachment or depot to which the officer or soldier belongs. [S. 465.]

COMMENTARY.

This rule corresponds to s. 465, C. P. Code, 1882, with verbal changes only.

A Court of Small Causes has no jurisdiction to try an action brought against a military officer in a military cantonment where a Court of Requests is established.—*Aboo Sait & Co. v. Arnott*, 2 M. 430

A non-commissioned officer or soldier, not serving in the army, but employed in the Civil Department and residing beyond military cantonments, is amenable to the jurisdiction of the Small Cause Courts as a Civil Court, even in cases below thirty pounds.—*Cohen v. McCarthy* 11 W. R. 231.

A European soldier doing duty as an army schoolmaster, [illegible] liable to a Court of Requests, is not exempted from liability to a [illegible]

ment Court of Small Causes. The Military Acts give soldiers no privileges as to liability to jurisdiction on actions.—*Marmady Beejarajoo* v. *Haynes*, 6 M. H. C. 83.

The 99th section of the Military Act (30 and 31 Vict., cap 13) exempts officers in all places in India, where anybody of Her Majesty's force may be serving, from the jurisdiction of the Civil Courts in respect of personal actions.—*Hossein* v *Dickenson*, 2 B. L R. S N. 3. 9 W. R 113.

COMMENTARY.

Reference to the High Court regarding the amenability of European soldiers and their native wives to Small Cause Courts in actions for debt.—*Kefee* v. *Christie*, 5 W R S C. C Ref 21.

Person so authorized may act personally or appoint pleader.

2. Any person authorized by an officer or a soldier to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as the officer or soldier could do if present; or he may appoint a pleader to prosecute or defend the suit on behalf of such officer or soldier. [S. 466.]

Service on person so authorized or on his pleader to be good service.

3. Process served upon any person authorized by an officer or a soldier under rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person. [S. 467.]

COMMENTARY.

The provisions of section 468 of the C. P. Code of 1882, which prescribed the rules for service of summonses on a military officer, have been embodied in Or. V., rr. 28 and 29.

ORDER XXIX.

SUITS BY OR AGAINST CORPORATIONS.

Subscription and verification of pleading.

1. In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case. [S. 435.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to section 435, C. P. Code, 1882, with some alterations and omissions. The words "*or by company auhorized to sue and be sued in the name of an officer or of trustee*," which occurred in the old section, have been omitted and the reason of such omission, as stated in the Report of the Select Committee is that "companies authorized to sue and be sued in the name of an officer or of a trustee must be very few, if, indeed, any exist, and they do not appear to call for special treatment."

The above omission seems also to have been made on the ground that the word "*corporation*" includes a company registered under the Indian Companies Act of 1882, and most companies are now-a-days registered.

The words "*or against*" have been added so as to include a defendant corporation; hence the word "*pleading*" has been substituted for the word "plaint" which occurred in the old section.

The word "corporation" has not been defined in this Code. It means "a fictitious body invested by law with the attributes of a person having a corporate name, by which it can sue and be sued and hold property, and enjoying immortal existence by reason of a perpetual succession of its members"—See *Williams on Real Property 20th Ed.*, pp. 295-96.

Form of Suit By or Against Corporations.—A corporation or company should be sued in its corporate name, and not in the names of its agents or servants.—*Ram Das Sen* v. *Collector of Moorshedabad*, 2 B. L. R. S. N. 6; 10 W. R. 336; and *Nubeen Chander* v. *Stephenson*, 15 W. R. 34.

Order XXIX, r. 1 applies only to corporations strictly so called, i.e., to bodies authorized by law to act as a person in law and not to unincorporated bodies or associations of men; *Ma Gyi* v. *Pat Lon*, 9 Bur. L. T. 27: 38 I. C. 572.

In the case of an unincorporated or unregistered company, the plaintiff if he does not know of what persons the company is composed, may sue the company by the name under which they are carrying on business, stating in his plaint his inability to describe them better.—*Kaylash Chunder* v. *Ellis*, 8 W. R. 45. But see, *Ganesha Singh* v. *Mundi Forest Company*, 21 A. 340; and *Panchaili Akhara, etc.* v. *Gouri Kuar*, 20 A. 167, in which

it has been held that where a company is not registered under Act VI of 1882, a plaintiff bringing a suit against such company must make each individual member of the company a defendant in the suit, and he cannot escape from this obligation by stating his inability to do so. *See* also, *The Mahomedan Association of Meerut* v. *Bukhi Ram*, 6 A. 284.

When a suit is brought against two companies, they should be described by their proper names.—*India General S N R. Co* v. *Lalmohon Saha*, 43 C 441: 22 C. L. J 241.

Unless a company is incorporated under Act VI of 1882, and authorized to sue or be sued in the name of an officer, it cannot sue by any of its officers.—*Campbell* v. *Jackson*, 12 C. 41. *See* also, *Ghulam Muhammad* v. *The Himalaya Bank*, 17 A. 292.

The Cantonment Committee of Poona is a body corporate, and is liable to be sued for damages in its corporate name on contracts entered into in its corporate character.—*Cantonment Committee, Poona* v. *Barjorji Bamanji*, 14 B 286.

An action to recover the price of goods supplied to a member of a non-proprietary club, or on his responsibility, cannot be brought in the name of the Secretary of the club.—*Michael* v. *Briggs*, 14 M. 362.

The Secretary of a Government aided school can maintain an action for the benefit of the school —*Sreehury Roy* v *Hills*, 6 W R. Civ Ref. 21. *See* also, 22 B. 754.

Foreign Corporation.—A foreign corporation is entitled to sue in its corporate character in this country without being registered under the Indian Companies Act of 1913 or an Act of Parliament. Thus a plaint filed in the Delhi Court on behalf of the Singer Manufacturing Company, which is incorporated in the United States of America, may be verified by an agent holding a general power of attorney from the Company as a "principal Officer" of the Company within the meaning of this rule;—*Singer Manufacturing Co.* v *Baijnath*, 30 C. 103; *Singer Manufacturing Co.* v. *Yar Mahummad*, 8 P. R. 1912.

Subscription and Verification of Pleadings.—S. 51, C. P. Code, 1882 (Or. VI, rr. 14, 15), regulating proceedings by or on behalf of ordinary plaintiffs, does not apply in the case of a corporation or company, but this rule is applicable. An acting manager of a corporation or company is a principal officer within the meaning of this rule, and can subscribe and verify the plaint on behalf of the company or corporation.—*Delhi and London Bank* v. *Oldham*, 21 C. 60, P C

Order XXIX of the C P. Code deals with the subscription and verification of pleadings in suits by or against a corporation. They say nothing about the manner in which the suit itself is to be framed: *Sinchi Ram Bihari Lall* v. *The Agent East India Ry. Co.*, 2 P. L. T. 679.

This rule does not require a "principal officer" of a corporation to verify a plaint from actual personal knowledge. The rule shows that a verifier may depose upon his information and belief.—*The Port Canning and Land Improvement Co.* v. *Dharnidhar*, 9 C. W. N. 608.

In a suit by an agent of unincorporated society: *Held* that, inasmuch as the Board of Foreign Missions of the Presbyterian Church of New York was not a corporation or company authorized to sue or be sued in the name of an officer or trustee within the meaning of this rule, and also as the person signing the plaint did not profess to be suing on his own possessory title to the land in respect of which ejectment was claimed, the suit must be dismissed.—*Yusuf Beg* v *Board of Foreign Missions*, 16 A 420

Held, that a plaint in a suit by a bank in liquidation in which the plaintiff was described as "The Official Liquidator, Himalaya Bank," and which was also subscribed and verified in the same terms was not a valid plaint.—*Ghulam Muhammad* v. *Himalaya Bank*, 17 A. 292.

Signing of plaint by the principal officer of a corporation is, notwithstanding that he is an Ammuktear, a sufficient compliance with the provisions of this rule.—*Chandra Sekhar* v. *Ram Koomar*, 20 C L J. 89

"Who is able to depose to the facts of the case."—Where a petition by the Bank of Bengal was verified by a person described as the officiating Inspector of Branches, Bank of Bengal, and there was nothing to show that he was not the officer authorized to sue or verify the petition on behalf of the Bank at Chittagong, or that he was not able to depose to the facts of the case *Held*, that the petition was properly verified under this rule.—*Ram Komal* v *Bank of Bengal*, 5 C. W. N. 91.

A plaint or a written statement may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case; *Sreenath* v. *East Indian Railway Co* , 22 C. 268.

Dismissal of Suit.—Where the plaint is signed and verified by an officer other than the principal officer of the corporation, the suit ought to be dismissed; *Yusuf Beg* v. *The Board of Foreign Missions of the Presbyterian Church*, 16 A. 420

Service on corporation.

2. Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served:

(*a*) on the secretary, or on any director, or other principal officer of the corporation, or

(*b*) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business. [S. 436.]

COMMENTARY.

This rule corresponds to the first part of s 436, C P Code, with some omissions and alterations. The section has been re-arranged, and except the change in its wording and phraseology, no other material change has been made.

Service by Post.—The Committee have enlarged the language of the Code so as to allow of service by post on corporations having a Registered Office, and by this means the rule is brought into line with the provisions of the "Indian Companies Act."—*See the Report of the Special Committee.*

Service on Corporation.—An Executive Engineer of a Railway Company is not an officer on whom a service may be made under this rule; and for the purposes of summons, a Railway Company must be deemed to dwell at its principal office —*Hanion* v. *Indian Branch Railway Company*, 1 Hyde. 197.

The Traffic Superintendent is not the Manager's Agent, and notice to him is not notice to the Railway Administration within the meaning of s. 77 of the Indian Railway Act (IX of 1890).—*Secretary of State* v. *Dipchand*, 24 C. 306. *See* also, *Periannan Chetti* v. *South India Railway Company*, 22 M. 137.

3. The Court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit. [S. 436, last para.]

Power to require personal attendance of officer of corporation.

COMMENTARY.

This rule corresponds to the last para of s 436, C. P. Code, 1882, with the addition of the words "*at any stage of the suit.*"

In a suit by an agent of unincorporated society: *Held* that, inasmuch as the Board of Foreign Missions of the Presbyterian Church of New York was not a corporation or company authorized to sue or be sued in the name of an officer or trustee within the meaning of this rule, and also as the person signing the plaint did not profess to be suing on his own possessory title to the land in respect of which ejectment was claimed, the suit must be dismissed.—*Yusuf Beg* v. *Board of Foreign Missions*, 16 A. 420

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2. Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served:

(*a*) on the secretary, or on any director, or other principal officer of the corporation, or

(*b*) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business. [S. 436]

COMMENTARY.

This rule corresponds to the first part of s. 436, C. P. Code, with some omissions and alterations. The section has been re-arranged, and except the change in its wording and phraseology, no other material change has been made.

India. "Carrying on business" means the possession in British India of a place of business held in the name of the firm, whether business is carried on behalf of the firm by a partner or by a person or persons in the pay of the firm. It makes no difference whether the partners are or are not out of British India, or whether or not they have another place out of British India. If they are carrying on business in British India in the firm's name, they can be sued as an Indian firm; *Worcester & Co.* v. *Fir Bank Pauling & Co.*, (1894) 1 Q B 784; *Shepherd* v. *Hirsch & Co.*, 45 C. D. 231; *Lysaght* v. *Clark*, 1 Q B. 552

"At the time of the accruing of the cause of action."—These words indicate that a suit contemplated by this rule may be brought by or against a firm in the firm's name, even though the firm may have been dissolved before the date of the suit, provided the cause of action arose before the dissolution, *Pulin* v. *Mahendra*, 34 C L. J 405; *Harjibandas* v. *Bhagwandas*, 49 C 394: 69 I C 236· A. I R. 1922 Cal. 390.

Suing of Partners in Name of Firm.—The effect of the provisions regarding suits against partners in the firm's name is merely to give a compendious mode of describing in the writ the partners who compose the firm; in effect the partners are sued individually. The firm's name is a mere expression and not a legal entity, *Ramprasad Chimonlal* v. *Anundji & Co*, 49 C. 524. A. I R. 1922 Cal. 408; *Gopaldas* v. *Baijnath*, 48 A. 239: A. I R. 1926 All. 238.

Where a suit is filed against a firm, but the defendant is also described as the owner of the firm and a question of limitation is pressed by the heirs of the defendant who are subsequently impleaded, the suit must in effect be treated as one against a firm and the subsequent words of description mere surplusage; *Motilal Jasraj* v. *Chand Mal Hindu Mal*, 25 Bom. L. R. 1081.

Under the old law in suits by or against a firm, all persons who are members of it were necessary parties, that is, in suits concerning partnership business, all the members of the firm were necessary parties. *See*, 25 W. R. 118; 7 C L J. 266; 31 C. 487, P. C.: 8 C. W. N. 442. In *Yeknath Babaji* v. *Gulab Chand*, 1 Bom H C. 85, it was held that in an action against a firm, the names of the partners should be specified in the plaint To remove all these technical obstacles the present rules have been framed.

Under the *present rule a firm may sue or be sued in the name of the firm*, without first ascertaining the names of all the members of the partnership. But at the same time it has been provided in sub-rule (1) that any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons, who were, *at the time of accrual of the cause of action*, partners in such firm, *that is*, who were partners of the firm before the dissolution of the partnership

Sub-rule (2) provides that in suits concerning partnership business, pleading, etc., may be signed and verified by one of the members of the firm.

Where a suit is instituted by one of the partners on behalf of the firm as its agent, the suit cannot be dismissed on account of the non-joinder of the other parties. All that the defendant is entitled to is

the disclosure of the names of those parties. If the other partners are added, as plaintiffs even after the period of limitation, the suit cannot be held to be barred by s 22 of the Limitation Act.—*Marayya Chetti* v. *Sami Chetty*, 2 L W 289 · 28 I. C. 210.

Minor.—Where a suit is brought against a firm, the mere fact that there is a minor member of the firm, does not bring the suit within the purview of Or. XXXII Where the matter is referred to arbitration it is not necessary that the Court should give assent under Or. XXXII r 7; *Sukha Nand* v *Beharram*, 68 I. C. 750

Where a suit is brought by one firm against another through their representatives, they can agree to refer the dispute to arbitration and the validity of the award is not affected by the fact that the minor members of the firm did not sign the reference to arbitration; *Firm of Bishambar Mal Pale Mal* v *Firm of Ganga Sahai Nihal Chand*, 5 Lah. L. J. 5: 71 I. C. 734.

Suit Against Firm—One Partner Cannot Refer the Case to Arbitration so as to Bind Others.—Or XXX, r. 1, sub-cl. (2) does not empower one partner to refer a case to arbitration so as to bind the other partners who have not agreed to or joined in the application for reference It could never have been in the contemplation of the Legislature to make an agreement for reference to arbitration by only one of the partners binding on all the partners, merely because the suit is against the firm as such, *Gopaldas* v. *Baijnath*, 48 A. 239: 24 A. L. J. 235. 91 I C. 930. A. I. R 1926 All 238.

Title of Suit.—The plaintiff who was a minor was described in the title of the plaint as "owner of the shop C" It was stated in Para 4 of the plaint "As the plaintiff the owner of the shop is a minor, the suit is not barred by limitation." The suit was dismissed by the trial Court holding that the plaintiff was the shop and not the minor. *Held* the dismissal was wrong —*Chambassappa* v. *Mal Kappa*, A. I. R. 1923 Bom. 368.

Verification of Plaint.—Two or more persons carrying a business in the name of a firm can institute a suit in the name of the firm itself When a suit is brought in the name of the firm any of the partners can sign and verify the plaint It is not necessary that all or even two partners should sign or verify it.—*Swarath Ram Saran Ram* v *Sarup Lal Ram*, 12 A. L J. 1020.

2. (1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.

Disclosure of partner's names.

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub-rule (1) all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct.

(3) Where the names of the partners are declared in the manner referred to in sub-rule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint:

Provided that all the proceedings shall nevertheless continue in the name of the firm. [New.]

COMMENTARY.

This rule is new It has been taken from English Or. XLVIII-A, r. 2.

Under this rule, where a suit is instituted in the name of a firm, the plaintiffs or their pleaders shall, on demand by or on behalf of any defendant must disclose the names of the partners and in default the proceedings in the suit may be stayed.

Disclosure of Partner's Names.—If the plaintiff firm has not made a full disclosure of their partners, the proper procedure is not to dismiss the suit, but allow the firm to put in a further declaration making a full disclosure and thus remedy the defect —*Imperial Pressing Co. v. British Crown Assurance Corporation*, 41 C 581, 585

3. Where persons are sued as partners in the name of their firm, the summons shall be served either —

Service.

(a) upon any one or more of the partners, or

(b) at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there,

as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India:

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable. [New.]

COMMENTARY.

This rule is new, it has been taken from English Or. XLVIII-A, r. 3.

This rule provides the mode of service of summons, notices, etc, in suits concerning partnership business. Its provisions are somewhat similar to the proviso to s. 74, C. P. Code, 1882.

Service of Summons.—This rule prescribes two alternative modes of service of summons in suits instituted against firms The first mode is by service upon any one or more of the partners. The second mode is by service at the principal place of business of the partnership, within British India, upon the person who has the control or management of the partnership business. If service is effected, in either of these modes, in accordance with law, there is good service upon the firm as a corporate entity and it is immaterial whether all or any of the partners are within or without British India; *Baisnab Charan* v. *Bank of Bengal*, 19 C. W. N. 1008; *Adiveppa* v. *Pragji*, 26 Bom. L. R. 388 It must be remembered, however, that in the case of service on a partner, it is good service not only upon the firm but also upon the partner personally, though it is not service upon any other member of the firm so as to make such member not served liable in execution proceedings under Or. XXI, r. 50 (1) (c). On the other hand if there has been a service upon the person who has the control or management of the business but is not a partner himself, such service is good service upon the firm but it is not service on any member of the firm so as to make him liable in execution proceedings under Or. XXI, r. 50 (1) (c); *In re Ide*, 17 K. B. D. 755. Where the mandate to bailiff is to serve the summons under Or XXX, r. 3 (b), on the manager or the managing partner of the firm at the place where the firm is carrying on business, and the name of the person to be served is not specified in the summons, it is no duty of the bailiff to deviate from this mandate and attempt to ascertain for himself who the managing partner is or to attempt to serve the summons on such managing partner by affixing it to his residence. Such a service is not proper service under Or. XXX; *Manji Mal* v. *Khub Chand*, 95 I C. 149· A. I. R. 1926 Sind 208.

Sections 74 and 76, C. P. Code, 1882 (Or. V, r. 11 and Or. V, r. 13), do not apply, where some of the defendants who are interested in the partnership are minors. Those sections are controlled by s. 443, C. P. Code, 1882 (Or XXXII, r. 3).—*Jotindra Mohun* v. *Srinath Roy*, 26 C 267: 3 C. W. N. 261 (14 C. 204 *referred to*).

In a suit instituted against a partnership firm, all the members whereof were non-residents at the place in which the business was carried on, service of summons could not be made under s. 80, C. P. Code, 1882 (Or. V, r. 17), on the refusal of the manager of the firm to accept service, by affixing a copy of the summons on the outer door of the house in which the business was located. S. 80, C. P. Code, 1882 (Or. V, r 17), contemplates that the persons sought to be served should be residing at the house But service so effected was properly made under s. 74, C. P. Code, 1882 (Or. V, r. 11), which contemplates, service on the person having management of the business, unless the Court otherwise directs —*Akhoy Kumar* v. *Nagendra Lal*, 13 C. W. N. 400.

Service in Case of Suit Against a Dissolved Firm.—An *ex parte* decree was obtained against a firm which had been sued in the firm's name and served as such with the leave of the Court by registered post. It

was alleged in an application to set aside the *ex parte* decree by the applicant that the summons was not duly served and that the firm had long ceased to carry on business as such firm but was being wound up by the applicant. *Held*, a suit can be brought against a firm in its firm name even if it be a dissolved firm provided only that the liability arose at a time when the firm was in existence. Under Or. XXX, r. 3, the only way in which such writ can be served is by serving it either upon a partner or by serving it at the principal place at which the partnership business is carried on in British India on a person having at the time of service control or management of the partnership business. If r. 11 of Chapter VII of the High Court rules is applied, it is necessary that it should be so applied as to comply with Or. XXX, r 3; *Herjibandas Govardhandas* v. *Bhagwandas Pursram*, A. I. R. 1922 Cal. 390.

"May direct."—The words "may direct" do not indicate express permission.—*Akhoy* v. *Nagendra*, 13 C. W N. 490.

Right of suit on death of partner.

4. (1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have—

(*a*) to apply to be made a party to the suit, or

(*b*) to enforce any claim against the survivor or survivors. [New.]

COMMENTARY.

Object and Scope of the Rule.—This rule is new. Section 45 of the Indian Contract Act IX of 1882, to which reference has been made in this rule, runs as follows: "*When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and after the death of the last survivor, with the representatives of all jointly*"

This rule has been framed to meet the following rulings under s. 45 of the Indian Contract Act in which it has been held that s. 45 of the Contract Act relates to partners as well as to other co-contractors. In *Moti Lal Bechardas* v *Ghellabhai*, 17 B 6 (11), (following 6 B. 700), it has been held that the right to performance of the contract, as far as the other contracting party is concerned, rests just as much with the representative of the deceased partner as with the surviving partner. Th

case has been approved in *Aga Gulam Hussain* v. *A. D. Sassoon*, 21 B 412 (421). *See* also, *Gobind Prasad* v. *Chander Shekhar*, 9 A. 486, and *Debi Das* v. *Nirpat*, 20 A. 365. In *Vaidyanath* v. *Rangasami*, 17 M 108 (117), it has been held that a surviving partner can sue alone for the recovery of a partnership debt. In *Ram Narain* v. *Ram Chander*, 18 C 86 (90), it has been held that the representatives of a deceased partner must always be made parties to suits as plaintiffs with the surviving partners.

On the death of a partner the right to sue in respect of debts due to the firm survives to the surviving partners.—*Bal Kissen* v. *Kanhya*, 17 C. L J. 648: 21 I. C 569

One of several joint contractees may sue to enforce his share of the obligation, if the other co-contractees are joined as defendants As a general rule all co-contractors ought to be joined as plaintiffs A suit by one would not be bad, if others are joined as defendants, and if there are good reasons for not joining them as plaintiffs.—*Shital Chandra* v. *Manik Chandra*, 9 C L. J 331 13 C. W. N 509 (26 C. 409 *followed*, 6 C. L. J 558, 25 C 787 *referred to*).

Applicability of the Rule.—Or. XXX, r. 4 of the C. P. Code, applies only to a case where the suit is brought in the name of the firm.—*Monmohan* v *Bidhubhusan*, 28 C L. J. 268: 48 I. C 309.

Rule 4 is limited in its operation to suits instituted by or against partners in the name of their firm and not in their individual names Hence in a suit filed by two partners individually, if one of them dies pending suit, but his legal representatives are not brought on the record, the suit shall abate; *Dost Mahomed* v. *Mohandas*, 91 I C 573: A. I R. 1926 Sind 81

Notice in what capacity served.

5. Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner. [New.]

COMMENTARY.

This rule has been taken from English Or. XLVIII-A, r. 4

This rule mentions three capacities in which notices may be served (1) Notice may be as a partner; (2) or as a person having the control or management of the partnership business; (3) or in both characters If the above provisions are not complied with, the person served shall be deemed to be served as a partner

Notice in What Capacity Served.—The present rule provides that the person served with a summons under 3 should be informed by notice in writing given at the time of the service, whether he is served

as a partner of the firm or as a person having the control or management of the partnership business or in both characters. In default of notice, the person served will be deemed to be served as a partner.

Appearance under Protest.—*See* r. 8, below.

In the absence of a written notice as to the capacity of the person on whom summons is served, the person served shall be deemed to be served as a partner and if he wants to contest that, he must appear under protest under r. 8: *Baisnab* v *Bank of Bengal*, 19 C W. N. 1008: 19 C. L. J. 581.

Appearance of partners.

6. Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless continue in the name of the firm. [New.]

COMMENTARY.

This rule has been taken from English Or XLVIII-A, r. 5.

"Individually."—Under Or. XXX, r 1 of the C P Code, a plaintiff suing a firm is entitled to know who the persons are who constitute that firm and the information cannot be withheld. *Held* also, that the word "individually" in r 6 is not synonymous with "in person". no partner can be forced under this rule to appear in person, but in his absence, after service of summons he will be dealt with *ex parte* And if appearance is put in for him, it will be reckoned as his individual appearance —*Bridges and Co* v. *Shamas Din & Co*, 78 P R 1918 P W R 1918 47 I. C 422

"All subsequent proceedings shall continue in the name of the firm."—In every suit against partners sued in the firm's name, the plaint and all subsequent proceedings must be headed with the firm's name as defendants; *Ajit Sing* v. *Grunning*, 27 Bom L R 998 A. I R 25 Bom. 494; *Pulin* v *Mahendra*, 34 C. L J 405 67 I. C 10

No appearance except by partners.

7. Where a summons is served in the manner provided by rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued [New.]

This rule has been taken from English Or XLVIII-A, r. 6.

Appearance under protest.

8. Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared. [New.]

COMMENTARY.

This rule has been taken from English Or. XLVIII-A, r. 7

Appearance under Protest.—The plaintiff filed a suit a defendants and served the summons on one *N* as a partner in t ants' firm *N* entered an appearance under protest and filed statement denying that he was a partner in the defendants' plaintiffs got an *ex parte* order for adjournment of the suit in they might serve dupilcate writ of summons on the defen applied that the order should be vacated and that the suit placed on board for trial of the issue whether he was a part defendant's firm. *Held*, that the order for adjournment sh in order to enable the plaintiff to serve the summons on the t firm, and that *N* had the right to have the question whether partner in the defendants' firm decided by the Court.—*Vithaldas* v. *Hansraj*, 23 Bom L R 1249.

Suits between co-partners.

9. This Order shall apply to suits between a firm or more of the partners therein and between firms having one or more pa common; but no execution shall be such suits except by leave of the Court, and, on an ap for leave to issue such execution, all such accounts and may be directed to be taken and made and directions give be just.

COMMENTARY.

This rule has been taken from English Or. XLVIII-A, r. 1

Rules 6, 7, 8 and 9 are to be read with r. 50 of Or. X prescribes the mode of execution of a decree against a firm.

Suit against person carrying on business in name other than his own.

10. Any person carrying on business in a name other than his own name may be sued name or style as if it were a firm na so far as the nature of the case will all rules under this Order shall apply.

COMMENTARY.

This rule has been taken from English Or. XLVIII-A, r. 1

Scope of the Rule.—This rule applies to a single indivi carries on business under an assumed or trading name other that name; and in such case the foregoing rules of this Order will such individual, who may be sued either in his own name, o trade name.

Application of the Foregoing Rules.—All the rules of this order relating to suits against firms have been made applicable by the latter part of this rule to suits against a person trading in the name other than his own, so far as the nature of the case will permit.

ORDER XXXI.

SUITS BY OR AGAINST TRUSTEES, EXECUTORS AND ADMINISTRATORS.

Representation of beneficiaries in suits concerning property vested in trustees, etc.

(1) In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made parties [S. 437.]

COMMENTARY.

This rule exactly corresponds to s. 437, C. P. Code, 1882, with the substitution of the word "*where*" for "when."

The word "trustee" has not been defined in this Code. For the definition of "trustee," *see*, the Indian Trust Act (II of 1882)

For the definition of the words "executor" and "administrator," *see*, s 3 of the Indian Succession Act (X of 1865)

This rule applies only when the contention is between the persons beneficially interested and a third party, but it does not apply where the contention is beween beneficiaries and trustees or between the beneficiaries themselves *See*, 18 M. 266 (272), noted below.

Scope of the Rule.—This rule applies only where the dispute is between the beneficiaries and a third person. It does not apply where the contention is between beneficiaries *inter se*. This rule does not purport to have been enacted for the purpose of enumerating the cases in which suits may be brought by or against a person in a representative character, they merely provide a mode of disposing of suits concerning property vested in trustees, executors, or administrators.—*Raghunandan v Parmeshwar*, 2 Pat. L. J. 306: 39 I. C 779.

Representation of Beneficiaries.—*Held* that, having regard to this rule the persons acting as trustees in succession under the will of a Parsi testator, made before Act X of 1866 came into operation, but proved subsequently, adequately represented all persons beneficially interested in the estate in all suits relating to it.—*Ardesir Jehangir v. Hira Bai*, 8 B 474

Under the provisions of the C. P. Code, the representatives of trustees are necessary paries to a suit for the recovery of trust property —*Annapurna Dabee v Moni Mohun*, 7 C. W. N. (S. N.) lxviii (68).

A trustee represents the persons beneficially interested, when the suit is concerning property vested in the trustee, and the contention is between the persons beneficially interested and a third party.—*Sathianama* v. *Saravanabagi*, 18 M. 266 (272)

A trustee sufficiently represents the beneficiaries for the purposes of a suit, and the beneficiaries entitled under the declaration of trust need not be made parties.—*Beresford* v. *Ramasubba*, 13 M. 197.

An executor of the will of a deceased Mahomedan, since the coming into operation of the Probate and Administration Act (V of 1881), cannot claim to represent the estate of his testator until he has taken out probate. *Fatema* v. *Essa*, 7 B 266. Reserved in appeal. *See*, 8 B. 241.

Where a suit for possession was brought by an executor in September 1898 and the names of the beneficiaries who took possession of the estate during the pendency of the suit were substituted as plaintiffs in November 1900: *Held*, that no new plaintiffs were substituted within the meaning of s 22 of the Limitation Act —*Janhabi Chowdhurani* v *Brojo Mohini*, 7 C. W. N. 817

The representatives of a testator are entitled to sue for the enforcement of the due performance of the trusts created by him for religious and charitable purposes, and in which they are not personally interested, but their suit will be dismissed, unless upon their plaint they substantially allege a state of circumstances which, if proved, will constitute a distinct breach of trust.—*Brojo Mohun* v *Hurro Lall*, 6 C. L R. 58· 5 C 700

Where a decree for foreclosure was obtained, against *S* who was the executor of his father's estate, and subsequently *A*, brother of *S*, and *M*, a purchaser of some of the mortgaged properties from *A*, made an application to be made parties and to redeem· *Held*, that they were not entitled to be made parties —*Mohanand* v *Akhoy Kumar*, 6 C W. N. 488.

A creditor of a deceased debtor cannot sue a person named as executor in the will of the deceased unless he has either intermeddled with the estate or proved the will An action commenced against the heir-at-law cannot be continued against him after the grant of probate, but the executor must be added as defendant.—*Dhirendra Kanta* v. *Kumar Saradindu*, 1 C. L. J. 29-n.

A beneficial owner is not a necessary party for setting aside an execution sale It is competent to the Court to set aside the sale finally and conclusively as against the beneficial owner although his benamidar only, and not he, is made a party to the proceedings.—*Barada Kanta* v. *Chunder Kanta*, 29 C. 682 6 C. W N 706.

In the absence of fraud or collusion the decree obtained against an executor or administrator and the sale thereunder, are binding upon their successors.—*Bai Meherbai* v. *Magan Chand*, 29 B. 96.

Section 85 of the Transfer of Property Act (IV of 1882), by reference to this rule, indicates, in very clear terms, who are to be regarded as representatives of persons, and they are trustees, executors, and administrators, —*Lala Surje Prosad* v. *Golab Chand*, 28 C. 517 (528): 5 C. W. N. 640,

In a suit by one legatee for legacy bequeathed to him, the executor may apply for his protection that other legatees may be made parties, and in such a case it is discretionary with the Court to make the addition of parties — *Purshottam v Kala Govindaji*, 26 B. 301.

When a suit for rent was brought against two persons as *mutwallis*, but one of them who was a minor was not properly served and no guardian was appointed on his behalf: *Held*, that the *mutwallis* are trustees and the presence of all of them in the suit was essential, and the suit was properly dismissed for defect of parties.—*Syed Abdul Rab* v. *H. C. Egan*, 12 C. W. N. 160.

So long as letter of administration, which was obtained by fraud, is not revoked, the guarantee to all intents and purposes alone represents the estate, and his receipts are valid discharges for all monies received by him as administrator.—*Debendra Nath* v. *Administrator-General, Bengal*, 12 C. W. N. 802, P. C.

When Beneficiaries may be Added as Parties.—Beneficiaries are made parties when the trustee is either wholly uninterested or has an interest adverse to their interest.—*Beresford v. Ramasuba*, 13 M. 197; *Clegg v. Rowland*, L. R. 3 Eq. 368. Where a suit for recovery of possession was brought by an executor, and the names of the beneficiaries, who took possession during the pendency of the suit, were subsequently substituted as plaintiffs, it was held that no new plaintiffs were substituted within s. 22 of the Limitation Act; *Jahnabi v. Brojomohini*, 7 C. W. N. 817. The beneficial owner can sue to get the benefit of a decree obtained by his trustee; *Juggobundhoo v. Nil Comul*, W. R. (1864) 190; but he is not a necessary party to a proceeding for setting aside an execution sale, *Baroda v. Chunder Kanta*, 29 C. 682.

Joinder of trustees executors and administrators.

2. Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them:

Provided that the executors who have not proved their testator's will, and trustees, executors and administrators outside British India, need not be made parties. [S. 438.]

COMMENTARY.

This section corresponds to section 438, C. P. Code, 1882, with some additions and alterations

The word "*where*" has been substituted for "when" and the word "*trustees*" has been added before the word "executors" and the words "*outside British India*" have been substituted for the words "beyond the local limits of the jurisdiction of the Court." By the above substitutions the scope of the section has been enlarged

"**Several trustees, executors or administrators.**"—Under this rule where there are several executors, they must all be made parties, subject to the proviso that the executor living outside British India need not be

made parties. The onus is upon the defendant to show that the executor is living within British India.—*Kumar Saradindu* v. *Dhirendra Kant*, 2 C. L. J. 484.

Where a Mahomedan testator had by his will appointed three executors only one of whom had acted and got possession of the estate, a suit by the testator's widow for administration of the estate was held sufficiently well constituted for the purpose of a motion for receiver, although only the executor who had acted was made defendant, the other two executors not being parties to the suit.—*Hafizabai* v. *Abdul Karim*, 19 B 83

In a suit against a temple, all the trustees are necessary parties even though there is an agreement between them authorizing one of them to represent the temple, *Adiraju* v. *Pattu*, A. I. R. 1922 Mad 405· 77 I. C. 942

Husband of married executrix not to join.

3. Unless the Court directs otherwise, the husband of a married trustee, administratrix or executrix shall not as such be a party to a suit by or against her. [S. 439.]

ORDER XXXII.

SUITS BY OR AGAINST MINORS AND PERSONS OF UNSOUND MIND.

Minor to sue by next friend.

1. Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor. [S. 440, para. 1.]

COMMENTARY.

This rule corresponds to para 1 of s 440, C. P. Code, 1882 with some omissions The last sentence of para. I of the old section which ran as follows "*And may be ordered to pay any costs in the suit as if he were the plaintiff,*" has been omitted.

The second para. of s. 440, was added by s. 53-A of Act VIII of 1890, but that section has been repealed by the present Code, and the provisions contained in ss 53, 53-A, 53-B 53-C, 53-D, and 53-E, by which ss 440, 443, 446, 461 and 464 of the old Code were amended, have been now incorporated in the present Code in an amended form.

Minor.—S 3 of the Indian Majority Act (IX of 1875) enacts that every person domiciled in British India who has not completed the age of 18 years is in law deemed a minor; but a minor of whose person or property a guardian has been appointed by the Court of Justice or whose property is under the superintendence of a Court of Wards shall attain his majority on completing the age of 21 years

The age of majority of a European British subject not domiciled in British India is 21 years —*Rohilkhand and Kumaon Bank* v. *Row*, 7 A 490

When a person, who by his father's will is made a guardian of his minor brother, and obtains probate of the will, such a guardian is not one "appointed by a Court of Justice" within the meaning of s 3 of the Majority Act (IX of 1875), and the minor attains majority on his completing the age of 18 years —*Jogesh Chunder* v. *Umatara*, 2 C. L R 577

The appointment of a guardian *ad litem* is sufficient to make the minor party subject to s. 3, Act IX of 1875, and to constitute his period of majority at 21, at any rate so far as relates to the property in suit, notwithstanding that such minor would, but for such appointment, have attained majority at 18 —*Suttya Ghosal* v. *Suttyanund*, 1 C. 388

The intention of the Legislature to be gathered from s. 3 of the Majority Act (IX of 1875) would appear to be to extend minority to 21 years of age in cases where at the time the minor reaches the age of 18, his person or property is in the hands of a guardian.—*Yeknath* v. *Warubai*, 13 B 285

When a guardian has once been appointed to a minor under the provisions of Act XL of 1858 or Act VIII of 1890, the disability of infancy will last till the age of 21 whether the original guardian continue to act or not—

Rudra Prokash v *Bhola Nath*, 12 C. 612: *Joyram* v. *Mahadeb*, 13 C. W. N. 643; *Guardhan Das* v. *Harivalubh Das*, 21 B 281; *Sadho Lal* v. *Murlidhar*, 29 A. 672· 4 A. L. J. 597; *Khawahish Ali* v. *Surju Pershad*, 3 A. 598. But see, *Birj Mohan Lall* v. *Rudra Prokash*, 17 C. 944. But where the order of appointment is subsequently set aside, the period of minority does not extend to 21 years.—*Nagardas* v. *Anandrao*, 31 B. 590: 9 Bom. L. R. 495.

When an order is passed appointing a person to be guardian of a minor, the minor becomes a ward of the Court, even though no certificate be taken out by the person so appointed, and the period of this minority is extended to 21 years —*Girish Chunder* v. *Abdul Selam*, 14 C 55 (8 C. 714, and 9 C. 901 *dissented from;* 8 C 967 *followed*). See, *Shivram Konda* v. *Krishnabai*, 31 Bom. 80. 8 Bom. L. R. 897.

The words " any other person who has not completed the age of 18 years " in s 3 of the Probate and Administration Act (V of 1881), read with s. 3 of the Majority Act (IX of 1875), mean any other person not domiciled in British India Section 3 of Act V of 1881 therefore fixes the limit of the period of disability for the purpose of the Act, not only for persons domiciled in British India, but any other persons whether they be aliens or not.—*In the goods* of *Sew Narain*, 21 C. 911

Evidence of Minority.—The minority should be decided on positive evidence, and not merely on the appearance of the alleged minor.—*Khetter Mohun* v. *Ramessur*, W. R. (1864) 301, *Kalee Halder* v. *Sree Ram*, W. R (1864) 830

Certificate of guardianship is not evidence of minority when the question of minority is in issue —*Gunjra Kuar* v. *Ablakh Pande*, 18 A. 478; and *Satis Chunder* v *Mohendro Lal*, 17 C 849 Followed in *Hem Chundra* v. *Bhobo Prosad*, 2 C. L J 69-*n*.

In a suit to set aside a decree on the ground of minority, the plaintiff relied upon a horoscope to prove his age *Held*, that the horoscope was not admissible under s 32 (*b*) of the Evidence Act.—*Satis Chunder* v. *Mohendro Lall*, 17 C. 849, and *Ram Narrain* v. *Monee Bibee*, 9 C. 613. These cases have been distinguished in *Goundan* v. *Goundan*, 17 M 134, where a horsoscope which had been a public record from *ante litem motam* was admitted in evidence as an " Admission " under sections 17 and 18 of the Evidence Act, to prove the plaintiff's age.

An entry in a school register as to the age of a boy is not admissible in evidence to prove the age.—*Amrita Lal* v *Jatindra Nath*, 32 C. 165 (168).

Object of having Next Friend or Guardian Ad Litem.—As a minor is considered incapable of prosecuting or defending a suit himself, it is necessary that his interests in the suit should be watched by an adult person. Such person is, in the case of a minor plaintiff, called his *next friend*, and in the case of a minor defendant, his *guardian ad litem*. But it must be remembered however that neither the next friend nor the guardian *ad litem* is a party to the suit.—*Rupchand* v. *Dosadha*, 30 A. 55.

Representation of Minors in Suits.—Where a suit was brought by a minor without a next friend, and the objection was not taken until the case

came on in appeal, when the plaintiff had attained majority. *Held*, th the irregularity was waived.—*Kamalakshi* v. *Ramasami*, 19 M. 127

Where a suit was brought by a manager appointed by the Court Wards, on behalf of an infant who had a right to sue, an objection to t manager's authority was disallowed as merely technical —*Hardi Narain* *Rudra Prokash*, 10 C. 627, P. C.

Where the manager of the estate of a minor authorized the plaint in order to save limitation to institute a suit on behalf of the Court Wards, which refused afterwards to sanction the proceeding with the su *Held*, that the Judge rightly ordered that the suit be rejected —*Bisesw* v *Shosi Sikareswar*, 17 C. 688, P. C.

Where a suit was filed on behalf of two minors by a person who w not the certificated guardian of the minors, there being a guardian du appointed by a competent Court in existence at the time, it was held th the suit was wrongly brought, having regard to this rule and that the pla should have been returned for amendment —*Sham Krishna* v. *Ram Di* 20 A 162 (13 C 189 *referred to*).

The rule of Mahomedan law, that an uncle cannot be the guardian o the property of a minor, does not prevent an uncle representing his infan nephew, under the Code of Civil Procedure as next friend in a suit— *Abdulbari* v *Rash Behari*, 6 C. L R. 413.

A minor may sue for possession in the Mamlatdar's Court by his nex friend although the Mamlatdar's Courts Act (III of 1876) makes no pro vision for such a suit —*Dattatraya Keshab* v. *Vaman Govind*, 21 B 8

A minor is not bound by the decree passed in a suit in which he wa not properly represented as required by section 2 of the Bombay Minor Act (XX of 1864).—*Vishnu Keshav* v. *Ram Chandra*, 11 B. 130 *See* also, *Guru Churn* v *Kali Kissen*, 11 C. 402, and *Sham Lal* v *Ghasit* 23 A. 459

The eldest male member of a joint Mitakshara family, who is of fu age, and who may have power to manage the estate, is not the guardia of the minor co-proprietors for the purpose of defending a suit brough against the minors, unless he has obtained a certificate under Act XL o 1858, s. 3.—*Durga Pershad* v. *Kesho Pershad*, 8 C. 656, P. C ; 11 C. L R 210, P C., and *Sham Lal* v. *Ghasita*, 23 A 459. But see, *Palmakar* v *Mahadev*, 10 B. 21.

Defendant improperly impleaded as a minor—No objection raised b the defendant during suit. *Held*, that it was not competent to the defend ant to sue subsequently for a declaration that decree was *not* bindin upon him, he is estopped from so doing —*Gangaram* v. *Mihire Lal*, 29 A 416.

Where a guardian had not obtained a certificate under the Bombay Minors Act (XX of 1864), the minor was held to be not properly represent ed in a suit in which a decree had been obtained against the guardian purporting to represent the minor —*Daji Himat* v. *Dhirajram*, 12 B 18

No judgment or order passed in a suit, to which a minor, *subject* to

ing majority, unless he is represented in the suit by some person who has taken out a certificate, or has obtained the permission of the Court to sue or defend on his behalf without a certificate.—*Mrina Moyi* v. *Jogodishuri*, 5 C. 450: 5 C. L. R. 361.

Suit on Behalf of a Person Alleged to be, but Not in Fact, a Minor.—Where in a suit instituted, on behalf of a person alleged to be a minor, through his next friend, it is found that the plaintiff was not in fact a minor at the date of the institution of the suit, the suit should not be dismissed but the plaint should be returned for amendment.—*Taqui Jan* v. *Obaidullah*, 21 C. 866; *Shamuga* v. *Narayana*, 40 M. 743: 41 I. C. 510. A contrary view was taken by the Allahabad High Court, in *Sheonama* v. *Bharat Singh*, 20 A. 90; *Ruhul Amin* v. *Shankar Lal*, 45 A. 701: 77 I. C. 30: A. I. R. 1924 All. 54, where it was held that, in such circumstances, the suit should be dismissed.

Where in a suit it was through *bona fide* belief that the plaintiff was described as a minor and was represented by his mother as his next friend, *held*, that inasmuch as the suit was instituted by the right person, thoug[illegible] 'o act as his next friend, the suit was [illegible] 100 I. C. 469: A. I. R. 1927 Cal. 477; [illegible] 366. But *see*, 20 A. 9 where a contrary view was taken.

Decree Against a Major, Treating him as a Minor.—A decree obtained against a person treating him as a minor, while in reality he was a major at the date thereof, is not a nullity, consequently, a sale in execution of a decree cannot be set aside on the ground that the Court had no jurisdiction to pass the decree.—*Seshagiri* v. *Hanumantha*, 39 M. 1031.

Sufficiency of Representation and Frame of Suits.—Where in a suit the plaint was headed "*S. B.*, widow of the late *C. B.*, mother and guardian on behalf of the minors, *S.* and *K.*, plaintiff." *Held*, that the plaint not having been framed in accordance with the provisions of this rule, proceedings were bad in law.—*Shonai Bewa* v. *Monoram Mundul*, 11 C. L. R. 15.

Where a suit is brought in violation of this rule or of the provisions of Act XL of 1858, the proper course for a Court to pursue is to return the plaint in order that the error may be rectified.—*Russick Das* v. *Preonath*, 10 C. 102: 12 C. L. R. 405.

Where a suit against minors was improperly framed, the proceedings in the suit were held null and void, and the suit was dismissed as against the minors.—*Guru Churn* v. *Kali Kissen*, 11 C. 402. *See* also, *Mongola Dossee* v. *Saroda Dossee*, 12 B. L. R. App. 2: 20 W. R. 48; *Ganga Prasad* v. *Umbica Churn*, 14 C. 754, and 32 C. 296, P. C.: 9 C. W. N. 201: 1 C. L. J. 584.

Where, on a construction of the plaint, it is found that the minor is the real plaintiff, the mere fact of the improper description of the minor is not ground for setting aside the decree, but the decree must be taken to be in favour of the minor as if the suit had been properly framed.—*Alim Buksh* v. *Jhalo Bibi*, 12 C. 48; *Bhaba Pershad* v. *Secretary of State*, 14 C. 169; *Jogi Singh* v. *Kunj Behari*, 11 C. 509: *Kedar*

Prosanno v *Protap Chunder*, 20 C. 11; *Suresh Chunder* v. *Jugut Chunder*, 14 C 204 But see, *Ganga Prasad* v *Umbica Churn*, 14 C 754

Estoppel.—A minor, who, representing himself to be a major and competent to manage his affairs, collects rents and gives receipt therefor, is estopped by his conduct from recovering again the money once paid to him, by instituting a suit through guardian —*Ram Rutun* v. *Shew Nandun*, 29 C 126 6 C W N 132. Similarly, a minor, who, representing himself to be of full age, sells certain property and executes a registered deed of sale, is estopped from seeking to have the sale set aside on the ground of his minority at the time of the sale.—*Ganesh* v *Bapu*, 21 B 198. A Court of equity will deprive a fraudulent minor of the benefit of the plea of infancy, but one who invokes the aid of the Court, must prove not only that the minor practised a fraud on him, but also that he was deceived into action by such fraud.—*Brohmo Dutt* v *Dharmo Das*, 26 C. 381

Applicability of Order XXXII to Execution Proceedings.—The provisions of Or XXXII, C. P Code, relating to "suits by or against minors" have no direct application in proceedings in execution after the rights of the parties have merged in a good and valid decree The *lis* in respect of which it is essential that a minor defendant should be represented by a duly appointed guardian is at an end after the decree is passed In determining whether a minor was sufficiently represented in the execution proceedings, Courts are at liberty to look at the substance of the transaction; *Fani Bhusan* v. *Surendra Nath*, 35 C L. J. 9

Liability of Next Friend for Costs of the Suit.—Where a suit brought by a minor through his next friend is dismissed and the Court finds that the suit was not for the benefit of the minor, the Court may direct the next friend to pay the costs personally.—*Girbala* v. *Chandrakant*, 11 C 213. But in such a case if the Court finds that there were reasonable grounds for instituting the suit and the next friend has acted in good faith the Court will not make the next friend liable for costs but direct its realisation out of the minor's estate.—*Devkabai* v. *Jefferson*, 10 B. 248

Where suit is instituted without next friend, plaint to be taken off the file.

2. Where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented.

(2) Notice of such application shall be given to such person, and the Court, after hearing his objections (if any), may make such order in the matter as it thinks fit. [S. 442]

COMMENTARY.

This section corresponds to s. 442, C. P. Code, 1882, with the substitution of the words "*where a suit is instituted*" for the words "if a plaint be filed" which occurred in the beginning of the old section.

Taking the Plaint Off the File.—This rule refers to a case where the plaint on the face of it appears to have been filed by a person who was a minor.—*Béni Ram* v. *Ram Lal*, 13 C. 189 (relied on in 44 M. L. J. 515); *Rattonbai* v. *Chabildas*, 13 B. 27.

Where the plaintiff who was a minor brought a suit without a next friend and his minority was not apparent on the face of the record but is proved on the trial of an issue in the suit itself, the Court ought not to dismiss the suit at once but should allow a reasonable time for a next friend to come on the record and go on with the suit and it is only if no one comes forward that it should reject the plaint (13 C. 189 *relied on*). It is no doubt open to the minor on attaining majority to drop the suit as not properly instituted but he is not bound to do so, he could affirm the previous proceeding and continue the suit; *Ranchan* v. *Manakkal*, 44 M. L. J. 515 74 I. C. 309 A. I. R. 1925 Mad 553.

The Courts, as a rule, only strike the plaint off the file where it appears, on the face of the plaint, that it was filed by a person who was a minor, or when it is proved that it was filed with the knowledge that the plaintiff was a minor, and with the intention of deceiving the Court, and evading the payment of costs in case the plaintiff fails in the claim. When the fact of minority is a *bona fide* question of evidence, and the defendant's allegation is found correct, then the usual course is to suspend all proceedings, and to allow sufficient time to enable the minor to have himself properly represented by a next friend.—*Rotonbai* v. *Chabildas*, 13 B. 7; *Mt. Durga Devi* v. *Gur Narain*, 69 I. C 401.

Where a minor plaintiff sued without next friend and the defendant had not appeared but the irregularity was apparent on the examination of the plaintiff; *held*, that it was the duty of the Judge to take notice of the disregard of the provisions of Or. XXXII, r 1 and to refuse to proceed farther with the case so illegally commenced; *Maung San* v. *Maung Nyi*, 3 R. 239: 89 I. C. 870: A I R 1925 Rang. 325. If the defendant appears and does not object, the Court should not reject the plaint but would allow the plaintiff time to get himself properly represented; *Ali Ahmad* v. *Said Mian*, 4 L. 390; 75 I. C. 1028: A. I. R. 1924 Lah 188

Costs to be Paid by the Pleader, etc.—Where the plaint in a suit was not framed in accordance with the provisions of s. 440, C P. Code, 1882 (Or. XXXII, r. 1), the High Court, on special appeal, directed that the pleaders of the original and of the lower Appellate Court, should be called upon to show cause why they should not be ordered to pay the costs of the suit and the appeal.—*Shonai Bewa* v. *Monoram*, 11 C. L. R 15.

When a suit is instituted by a minor without a next friend, the pleader or any other person presenting the plaint is liable for costs but the Court should not make a minor's estate liable for costs.—*Ami Chand* v. *Collector of Solapur*, 13 B. 234.

Decree in Suit Instituted by Minor Without Next Friend.—Where, in a suit instituted by a minor without next friend, no objection as to the plaintiff's minority is taken by the defendant and a decree is passed, the defendant will be deemed to have waived his objection. The institution of a suit by a minor without a next friend is not a nullity but is

merely an irregularity which can be waived by the conduct of the defendant; *Kamalakshi* v. *Ramasami*, 19 M. 127

Guardian for the suit to be appointed by Court for minor defendant.

3. (1) Where the defendant is a minor, the Court on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor. [S. 443.]

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed. [S. 456. para. 1.]

(4) No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing an objection which may be urged on behalf of any person served with notice under this sub-rule. [New.]

COMMENTARY.

Alterations in the Rule.—Sub-rule (1) corresponds to para 1 of s 443, C. P. Code, 1882, with some alterations and omissions. The last sentence of para 1, and the whole of para. 2 of the old section have been omitted.

Sub-rules (2) and (3) correspond to para 1 of s 456, C. P. Code, 1882, with some verbal changes.

Sub-rule (4) is new. This rule has been inserted to protect the interests of the minor. No order under this rule shall be made unless some one interested in the welfare of the minor is served with notice. It seems to have been framed adopting the principle of 11 C. 204, noted below

"This is based on section 443. The Committee think it necessary to ensure that notice should reach one, interested in the minor's welfare, and this rule aims at securing this result. The form of application and notice in conformity with this sub-rule will be inserted in the Schedule of Forms"—*See the Report of Special Committee.*

Duty of Court to Appoint Guardian Ad Litem.—It is the duty of the Court to appoint a guardian *ad litem* for a minor defendant under

Or XXXII, r 3, C. P. Code. No person can be appointed guardian without his consent At the same time where the Court has given sanction and approval for the appearance of a person as guardian, the absence of formal order of appointment is not always fatal to the proceedings. A mere irregularity in the appointment of a guardian *ad litem* will not render the decree passed against the minor null and void, unless it is proved that the minor's interests have suffered thereby At the same time where no notice or summons is served on the guardian of the minor, and no order was made appointing a guardian for the minor, and there was no appearance by the so-called guardian at any stage of the proceedings, a decree passed against the minor is not binding on him -*Ram Chattra Kumari* v *Panda Radha Mohan*, 3 Pat. L T 451· 66 I C 137 (26 C. L J 258, 37 A 179, 20 C L. J 469, 2 P L T 617 *relied on*) It is the duty of the Judge himself to decide who is the proper person to be appointed as guardian *ad litem*, *Ram Chandra* v *Jati Prasad*, 29 A 675.

Guardian Ad Litem.—Appointment of guardian *ad litem* other than the certificated guardian is a mere irregularity and would not of itself vitiate either the decree passed or a sale consequent upon such a decree. *Jogeshwar Narain* v. *Lala Moorlidhar*, 7 C. L. J. 270, *Dammar Singh* v. *Pirbhu Singh*, 29 A 290; *Midnapur Zemindary Co* v *Gobindo*, 8 C. L. J 31 and 31 A 7.

When the Court is satisfied of the fact of the defendant's minority, it should follow the procedure laid down in this rule instead of dismissing the suit.—*Rohilkhand and Kumaon Bank* v. *Row*, 7 A 490.

Where no administrator of the estate of a minor is appointed under Act XX of 1864, there is no objection to the appointment of a guardian *ad litem* for the purpose of defending a suit against a minor.—*Jadow Mulji* v. *Chhagan Raichand*, 5 B 306

Where a guardian *ad litem* has once been appointed, his appointment enures the whole of the *lis* in the course of which it has been made, including proceedings in execution and appeal —*Jwala Dei* v. *Pirbhu*, 14 A. 35 *See* also, *Venkata* v. *Alakara Jamba*, 22 M. 187, where it has been held that the appointment of a guardian *ad litem* in a Court of first instance ensures not only for the term of the proceeding in that Court, but also for purposes of appeal, and *Krishna Pershad* v. *Gosta Behari*, 5 C. L. J. 434; *Shamboo* v. *Kanhaya*, 44 A. 619: 20 A. L J. 599; *Bhagelu* v. *Dharma*, 45 A. 623: 21 A. L. J. 591

A guardian *ad litem* is not a party to a suit or appeal. He is merely named in the record as the person appointed by the Court to look afte the interest of the minor. So, where a guardian *ad litem* of a defendant-respondent is not made a party to an appeal filed by the plaintiff, until after the period of limitation for filing such appeal has expired, the appeal is not for this reason time-barred; *Rup Chand* v. *Dasodha*, 30 A. 55; *Khem Karam* v *Hardyal*, 4 A. 37.

In a suit by a husband for divorce under the Parsi Marriage Act (XV of 1865), a guardian *ad litem* must be appointed, if the defendant be under 21 years.—*Sorabji Cowasji* v *Bachoo Bai*, 18 B. 366.

When Defendant Pleads Minority.—When minority is pleaded as a defence to an action, a guardian should be appointed for the defendant, and a preliminary issue should be framed and tried as to whether defendant is or is not a minor. If the defendant is found to be a minor, a guardian *ad litem* should be appointed for him; but if he is found to be a major, the guardian appointed for the enquiry should cease to act and then he may conduct his own case.—*Kasi Dass* v. *Kassim Sait*, 16 M 344. *See* also, *Purno* v. *Maharaja of Burdwan*, 18 C. L. J. 18: 17 C W. N. 549 Similarly if a dispute arises as to whether a minor is the legal representative of a deceased party, the Court should appoint a guardian *ad litem* and decide the matter; *Ruckmani* v. *Veerasami*, 47 M L J 370· 80 I. C 942· A I R. 1924 Mad. 813.

If there is any doubt as to the minority of the defendant, that question ought to be made an issue in the case and the Court ought to decide whether it is a case in which a guardian ought to be appointed It is not sufficient for the Court by just looking at the defendant to come to a conclusion that he is not a minor; *Ram Gobind* v. *Sital*, 96 I. C 273 A. I. R 1926 Pat. 489.

Estoppel.—When a person was sued as a minor by his guardian *ad litem*, and it appeared that he was in fact a major at the date of the suit, and that he knowingly allowed the guardian *ad litem* to conduct the defence on his behalf *Held* that he was bound by the decree passed in the suit, and cannot afterwards sue to set aside the decree and the sale thereunder —*Ramachari* v *Durai Sami*, 21 M. 167.

Where No Guardian Ad Litem Appointed.—Where there is no appointment of a guardian *ad litem* of a minor defendant in the manner prescribed by this rule and a decree is passed against him, the decree is a nullity and it cannot be enforced against him —*Bhura Mal* v *Har Kishan*, 24 A 383, F B. (14 C. 204 *referred to*). *Dakeshwar Prosad* v. *Rewat*, 24 C 25; *Hanuman* v *Muhammad*, 28 A. 137; *Daji* v. *Dhirajram*, 12 B 18; *Rasihdunnissa* v *Muhammad* 36 I. A. 168; *Balkissen* v. *Tapesur*, 17 C. W N 219, *Lala Rampirit* v. *Thakursaran*, (1921) Pat 335. 2 Pat L. T. 617, *Pande Satadeo* v *Ramayan*, 4 Pat L. T. 147: 2 Pat. 335· 71 I. C. 705; *Purna* v *Bijoy*, 17 C. W. N. 549: *Narendra* v. *Jogendra*, 17 C W N 537, *Surendra* v *Aghore*, 25 C. W. N. 625; *Umapati* v. *Sheikh Masitulla*, 37 C L. J. 496· 72 I. C. 475: A I. R. 23 Cal. 692.

Where one of the defendants in a suit for a declaration of a right of way is a minor, and he is not represented by a guardian, the suit ought to be dismissed. No effective decree can be made in the absence of one of the persons jointly interested in the serveint tenement; *Sadhu Charan* v. *Indra Mohan*, 64 I C. 90 (25 C. W. N. 249 *folld.*).

Formal Order for Appointment Not Absolutely Necessary.—Under this rules the Court is bound, after satisfying itself to the fact of minority, to appoint a proper person to act on behalf of a minor in the conduct of a suit; and this rule should be strictly followed. But where the Court by its action has given its sanction to the appearance of a person as such a guardian, the absence of a formal order of appointment is not necessarily fatal to the proceedings.—*Walam* v. *Banke Bihari*, 30 C. 1021: 7 C W. N. 774, P. C. (14 C. 204 and 16 C. 40, P. C., *approved*). *Partly*

Satdeo Narain v *Ramayan Tewari*, 4 Pat. L. T. 147: 2 Pat 335. *See* also, *Vithaldas* v. *Dattaram*, 26 B. 298; *Kedar* v. *Protap*, 20 C. 11; *Keshawesaundra* v. *Debendiabala*, 4 Pat L. J 213, *Hanuman Prasad* v *Muhammed Ishaq*, 28 A. 137. 2 A L. J 615; *Midnapore Zemindary Co.* v. *Gobindo*, 8 C. L. J 31; *Sures Chandra* v *Jagut Chander*, 14 C 204; *Hari* v *Bhubaneshwari*, 16 C. 40; *Udhan Singh* v *Gurdit Singh*, 39 P W. R. 1919; *Kairaj Mal* v *Daim*, 32 C 296, P C 9 C. W. N 201 1 C. L. J. 584 · 7 Bom L R 1. 2 A. L J 71; P C. *Narain Das* v *Ralli Brothers*, 61 P. R. 1915 136 P. W R 1915, *Satdeo* v *Jai Nath*, 9 O. L. J. 141: 67 I. C 808; *Ram Chattra Kumari* v *Panda Radha Mohan*, 3 Pat. L. T. 451: 66 I C 137; *Darshan Singh* v *Ratan lal*, 9 O and A L. R 463: 74 I. C 421; *Mata Ghulam Singh* v *Sital Prasad*, 26 O C. 113: 74 I. C 409; *Phulli* v *Debi Prasad*, 5 L 38. 75 I C 449 A. I R 1923 Lah. 575, *Sadasheo* v *Karim*, 92 I C 241 · A I R. 1926 Nag 267 In *Ram Chandra* v *Joti Prosad*, 29 A 175 A W N (1907) 225, it has been held that the duty of the Court is not a mere matter of form It must not only appoint a guardian but satisfy itself that the proposed guardian is a fit and proper person to represent the minor, to put in a proper defence and generally to act in the interests of the minor.

Though the matter of the appointment of a guardian *ad litem* is left to the discretion of the Court, it is always desirable that the appointment at the instance of the plaintiff should not be made, unless the minor or his friends and relatives, in whose care he may be, failed to move the Court for that purpose within a reasonable time after receiving notice of the institution of the suit.—*Suresh Chunder* v *Jugut Cunder*, 14 C. 204

Procedure in Appointing Guardian Ad Litem Illegal—Effect.—Where a Court after knowing of the existence and address of the guardian of the minor defendant in a suit, did not order fresh notice to the guardian but made the head clerk of the Court, the guardian of the minors and proceeded with the suit in consequence of which there was not proper defence to the plaintiff's suit, *held*, that the decree the execution and sale which followed it were illegal and not binding on the minor and that the Court had inherent power to set aside the decree and the execution sale after impleading the auction purchaser as a party, *Jambu Ammal* v. *Minor Natarajam*, 31 M. L. T. 215 (H. C.)

Such Application shall be Supported by an Affidavit.—The absence of an affidavit such as is required under r 3, cl. (3) is not sufficient to render the proceedings illegal and void as against the minor on the ground that he was not properly represented —*Munnoo* v. *Gholam*, 32 A. 287 P. C.; *Imamdin* v *Puranchand*, 55 I. C. 833; *Ramaswami* v. *Doraiswami*, 44 M. L. J. 299.

Service of Summons.—There are no special provisions as to service of summons on infants. Where the defendant is a minor, the summons should be served upon him in the ordinary way. —*Jatindra Mohan* v. *Srinath*, 26 C. 267: 2 C. W. N. 261; *Abdul* v. *Eggar*, 35 C. 182, 184; *Sures Chunder* v. *Jugut Chunder*, 14 C. 204, 215. But under Or. XXXII, r 5, all notices of application and other process in a suit should be served on the guardian *ad litem*.

Notice to Minor and his Guardian.—Where the appointment of Court guardian to a minor party is proposed, notice must always go to the natural guardian of the minor or the person with whom he lives—*Nachiappa* v. *Chinniap*, 4 L. W. 362: 36 I. C. 791.

An order appointing a *guardian ad litem* of a minor defendant without giving notice to the minor as required by Or. XXXII, r. 3 (4) is without jurisdiction and is liable to be set aside; *Rajendra Prasad* v. *Probodh*, 2 Pat. L. T. 116: 6 Pat. L. J. 82; *Rani Chattra Kumari* v. *Panda Radha Mohan*, 66 I. C. 187: 3 Pat. L. T. 451.

Or. XXXII, r. 3 (4) applies only to cases where an application is made for the appointment of a guardian in the name of or on behalf of the minor or the plaintiff but when on the death, retirement or removal of a guardian, another guardian is appointed in his place, no such notice is necessary; *Sri Thakur Radha Krishna* v. *Babu Lakshmi Narayan*, 1 Pat. L. R. 86: 2 P. 273: 4 Pat. L. T. 329: 71 I. C. 341; *Phulli* v. *Debi Pershad*, 1923 Lah. 575: 75 I. C. 449.

No irregularity by way of an omission to send a notice as required by Or. XXXII, r. 3 (4) will operate to render void the presumed representation of the minor in a suit by a guardian *ad litem* appointed for him, unless such an omission has in fact prejudiced his defence; *Kidambi Tirumala Charyulu* v. *Ammisetti*, 46 M. L. J. 363.

4. (1) Any person who is of sound mind and has attained majority may act as *next friend* of a minor or as his guardian for the suit;

Who may act as next friend or be appointed guardian for the suit.

[Ss. 445 and 457.]

Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed as the case may be. [Ss. 440 and 443.]

(3) No person shall without his consent be appointed guardian to the suit. [New.]

(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor

is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require. [S. 456, para. 2.]

COMMENTARY.

Alterations in the Rule.—Sub-rule (1) corresponds to ss. 445 and 457 of the C. P. Code, 1882 The provisions of those two sections have been amalgamated in this sub-rule with some alterations and omissions. The words "*nor a married woman can be so appointed,*" which occurred in the concluding part of s 457 of the old Code, have been omitted, the omission seems to have been made adopting the views in 17 C. 488, F B. and 29 M. 58, and to set at rest the conflicting rulings on the point. The cases (29 A. 28, 6 C. L. J 36; 11 C. W. N 176-*n*) in which a contrary view was taken have been overridden by the above omission. Under the present Code, a married woman may be next friend and may also be appointed as guardian *ad litem*

Sub-rule (2) corresponds to para. 2 of ss 440 and 443, C. P. Code, 1882, with some alterations and omissions. The provisions of those two paras. have been amalgamated in this sub-rule with some modifications.

Sub-rule (3) is new. It is based on the principles laid down in 7 C. 242: 9 C. L R 13 and in 5 B 306.

Sub-rule (4) corresponds to para 2 of section 456, with some modifications.

Construction and Scope of Rule.—Or. XXXII, r. 4 and other rules as to the appointment of guardian must be read with the provisions of r. 3 which provides for applications for appointment of guardians —*Natchiappa* v. *Chinniah*, 4 L W. 362: 36 I. C. 794.

Who may be Next Friend or Guardian Ad Litem.—If in a suit the personal interest of the next friend of a minor conflicts with his duty towards the minor, he is not competent to act as his next friend unless he shows *uberrima fides* In such a case the minor is not properly represented and so the decree in the suit is not binding on him.—*Bejoy Singh* v. *Mathuriya Debya*, 56 I. C. 97.

A person who is to succeed to the property of minor on his death has an interest adverse to the minors; and, if he is not a blood relation of the minor, he is not fit to be a guardian of the minor's person, although appointed by the will of the minor's father to be guardian of both the person and property.—*Sami Raw* v *Elaianatha Raw*, 16 M. L J. 357.

On the re-marriage of a Hindu widow if neither she nor any other person has been specially constituted by the will of the deceased husband the guardian of the child, a proper male relative of the deceased husband, should ordinarily be appointed guardian of such child in preference to his re-married mother.—*Khusali* v. *Rani*, 4 A. 195.

The rule of Mahomedan law, that an uncle cannot be the guardian of the property of a minor, does not prevent an uncle from representing his infant nephew under the C. P. Code as next friend in a suit.—*Abdul Bari* v. *Rash Behari*, 6 C. R 413.

A married woman may act as the next friend of an infant plaintiff.—*Asiru Bibi* v. *Sharip Mondal*, 17 C. 488, F. B (11 C. 733 *overruled*)

Guardian Ad Litem with Adverse Interest—Decree If Binding on Minor.—A minor defendant represented in a suit by a guardian *ad litem* whose interest is adverse to that of the minor, is not represented at all, and any decree passed in the suit is a nullity so far as the minor is concerned, *Sellapa Goundan* v. *Masa Naiken*, 47 M 79: 76 I. C 1018 A I R. 1924 Mad 297 A mere defect in following the rule as to representation of minors is not necessarily fatal to the proceedings so as to render void a decree against the minor; *Kuppusami* v. *Kamalammal*, 42 M. 842, 39 M L J 375, *Ramaswami* v. *Doraiswami*, 44 M L J 20 73 I C 409 A I R 1923 Mad 465; *Venkata Chalam* v. *Paramasivam* 52 M L J 709 A I R 1927 Mad. 668

Where in a suit to enforce a mortgage executed by the manager of a joint Hindu family he is himself appointed guardian *ad litem* of the minor members impleaded in the suit, and a decree is passed on confession of judgment, the decree is a nullity as against the minors for the manager was not a proper person to be appointed as a guardian; *Murlidhar* v. *Pitambar Lal*, 44 A 525 20 A L J. 320: 66 I. C. 372

"Guardian appointed or declared by competent authority."—S 47 of the Indian Succession Act not being applicable to Hindus, a Hindu father had no statutory power to appoint a guardian to his son after his death The words "competent authority" in this rule do not include the case of a Hindu father purporting to appoint a guardian under his will Or XXXII rr 1 and 4 do not apply to all guardians, as they cannot apply to natural guardians —*Budhi Lal* v. *Moraji*, 31 B. 413: 9 Bom L R 553 *See*, however, *Shahu* v *Habija*, 17 B 560, and *In the matter of Srish Chandra Singh*, 21 C. 206. *In Midnapore Zemindari Co., Ltd* v *Gobinda Mahato*, 8 C L J 31, and in *Dammar Singh* v. *Pirbhu Singh* 21 A 290 4 A L J 155, it has been *held* that where the Court acts in contravention of the provisions of rule 4 and overlooking the claims of the certificated guardian appoints some body else guardian of the minor it is a mere irregularity and the decree and sale thereunder is not void But it was *held* in *Pyari Bhimaji* v. *Hussain Saheb*, 39 M. L J. 29 (*following* 31 A 572 and 32 C. 296), that a decree passed against a minor defendant is illegal and liable to be set aside where in spite of the fact that he had already a court guardian validly appointed for him the Court appointed another person as his guardian *ad litem* and passed the decree *See* also, *Sridhar Rao* v *Ramlal*, 31 A. 7, and *Jageshwar Narain* v *Jeta Mooralidhar*, 7 C L J 270; *Bhimaji* v. *Rajabhai Sahib*, 50 I. C. 842

The omission to record reasons under Or. XXXII, r. 4 (2) for the appointment of a Court guardian is only an irregularity and will not by itself vitiate the decree if the minor is in fact properly represented by a guardian appointed by Court Where, however, the appointment of a guardian is secured by fraud and by false statements and concealment of material particulars, the minor is not bound by the decree passed in the suit or by the sale held in execution of the decree (37 A. 179 *followed*) *Raichan* v *Manakkal*, 44 M. L. J. 515: 74 I C. 309: A. I R 1923 Mad 553.

"Another person be permitted to act."—It is not necessary that the permission should be express.—*Sridhar Rao* v. *Ramlal*, 31 A. 7.

No Person can be Appointed Next Friend or Guardian Without his Consent.—No person can be appointed a guardian *ad litem* without his express consent. The question whether the person so appointed consented to act will always be one of importance on the merits.—*Radhasyam* v *Rangasundari*, 24 C. W. N. 541. Where the mother of an infant is appointed guardian *ad litem* without her consent the decree obtained in the suit is liable to be set aside on appeal.—*Narendra* v *Jogendra*, 19 C W. N. 537 20 C L J 469. *Umapati* v *Shaikh Moseetullah*, 72 I C. 475: 37 C. L J. 496; *Shroof Sahib* v *Ragunatha Sivaji*, 18 M. L T. 401 (17 C W N 219, 35 A. 487 *followed*). A guardian who has not consented to act as such, is no guardian at all, and the decree is invalid irrespective of any question of prejudice, because the minor has not been represented in the suit, *Narendra* v *Jogendra*, 19 C. W N 537, *Surendra* v *Aghore*, 25 C W N 525. 62 I C. 464, *Shaikh Sujjad* v *Sakai Rai*, 2 Pat. 7. A I R 1922 Pat 448, *Jagadis* v *Harihar*, 40 C. L J. 39: 78 I. C. 219: A. I. R 1924 Cal 1042; *Sriramulu* v *Lakshminarayana*, 47 M. 783: A I R. 1925 Mad 30

Where the proposed guardian of a minor does not signify his consent, the Court should not, in contravention of the express direction of Or. XXXII, r 4 (3), C. P Code, appoint him as guardian for the suit. When a person has been appointed guardian without his consent, the infant is not represented and a decree made in a suit so constituted has no binding effect (32 C 296). The provision as to the consent of the person proposed to be appointed guardian of the suit is mandatory and imperative Or XXXIV, r 4 (3) controls both sub-rule (1) and (2) and place a material restriction upon the power which the Court may exercise thereunder. Or XXXII, r 4 (3) is applicable as well, to cases under sub-rule (1) as to cases under sub-rule (2). No person who is competent to act as guardian of an infant either under sub-rule (1) or under sub-rule (2) shall be appointed guardian of the suit without his consent; *Annada Prasad* v *Upendra Nath*, 34 C L J 293 26 C W N 781 68 I. C 18.

The consent referred to in this rule may be either express or implied. —*Baij Nath* v. *Radharaman Prasad*, 43 I. C 563; *Chatter Singh* v. *Tej Singh*, 43 A 104 18 A. L. J 956; *Jawahar Singh* v *Sewa Singh*, 5 Lah L. J. 487 The consent of the guardian *ad litem* may be presumed from the fact that he accepted the summons in the suit; *Venkata Chalam* v. *Paramasivam*, 52 M L J. 709· A. I R 1927 Mad. 668 Consent being a question of fact, evidence as to consent may be indirect and circumstantial, or it may be proved by conduct; *Sriramulu* v. *Lakshminarayana*, 47 M 783 83 I C 312 A I R 1925 Mad 30 F B, *Jawahar Singh* v *Sawa Singh*, 5 Lah L J 487 79 I C 572 A I R. 1924 Lah 97.

Under Or I, rr 8, 10, 11 no person can be added as a plaintiff unless he has previously consented thereto.—*Uma Sundari* v *Ramji Haldar*, 7 C. 242: 9 C L R 13

In the absence of a provision in the old C P. Code of 1882, corresponding to Or. XXXII, r. 4 (3) of the present Code, where a certificated guardian was proposed for appointment as guardian *ad litem*, the Court might unless he declined the appointment, presume his consent.—*Sarat Chandra* v. *Bibhabati*, 34 C. L. J. 302; *Thakur Tyishwar* v. *Lakhan Prasad*, 4 Pat. L. T 127. 1 Pat. L. R. 59: (1923) Pat. 68

The contravention of the provisions of Or. XXXII, r. 4 (3), does not deprive the Court of its jurisdiction to decide the case.—*Pande Sidha Narain v. Ramayan Tewari*, 4 Pat. L. T. 147: 2 Pat. 335

Neither Act XX of 1864 nor the C. P. Code, empowers any Court to appoint a person against his will to be a next friend, guardian *ad litem* or guardian of the person of a minor.—*Jadav Mulji v. Chhaganlal Chand*, 5 B 306.

Wishes of Minor—Whether should be Considered.—In appointing a guardian *ad litem* for a minor defendant, it is desirable if possible, that the Court should consider the wishes of the minor as to the person who should be appointed, *Rajendra Prasad* v. *Probadh*, 2 Pat. L. T. 116 Pat. L. T. 52, *Sori Thakur Radha Krishna* v. *Babu Lakshmi Narain* 1 Pat. L. R. 86: 4 Pat. L. T. 329: 2 Pat. 273

" Where there is no other person fit and willing to act."—Where the Court appointed a Court guardian without funds, to represent a minor defendant when there was a natural guardian available, and ordered the minor to deposit all the costs of the plaintiff before his application to set aside the *ex parte* decree passed against him could be considered, held that the order was bad and must be set aside; *Rajamanicka v. Venkataramana*, (1926) M. W. N. 8 93 I. C. 84: A. I. R. 1926 Mad 970

Court Can Appoint Any of Its Officers Guardian Ad Litem.—An officer of the Court who has been appointed guardian *ad litem* should not be paid for his trouble.—*Keralcoose* v. *Serle*, 3 M. I. A. 329. But where the Court appoints an officer of the Court as guardian *ad litem* of the minor defendant, it must require the party who gets him appointed, to make a deposit for the purpose of defending the case; *Raja Manicka* v. *Venkataramana*, (1926) M. W. N. 8: 93 I. C. 84: A. I. R. 1926 Mad 950; *Mohan Lal* v. *Ganga Prasad*, 45 A. 395. 71 I. C. 975: A. I. R. 1923 All 298

A Court can appoint an officer of Court as guardian, only when there is no other person willing to act as guardian.—*Nachiappa Chetty* v. *Chinniah Ambalam*, 4 L. W. 362: 36 I. C. 794 (37 A. 179 *followed*)

The Court has power to relieve the nazir of his position as a guardian when the nazir has no funds for the purpose of conducting adequately the defence of the minor.—*Gopi Lal* v. *Agarsingji*, 28 B. 626.

A Vakil is an officer of the Court for purposes of Or. XXXII, r. (4); *Mohan Lal* v. *Ganga Prasad*, 45 A. 395: 71 I. C. 975

Where a clerk of the Court is appointed as a Court Guardian of a minor defendant after his father's expression of unwillingness to act as guardian on an affidavit to the effect that there were no other proper guardian for the minor defendant, a decree obtained against the minor is not bad on the ground of his non-representation if it is not shown that the plaintiff procured the appointment of the Court guardian by collusion and false affidavit, *Sri Rajah Dantuluri* v. *Peda Venkata*, 46 M. L. J. ...

In a suit against several defendants one of whom was an infant, the mother on being proposed as guardian appeared through a pleader and stated that she could not act unless the name was corrected which ...

being done, she did not defend the suit on behalf of the infant. *Held*, the mother could not be forced to accept the guardianship (15 C L. J 3 *followed*). If she declined to accept the guardianship for reasons, technical or otherwise, the proper course to follow was to appoint an officer of the Court to conduct the defence on behalf of the infant: *Birendra Nath v. Aghorenath*, 25 C W N 525. 62 I C 461.

A Sub-Judge who, under this rule appoints the nazir or any other officer of his Court to act as a guardian of a minor plaintiff or defendant in a suit in his Court, has no jurisdiction to hear it, and pass a decree against that officer as guardian *ad litem* of the minor.—*Mohan Iswar* v. *Haku Rupa*, 4 B.638 (4 Bom. 642-*note*, *followed* But see, *Issur Chunder* v *Nobo Kristo*, 7 C L. R 407; *Babaji* v. *Maruti*, 11 Bom. H C R. 182.

There is no power in the Court to order a plaintiff to pay a fee for the purpose of enabling the nazir who has been appointed guardian *ad litem*, to put himself in communication with the natural guardians and other friends, but the Court may refuse to go on with the suit, if it should be of opinion that the nazir has been unavoidably prevented from making himself acquainted with the case against the minor.—*Narayan Das* v. *Saheb Hussain*, 12 B 553.

Whether Or. XXXII, r. 4 Applies to Non-contentious Probate Proceedings.—Or. XXXII, r 4, does not apply to a non-contentious proceeding in Probate But where minors are concerned and citations are issued to them, it is necessary for the protection of their interest for the Court to be satisfied not only that a guardian has been appointed but also that he has consented to accept the appointment and take upon himself the onus that by virtue of the appointment falls upon him on behalf of the minors; *Sachindra Narain* v *Hironmoyee*, 59 I C. 435, *Radha Shyam* v. *Rangasundari*, 24 C. W. N 541 59 I. C. 664

Leave to Sue or Defend on Behalf of a Minor.—The effect of s 3 of Act XL of 1858, read with Or XXXII, rr. 1 and 4, is that a minor plaintiff must not only always sue by his next friend, but the person representing the minor must either be a certificated guardian, or must obtain the sanction of the Court for the suit to proceed The mere admission of a plaint by the Court does not sufficiently indicate that sanction is accorded—*Durga Churn* v. *Nilmoney*, 10 C 134. 13 C L R. 369. Permission granted to sue or defend on behalf of a minor should be formally placed on the record The mere admission of a plaint by the Court does not sufficiently indicate that sanction is accorded—*Mrinamoyi* v. *Jogodishuri*, 5 C. 450; 5 C L. R. 361; *Ganga Prosad* v *Umbica Churn*, 14 C. 754; *Russick Das* v *Prio Nath*, 10 C 102; 12 C. L. R 405 But see, *Bhoba Pershad* v. *Secretary of State*, 14 C. 159; *Parmeshar Das* v. *Bela*, 2 A. 503; *Pirthi Singh* v. *Sobban Singh*, 4 A. 1; *Luchmiput* v. *Amir Alum*, 9 C. 176; 12 C. L. R 22, *Suresh Chunder* v. *Jugut Chunder*, 14 C. 204; *Jogi Singh* v. *Kunj Behari*, 11 C. 509; *Newaj* v. *Maksud Ali*, 12 C. 131; *Kedar Nath* v. *Debidin*, 4 A. 165; *Janki* v. *Dharam Chand*, 4 A. 177; *Akhil Chunder* v. *Tripoora Soondurce*, 22 W. R. 525. In all these cases it has been held that a written permission to sue is not absolutely necessary; but the admission of the plaint by the Court sufficiently indicates that sanction has been given.

GENERAL PRINCIPLES OF LAW AS TO THE DISABILITY OF MINORS.

Minor's Right to Sue and the Effect of his Disability.—A suit by a guardian on behalf of a minor is that of the minor, and is governed by the law of limitation applicable to the minor.—*Khodabux* v *Budree Nara...* 7 C 137, 8 C L R 306 *See* also, *Sufturoonissa* v *Noorul Hossein*, ... W R. 419 *See* also, *Shama* v. *Kanangai Chaitan*, 7 C W. N 34... The fact that a minor is for a time represented by a guardian does not remove the disability of the minor.—*Annantharama* v *Karuppanan* 4 W... 119

Where a right of action accrues to a minor, the fact that his guardian might have maintained a suit during his minority does not deprive him of the protection given to him by s 6 of Limitation Act —*Jagadindra Nath* v *Hemanta Kumari*, 32 C. 129, P. C : 8 C W. N. 809, P. C ... also, *Harek Chand* v. *Bejoy Chand*, 9 C. W. N 795

It was held that the limitation of one year provided for by Art 11 of the Limitation Act, for suits under s. 283, C. P. Code, 1882 (Or XXI r 63), was subject in the case of a minor, to be modified by ss 6 and ... of the Limitation Act The benefit of s. 6 of the Limitation Act is not limited to the period when the disability of minor has ceased, but applies also to the period during which the disability continues; and, therefore during the latter period, it is open to the minor to sue by his guardian *Phoolbas Koonwar* v. *Lalla Jogeshur*, 1 C. 226, P. C. 25 W R 2... P C *Relied upon* in *Shama Churn* v. *Kananagai Chaitan*, 7 C W N 591.

It has been held that the period of limitation provided for an application to set aside a sale under s 311, C P. Code, 1882 (Or XXI, r 90) was subject, in the case of a minor, to be modified by the provisions of s 6 of the Limitation Act —*Baldeo Singh* v *Kishan Lal*, 9 A 411 (1 C 226 referred to) *See* also, *Maharajkumar Guneshawr Singh* v *Jagodhis Pershad*, 8 C. W N 34.

Section 6 of the Limitation Act, only applies to cases dealt with by that Act itself. The provisions of the C. P. Code must, in the absence of anything to the contrary, be deemed to be subject to the general principle of law as to the disability of minor, which is that time does not run against a minor, and the circumstances that a minor has been represented by a guardian does not affected the question —*Maro Sadashiv* v *Visaji Raghunath*, 16 B 538.

Suit by minor for declaration of invalidity of widow's alienation— Omission by minor's father to sue—Father's right to sue barred Held that where there are several reversioners entitled successively to succeed to an estate held for life by a Hindu widow, no one of such reversioners can be held to claim through or derive his title from another reversioner but each derives his title from the last full owner and the plaintiff was therefore entitled to the benefit of s. 6 of the Limitation Act, and the suit was not barred —*Govinda Pillai* v *Thayammal*, 28 M 57 (22 ... referred to)

When a suit was filed by a minor represented by a wrong person as next friend and another person was afterwards substituted as the next

friend in his place, it was held that the suit as originally filed was not faulty in its citation of plaintiff even though the substitution was made after the expiry on the period prescribed for the filing of the suit.—*Ishwari* v. *Dukhi*, 54 I. C. 575.

Representation of minor by next friend or guardian for the suit.

5. (1) Every application to the Court on behalf of a minor, other than an application under rule 10, sub-rule (2), shall be made by his next friend or by his guardian for the suit. [S. 441.]

(2) Every order made in a suit or on any application, before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, where the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader [S. 444.]

COMMENTARY.

Sub-rule (1) corresponds to s. 441, C P Code, 1882, with some verbal changes only.

Sub-rule (2) exactly corresponds to s 444, C P Code, 1882

Effect of an Application Without Next Friend or Guardian.—Under Or. XXXII, r. 5, no order affecting a minor can legally be made without such minor being represented by a next friend Neither r 2 nor r 5 gives any authority to a Court to make a minor's estate liable for costs —*Amichand* v. *Collector of Sholapur*, 13 B 234.

The words "may be discharged" imply that the Court's power is discretionary.—*Doorga Mohun* v *Tahir Ally*, 22 C 274

In order that the Court's order may be binding on the minor it is necessary that he should be properly represented at the time the order is made.—*Mrinmoyi* v. *Shibchand*, 5 C 450; *Vishnu Keshore* v *Ramchandra*, 11 B. 130; *Daji Himat* v *Dhirajram*, 12 B 18; *Ganga Prosad* v. *Umbica Churan*, 14 C 754, *Jungee Lal* v *Shamlal*, 20 W R. 120, *Durga Pershad*, v *Kesto Pershad*; 8 C 656, 662, *Radha Krishto* v *Ram Chunder*, 11 W. R. 300, *Russick Das* v *Preonath*, 10 C 105, *Shamal* v *Ghasita*, 23 A 459.

Under s. 8 of Act (XL of 1858), the Civil Court has no power to refuse to admit a person who has obtained a certificate under the Act to defend a suit on behalf of the minor as his guardian.—*Baleo Das* v. *Gobind Shankar*, 7 A 914

A suit was instituted in a mofussil Court against two defendants, one of them being a minor Before a guardian *ad litem* had been appointed for the defendant, an application was made to the High Court to transfer the case from the mofussil to the High Court, through a next

friend. *Held*, that the application was not informal, and could be made through the next friend.—*Jotindro Nath* v. *Raj Kristo*, 16 C 771.

For further cases on this point, *see*, cases under the heading "Representation of Minors in suits" given under r. 1.

A next friend of an infant is entitled to an order for change of attorney on the same terms as any other litigant *sui juris*. So long as he continues to be the next friend, he is entitled to appoint and change his own solicitor.—*Dinendra Nath* v. *T. H. Wilson & Co.*, 5 C. W. N. 434

The Court has no authority to make a minor's estate liable for costs when such minor is unrepresented or not properly represented.—*Ami Chand Talak Chand* v. *Collector of Sholapur*, 13 B. 234

Pleader's Liability for Costs.—Where the plaint in a suit by minors was not framed in accordance with the provisions of rr. 1 and 4, the High Court directed that the pleader who filed the original suit, and the pleaders who filed the appeal in the lower Court, should be called upon to show cause, why they should not be ordered to pay the costs of the suit and of the appeal.—*Shonai Bewah* v. *Monoram Mundul*, 11 C. L. R. 15

Receipt by next friend or guardian for the suit of property under decree for minor.

6. (1) A next friend or guardian for the suit shall not without the leave of the Court, receive any money or other moveable property on behalf of a minor either—

(*a*) by way of compromise before decree or order, or

(*b*) under a decree or order in favour of the minor.

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or having been so appointed or declared, is under any disability known to the Court to receive the money or other moveable property the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.

COMMENTARY.

This section exactly corresponds to s. 461, C. P. Code, 1882.

Joint Hindu Family.—The managing member of a joint Hindu family governed by the Mitakshara School, who is also appointed guardian *ad litem* of his minor brother for the purpose of a rent suit, in which the brothers obtained a decree for arrears of rent against their tenant, is exempt from the restrictions imposed by this rule.—*Harihar Persad* v. *Mathura Lal*, 35 C. 561: 12 C. W. N. 598: 8 C. L. J. 256. But on the other hand, a later decision of the Privy Council has decided that a managing member of a joint Hindu family, if he is also a next friend

or guardian, is subject to the control of the Court, and that he cannot do any act in his capacity of manager for which the leave of the Court would have been necessary if he had acted as next friend or guardian; *Ganesh* v. *Tuljaram*, 36 M. 295, 40 I. A. 132: 19 I. C. 515. So where payment under a decree passed jointly in favour of a minor and of the manager of a joint Hindu family was certified by the manager alone as the next friend of the minor, the Court refused to record the payment on the ground that the leave of the Court had not been obtained; *Pitchakuttiya* v. *Doraiswami*, 47 M. L. J. 498: 82 I. C. 588: A. I. R. 1925 Mad. 230.

A Court cannot, under this rule, order payment of money to a person not appointed guardian *ad litem* by any competent authority without demanding security from him.—*Krishna Iyer* v. *Chakrapani*, 29 I. C 475 (31 B 413: 9 Bom. L. R. 553 *followed*).

"The Court shall give such directions."—The order for attachment of a surety's property under Or. XXXII, r. 6 cannot fall within the words "such directions as will, etc." The legislature could not have intended to include such a large power as that of attaching the property of a person not a party to any suit or decree within the cognizance of the Court under the category of mere directions.—*Nadanaligi* v. *Angadi*, (1917) M. W. N. 490: 22 M. L. T. 320, 39 I. C. 928.

Agreement or compromise by next friend or guardian for the suit.

7. (1) No next friend or guardian for the suit shall, without the leave of the Court expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor. [S. 462.]

COMMENTARY.

This rule corresponds to s 462, C P. Code, 1882, with this modification, that the words "*expressly recorded in the proceedings*" have been added after the words "without the leave of the Court" The above addition has been made in accordance with several rulings of the Privy Council and of the High Courts noted below. By the addition of the above words the case in which it was held that when the Court permits a compromise, it must be presumed in the absence of the evidence to the contrary that it gave due consideration to the matter, have been superseded.

Object and Scope of the Rule.—The provisions of this rule have been adopted from the rule previously laid down by the Privy Council and are intended to protect the interests of minors.—*Rajagopal* v. *Subramanya*, 33 M. 103, 104; *Sharat Chunder* v. *Kartik Chunder*, 9 C 810; *Moulvi Abdool* v. *Mozuffer Hossein*, 16 W. R. P. C. A suit relating to the estate or person of a minor and for his benefit has the effect of making him a ward

of Court and no act can be done affecting the minor's property unless under the direction of the Court, express or implied—*Dora Swami* v. *Thunga Swami*, 27 M. 377. Before a compromise decree can be passed in a suit to which a minor is a party it is necessary to take the following steps *viz.*, (1) an application by the next friend or guardian *ad litem* to compromise the suit (2) the granting of permission by the Court to so compromise and (3) the consent of the next friend or guardian to the proposed compromise after the Court's leave is obtained; *Aman Singh* v. *Narain*, 20 A. 98. The Court cannot force a compromise upon a minor against the wishes of the guardian *ad litem* or next friend; *Hemangini* v. *Bhagwati*, 27 C. W. N. 792: 75 I. C. 682: A. I. R. 1923 Cal. 685, but if the guardian or next friend appears to be refusing to consent to an arrangement which is likely to prove beneficial to the interests of the minor, the Court may take steps for his removal and appoint some other person; *Hemangini* v. *Bhagwati*, 27 C. W. N. 792.

"Without the leave of the Court expressly recorded in the proceedings."—In giving permission to compromise a suit on behalf of a minor, it is usual and desirable that the Court should record an order stating that it considers the compromise to be for the benefit of the minor, but such an order is not essential to the validity of the compromise. The addition of the words "expressly recorded in the proceedings" in Or. XXXII, r. 7 has not changed the pre-existing practice under s. 462 of the old Code—*Bejoy Singh* v. *Mathuriya Debya*, 56 I. C. 97; *Ishan Chandra* v. *Nil Ratan*, 2 Pat. 538: 4 Pat. L. T. 311: 1 Pat. L. R. 217. *But see*, *Hanuman Rai* v. *Jagdas Rai*, 35 I. C. 675. The leave must be express, not implied, *Raja Gopal* v. *Muttipalem*, 3 M. 103; *Sharat* v. *Kartik*, 12 C. L. R. 455, 9 C. 810; *Rameswar* v. *Ram Bahadur*, 5 C. L. J. 175: 11 C. W. N. 178. The sanction of the Court to a compromise cannot be inferred merely from the fact that the Court passed a decree in accordance with the compromise, *Manohar Lal* v. *Jadunath*, 28 A. 385; *Parlab* v. *Bhabuti Singh*, 35 A. 487: 40 I. A. 182; *Sharat* v. *Kartick*, 9 C. 810; *Ram Gulam* v. *Durga Prasad*, 6 Pat. L. J. 190: 60 I. C. 980. But an order of the Court sanctioning a compromise need not, on the face of it, state in so many words that the Court had considered the terms of the compromise and regarded them to be beneficial to the minor; *Janki* v. *Nanni Lal*, 36. P. R. 146: 39 I. C. 53; *Rajagopalam* v. *Subbarama*, (1919) M. W. N. 356: 53 I. C. 354.

Compromise under Misapprehension of Material Facts.—Where it appears that the compromise has been entered into by the parties and sanctioned by the Court, under a misapprehension of material facts, the minor is entitled to have the compromise set aside, and the parties are entitled to be restored to their rights in the former suit as at the time it was effected.—*Bibee Solomon* v. *Abdool Azeez*, 6 C. 687: 8 C. L. R. 169; *Jhanda Singh* v. *Lachmi*, 56 I. C. 878.

Materials to be considered by Court in Sanctioning a Compromise on Behalf of a Minor.—The Court must exercise its discretion in a judicial manner when sanctioning a compromise on behalf of a minor. If it does, it cannot be set aside in a subsequent suit. What materials the Judge must consider before sanctioning the compromise will depend upon the facts of each case. There is no general rule.—*Dhairya Singh* v. *Kissandas*, 28 Bom. L. R. 362: 94 I. C. 404: A. I. R. 1926 Bom. 291.

Compromise of Execution Proceedings.—This rule applies to a compromise of execution proceedings Hence an adjustment of a decree to which a minor is a party requires under this rule the sanction of the Court.—*Virupakshappa* v. *Shidappa*, 26 B. 109; the provisions of this section apply to compromises after decree and no adjustment by compromise of a decree by the guardian of a minor can be certified under s 258, C. P. Code, 1882, (Or. XXI, r. 2) without the leave of the Court under this rule.—*Arunachellam* v. *Rama Nadhan*, 29 M. 309; *David Rowther* v. *Paramasami*, 31 M. L. J 207 35 I C. 270. *See* also, *Ramgulam* v. *Shamsahai Dass*, 5 Pat. L J. 379; *Gurumallappa* v. *Mallappa*, 22 Bom. L. R. 725; and *Sadashiv Ram Chandra* v *Trimbak*, 40 B. 202 · 22 Bom L. R. 266.

Sanction of Court If Necessary to Transfer of Decree in Favour of Minor by Guardian or Next Friend.—The next friend of a minor cannot transfer a decree which he had obtained on behalf of the minor, to a third party without obtaining the leave of the Court; *Kancherla Kanakayya* v *Mulpuree Kottayya*, 41 M. L. J 75 · 13 L. W. 637. But see *Govindarajulu* v *Ranga Row*, 40 M L. J. 124; 13 L W 97 where a contrary view was taken.

Agreement to be Bound by Oath under Indian Oaths Act., 1873, Not Within this Rule.—An agreement by the guardian on behalf of the minor to be bound by the statement, on oath, of a certain witness does not amount to a compromise requiring sanction of the Court for its validity, and is binding upon the minor without such sanction, in view of the provisions of s 11 of the Oaths Act of 1873.—*Deoraj* v *Musst Abhai Raji*, 102 I C. 38: A I R 1927 All 584. Similarly an agreement by the next friend of minor that an issue in the suit should be determined by the oath of the defendent, does not come within the purview of this rule, and the sanction of the Court is not necessary; *Chengal* v *Venkata*, 12 M 483 · *Sheo-nath* v *Sukh Lall*, 27 C. 229

Conditions Necessary to Make Binding Compromise by Minor's Guardian.—When a compromise of the suit is made, it ought to be carried out by proper deeds and filed in Court, particularly when infants are concerned, so as to have the assent of the Court at the time, instead of its being totally concealed from them —*Abdool Ali* v *Mozuffer Hussein*, 16 W. R 22 P C

In order that a compromise may be binding upon a minor the leave must be express and the Court in sanctioning a compromise under this rule should record the fact that the application was made to it by the next friend or guardian, that the terms of the compromise were considered by it, and should in terms state that the question whether the compromise was for the benefit of the infant was considered From the mere fact that the Court passed the decree in accordance with the compromise it cannot be inferred that any of those steps preliminary and necessary to the making of the decree had been taken by the Court.—*Biku Haluai* v *Mohesh Halwai*, 8 C L J 266 (16 W R 232 26 B 109, *followed*) *See* also, *Virupakshappa* v *Shidappa*, 26 B 109; *Govindasami* v *Nagusami*, 29 M. 101, *Krishna Persad* v *Romes Chandra*, 8 C L J 271 13 C. W. N. 163, *Manohar Lal* v *Jadu Nath*, 28 A 585, P. C 4 C L. J 8 · 10 C. W. N 898; *Rajagopalam* v. *Subrahmanya*, (1910) M W N. 356; *Lala*

Majlis Sahai v *Naram Bibi*, 7 C. W. N. 90; *Kalavati* v. *Chedi Lal*, 17 A 531 · *Sharat Chunder* v. *Kartik Chunder*, 9 C. 810: 12 C. L R 455, *Ram Gopal* v *Muttupalem*, 3 M. 103; *Arunachalam* v. *Meyyapa*, 21 M 91: *Ram Gulam* v. *Durga Pershad*, 6 Pat. L. J. 190: 2 Pat L. T. 325 But see, *Aman Singh* v *Narain Singh*, 20 A. 98; and *Nirvānaya* v. *Nirvanaya* 9 B 365 · *Midnapur Zemindari Co. Ltd.* v. *Gobinda Mohato*, 3 C. L J. 31

Effect of Compromise Without Leave of Court.—In cases to which this rule applies it should be clearly shown that the leave of the Court was obtained and that the attention of the Court was drawn to the fact that there was a minor.—*Pratab Singh* v. *Bhabati Singh*, 35 A. 487 P C. 18 C. L J 384 17 C W. N. 1165; *Ishar Chandra* v. *Nilratan*, 2 Pat 538 4 Pat. L T. 311 Otherwise the compromise is not enforceable against the minor.—*Subramaniyam* v. *Rajeswara*, 39 M. 115: 20 C W N. 201 (P. C.); *Jawa labai* v. *Vasanto Rao*, 39 M. 409: 39 M. 83. 34 M. 315.

Where the guardian of a minor litigant fails to obtain the leave of the Court to enter into a compromise on behalf of a minor, it is open to the minor under Or XXXII, r. 7 to avoid the compromise. In the absence of an order granting permission to the guardian to enter into a compromise, the presumption is that no such permission was granted —*Badra Prashad* v *Gopal Behari Lal*, 41 All 653: 17 A. L. J. 789: 50 I. C. 752· 29 M L J 856.

A compromise in a suit made without the leave of the Court though not binding on the minor will be binding on the other parties —(1918) Pat 193: 3 Pat. L J 255 · 4 Pat. L W 393

If a compromise is entered into by a guardian on behalf of a minor without the leave of the Court and a decree is passed in accordance with the terms of the compromise, such a decree is not a nullity but is voidable at the instance of the minor, *Jita Singh* v. *Man Singh*, 2 Lah. 161· 62 I C. 791 (26 B. 109 95 P R. 1912, *folld;* 28 A. 187, 35 A 487 P. C. *distd.*), *Chellaram* v *Kimatram*, 14 S L R. 245: 61 I. C. 118

Compromise of suit by guardian *ad litem*—Leave of Court not obtained—Withdrawal from compromise by the guardian—Suit to have the compromise enforced *Held*, that inasmuch as leave of the Court had not been asked for, and the guardian had objected to the Court passing a decree in terms of the compromise, the Court had no power to enforce compromise, even though the terms of it might appear to be beneficial to the minor —*Ranga Rao* v *Rajgopala Raju*, 22 M. 378

Compromise When can be Set Aside.—A compromise sanctioned by a Court under this rule cannot be set aside merely on the allegation that the compromise was not in the interest of the minor and unconscionable The Court has to consider the question whether the compromise is for the benefit of the minor before it sanctions it, and so there must be something amounting to fraud before the Court can set it aside —*Maharaj Bhanudas*, v. *Krishnabhai*, 28 Bom. L. R. 1225: 50 B. 716: A. I. R 1927 Bom. 11.

Agreement to Refer to Arbitration, Whether under this Rule.—An agreement entered into by a next friend or guardian *ad litem* to refer any matter in dispute in the suit to arbitration is an " agreement " falling

within this rule and the Court's sanction is therefore necessary; *Lakshmana* v. *Chinnathami*, 24 M. 326; *Vijaya* v. *Venkatasubba*, 39 M. 853; *Atmaram* v. *Bhila*, 15 Bom. L. R. 223; *Ganesha* v. *Mul Chand*, 95 P. R. 1912; *Muhamad Ibrahim* v. *Allah Baksh*, 145 P. R 1919; *Chhajjumal* v *Tarloki Nath*, 8 Lah. L. J. 414: 96 I C. 748, A I. R 1926 Lah. 666 It has been held by the Allahabad High Court that such an agreement is not within this rule, and the sanction of the Court is not necessary.—*Hardeo* v *Gauri Shanker*, 28 A. 35, *Latawan* v *Lachya*, 36 A 69: 21 I. C 989 F B.

The agreement contemplated in Sch II, C. P Code, para 1, *et seq*, is an "agreement with reference to the suit" under Or XXXII, r 7, and it is not validly entered into on behalf of a minor where the guardian of the minor purports to bind the minor without the leave of the Court expressly recorded and thus exceeds the authority given to him by the said rule —*Davuluru Vijava* v *Davuluru Venkatasubha*, 39 M 853 30 M L. J 465 *See* also, *Baktawar* v *Kesarsingh*, 59 I. C. 31. But the Allahabad High Court, in *Hardeo* v. *Gouri Shankar*, 28 A. 35, has held that such an agreement is not within this rule, and the Court's sanction is therefore not necessary This was approved by the Calcutta High Court in *Annada Krishna* v *Jogendra Nath*, 8 C L. J. 294

Withdrawal of Suit by Next Friend.—When a person acting for a minor has fraudulently withdrawn the minor's suit, without obtaining leave to bring a fresh suit, it is open to the minor to relieve himself from the consequences of fraud in one of three ways, *viz* (1) by an application to the Court in the suit in which the withdrawal took place; (2) by a regular suit to set aside the judgment founded upon the withdrawal, (3) by bringing a fresh suit for the same purpose, and setting up the fraud as an answer to the statutory bar.—*Eshan Chundra* v. *Nundamoni* 10 C. 357 Approved in *Virupakshappa* v. *Shidappa* 23 B. 620. *See* also, *Ram Sarup* v. *Shah Latafat Hossein*, 29 C. 735; *Rajada* v. *Ghulia*, 59 P. R. 1919. In *Doraswami* v *Thungasami*, 27 M. 377, the order of withdrawal was set aside by the High Court on revision.

Power of a Guardian to Bind the Minor by the Oath of the Opposite Party or by Reference to Arbitration.—The offer of the guardian of a minor defendant to be bound by the oath of the opposite party, stands on a very different ground from an agreement or compromise contemplated by this rule. In such a case, the minor is bound by the consent of his guardian, although given without the leave of the Court, provided that there is no fraud or gross negligence on the part of the guardian.—*Sheo Nath* v. *Sukh Lal*, 27 C. 229: 4 C. W. N. 327. *Followed* in *Hardeo Sahai* v. *Gouri Shankar*, 28 A. 35: 2 A. L. J. 493. *See* also, *Chengal Reddi* v. *Venkata Reddi*, 12 M. 483, and *Ananda Krishna* v. *Jogendra Nath*, 8 C. L. J. 294.

A manager of a joint Hindu family has the power to bind the family by reference of a dispute with any outsider regarding any family property to arbitration. Minors in the family are bound by the reference and consequently the award made upon it—*Balaji* v. *Nana*, 27 B. 287. *See* also, *Vithaldas* v. *Dattaram*, 26 B. 298.

Whether the Court can Force Compromise Against the Wishes of the Guardian ad litem or Next Friend.—Although the Court can and must

approve of a compromise on behalf of infants, it cannot and will not force one upon them against the opinion of the next friend or guardian *ad litem* in the action. No doubt if the Court found that a guardian or next friend was acting improperly and against the infants' interest in refusing to assent to an arrangement which appeared clearly beneficial to them, steps might be taken to remove him and substitute some other person.—*Hemangini Dasi* v. *Bhagwati Sundari*, 27 C. W. N. 792: 75 I. C. 682.

Gross Negligence or Fraudulent Conduct of Next Friend or Guardian Ad Litem Vitiates Proceedings.—An infant has remedy either by application for review of judgment or by separate suit when either gross laches or fraud or a collusion is found in the next friend. The result appears to be that the negligence or laches of the guardian which entitles the minor to avoid the decree must be of a gross character.—*Ram Sarup* v. *Shah Latafat Hossain*, 29 C. 735. It is not every kind of negligence nor any amount of negligence which would render proceedings, otherwise regular and proper, liable to be opened. It must be such negligence as leads to the loss of a right which, if the suit had been conducted or resisted with due care, must have been successfully averted. It is not sufficient to show that the guardian *ad litem* absented himself, it must also be proved that there was an available good ground of defence which was not put forward owing to the default of the guardian *ad litem* to appear at the trial. The test in such a case is whether or not there has been culpable neglect of the interests of the minor. Has there been in the conduct of the suit, any act or omission on the part of the guardian *ad litem* which, in the result, has brought prejudice to the minor's interests.—*Brijraj* v. *Ram Sarup*, A. I. R. 1926 All. 36; *Parmeswari* v. *Sheo Dat*, 6 C. L. J. 448; *Lekhraj Roy* v. *Mahtab Chand*, 14 M. I. A. 393: 17 W. R. 117.

A suit by minor to set aside a compromise decree on a ground other than fraud is maintainable. When and under what circumstances such a suit is maintainable explained and pointed out.—*Surendra Nath* v. *Hemangini*, 34 C. 83 (10 C. 612: 2 C. L. J. 508, *referred to*). *See* also, *Brahmdeo* v. *Banarasi*, 3 C. L. J. 119, and *Baranasi* v. *Ram Narain*, 30 A. 105.

The proper course for a minor to set aside a compromise entered into by his guardian without the leave of the Court and the decree based upon it, is by way of an application for review in the first Court or by a separate suit, but not by an appeal from the compromise decree.—*Rakhalmoni* v. *Adwyata Prosad*, 30 C. 613: 7 C. W. N. 410. *See* also, *Biraj Mohini* v. *Chinta Moni*, 5 C. W. N. 877.

In addition to the cases noted above, see the cases noted under Or. XXIII, r. 3 on this point, under the heading "COMPROMISE BY THE MINOR'S NEXT FRIEND AND GUARDIAN AND ITS EFFECTS."

Retirement of next friend.

8. (1) Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred.

(2) The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed, and also that he has no interest adverse to that of the minor. [S. 447.]

COMMENTARY.

This rule exactly corresponds to section 447, C. P. Code, 1882.

Retirement of Next Friend.—This rule directs that a next friend shall not retire at his own request without first procuring a fit person to be put in his place and without giving security for the costs, already incurred. Where the same person is both certificated guardian and guardian *ad litem* to minor plaintiff, the fact that one of such plaintiffs has come of age and been appointed certificated guardian of the persons and property of the others would not relieve the original guardian of his duties as guardian *ad litem*: to do this requires a special order under this rule.—*Banarasi Prasad* v. *Ram Narain*, 30 A. 105: 5 A. L. J. 35.

9. (1) Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or where he does not do his duty, or, during the pendency of the suit ceases to reside within British India, or for any other sufficient cause, *application may be made on behalf of the minor or* by a defendant for his removal; and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly, and make such other order as to costs as it thinks fit.

Removal of next friend.

(2) Where the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit. [S. 446.]

COMMENTARY.

Alterations in the Rule.—Sub-rule (1) corresponds to para. 1 of s. 446, C. P. Code, 1882, with some modifications. The word "*where*" has

been substituted for the word "if" wherever it occurred in the old section, and the words "*and make such order as to costs as it thinks fit,*" have been added

Sub-rule (2) corresponds to para. 2 of section 446 of the C. P. Code 1882, with the addition of the following words. "*and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit.*"

"The Committee think it expedient that where a guardian insists on his right to be appointed next friend in the place of another there should be power to require him to become liable or give security for costs in the suit previously incurred"—*See the Report of the Special Committee*

"Where the next friend does not do his duty."—Where a Court finds that a next friend does not do his duty in relation to a suit, it is its duty not to permit him to prejudice the interests of the minor, but to adjourn the suit in order that some one interested in the minor may apply on his behalf for removal of the next friend and for the appointment of a new next friend, or in order that the minor plaintiff himself may, on coming of age, etc., proceed with the suit or withdraw from it; *Doraswami v Thungasami*, 27 M 377

Where charges of immorality were brought against the holder of a certificate under Act XL of 1858, it was held to be the duty of the Judge to enquire into the truth of the charges and fitness of the certificate holder —*Mohunuddy Begam* v *Oomdultanessa*, 13 W. R. 454

Adverse Interest.—When the next friend or guardian of the minor has, for his own advantage or by negligence, allowed time for appeal to run out, the Court may enlarge time for appeal in the minor's favour—*Gursandas* v *Ladhavahoo*, 20 B 104. If a Court considers that the interest of a next friend of a minor plaintiff is adverse to that of the minor, it should remove the next friend under this rule and then stay further proceedings under the next rule until the appointment of a fresh next friend; *Kirit Narayan* v *Chanchal*, 6 Pat. L. J. 317: 63 I. C. 736

In a case where the guardian, without any sufficient cause or justification, and without legal advice, withdrew an appeal made to set aside a sale of the estate of the minors, the certificate of guardianship was cancelled —*Pitamber Dey* v *Ishan Chunder*, 18 W. R. 169

An application for the removal of guardians must be supported by proof of malversation or misconduct such as would afford sufficient ground for removal.—*Rajessurge Debia* v. *Jogendra Nath*, 23 W. R. 278.

Stay of proceedings on removal, etc., of next friend.

10. (1) On the retirement, removal or death of the next friend of a minor further proceedings shall be stayed until the appointment of a next friend in his place. [S. 448.]

(2) Where the pleader of such minor omits, within a reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or in the matter in issue may apply

to the Court for the appointment of one, and the Court may appoint such person as it thinks fit [S. 449.]

COMMENTARY.

Sub-rule (1) corresponds to s. 448, C. P. Code, 1882, with the addition of the word "*retirement*" before the word "removal."

Sub-rule (2) corresponds to s. 449, C. P. Code, 1882, with the substitution of the word "where" for the word "if" which occurred in the old section.

Death of Next Friend.—On the death of a minor plaintiff's next friend, the suit does not abate, and, therefore, should not be dismissed If, however, an order of dismissal is passed, it is a nullity and can have no effect upon the rights of the plaintiff. The duty of the Court is either to appoint a new next friend or to allow the suit to be pending till the minor attains majority.—*Venkateswara* v. *Cherrseri*, 27 M L. J. 405. 25 I. C. 597.

Retirement, removal or death of guardian for the suit.

11. (1) Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him and may make such order as to costs as it thinks fit. [S. 458.]

(2) Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place. [S. 459.]

COMMENTARY.

Sub-rule (1) corresponds to s. 458, C P. Code, 1882, with some additions and alterations The old section is reproduced below to observe the changes introduced in this rule: "*If the guardian for the suit of a minor defendant does not do his duty, or if other sufficient ground be made to appear, the Court may remove him, and may order him to pay such costs as may have been occasioned to any party by his breach of duty.*"

Sub-rule (2) corresponds to s 459 C. P. Code, 1882, with some modifications. The word "retires" has been added before the word "dies."

The other changes are merely verbal.

Retirement of Guardian.—It is not open to a guardian appointed by the Court to retire at his own sweet will without the permission of the Court. It is a matter of discretion for the Court to permit the guardian to retire —*Narendar Singh* v *Chatrapal*, 91 I C 840 A I R 1926 All 437

"May remove him."—The power of the Court to remove the guardian *ad litem* and appoint a new guardian instead may be exercised at any time during the pendency of the suit and the same is not taken away by the fact that an order to try the suit *ex parte* had previously been

passed.—*Ayya Nadan* v. *Thennammal*, 27 M. L. T. 171 (1920) M W N. 241 55 I C 945.

"Court may make such order as to costs as it thinks fit."—The C. P Code does not authorize a Court to decree costs against the guardian of a defendant except in the case referred to in this rule.—*Narasimha Rau* v *Lakshmipati Rau*, 3 M. 263

Where a guardian *ad litem* of an infant had been guilty of gross misconduct in putting executors to proof of a will which he wished to upset for his own private purpose, and which, the evidence showed, was to his knowledge duly executed by the testatrix in a sound state of mind *Held* that he was liable for the costs of the suit.—*Goolam Hossain* v *Fatmabai*, 8 B 391

After the dismissal of an administration suit brought by the next friend of a minor plaintiff, the Court ordered the next friend to pay the costs, being of opinion that he was the real actor in the suit, and that the suit was unnecessary —*Devkabai* v. *Jefferson*, 10 B. 248.

This rule is not, so far as regards payment of costs, applicable to any person appointed to act as guardian *ad litem* with his previous assent —*Jadow Mulji* v. *Chhagan Raichand*, 5 B. 306.

Death of Guardian Ad Item.—Where death of guardian *ad litem* takes place pending appeal, and judgment is passed without a new guardian, it is a mere irregularity.—*Ramdayal* v. *Ajudhia*, (1906) A. W. N 40, *Gobardhan* v *Mahabir*, 34 A. 321.

Where a guardian *ad litem* died during the pendency of the appeal and the appeal was disposed of without a fresh guardian being appointed but a new guardian was appointed in execution proceedings. *Held*, that no guardian for the minors having been appointed they were to all intents and purposes not parties to the appeal at all and therefore the decree and sale in execution were as against them a nullity.—*Chundury Krishnayya* v *Koripalli Raju*, 31 M L J 39 35 I. C. 154.

Where a minor filed an objection in execution proceedings with a particular person as next friend and in the appeal against the order in those proceedings, the minor was represented by another person and no objection was raised as regards the guardianship. *Held*, it was only a minor irregularity and s 99 of the C P. Code precluded the Court from reversing the decree on that ground; *Abdul Gani* v. *Barkia*, 61 I C 605.

Course to be followed by minor plaintiff or applicant on attaining majority.

12. (1) A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application. [S 450]

(2) Where he elects to proceed with the suit or application, he shall apply for an order discharging the next

(3) The title of the suit or application shall in such case be corrected so as to read thenceforth thus :—

"A. B., late a minor. by C. D., his next friend, but now having attained majority." [S. 451, Para. 2.]

(4) Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend. [S. 452.]

(5) Any application under this rule may be made *ex parte* : but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend. [S. 453.]

COMMENTARY.

Alterations in the Rule.—The provisions contained in ss. 450, 451, 452 and 453 of the C P. Code, 1882, have been amalgamated in this rule with some additions and alterations.

Sub-rule (1) corresponds to s 450, C. P. Code, 1882, with some verbal alterations The words "*shall*" has been substituted for the word "must" and the words "*on attaining majority*" have been substituted for the words "on coming of age," which occurred in the old section.

Sub-rule (2) corresponds to para. 1 of s 451 of the C. P. Code, 1882, with some modifications The word "*where*" has been substituted for the word "if"; and the words "*with the suit or application*" have been substituted for the words "with it," which occurred in the old section.

Sub-rule (3) corresponds to para. 2 of s. 451 of C. P Code, with this modification, that the words "*having attained*" have been substituted for the words "but now of full age," which occurred in the last part of para. 2 of the old section.

Sub-rule (4) corresponds to s 452, C. P Code, 1882, with slight modification. The words "*or opposite party*" have been added after the word "defendant."

Sub-rule (5) corresponds to s. 453, C P Code, with some additions and alterations. The words "and it must be found by affidavit that the late minor has attained his full age," which occurred in the old section have been omitted ; and the words "*but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend*" have been added

When a suit is instituted on behalf of a person alleged to be, but not, in fact, a minor, and the suit is brought through a next freind, the Court should not dismiss the suit In such a case the proper remedy is for the defendant to apply to have the plaint taken off the file or amended, and

if it be not amended, the next friend's name may be treated as a mere surplusage, and the suit should be allowed to proceed.—*Tagui Jan* v *Obaidulla*, 21 C 860 *Contra* in *Sheorania* v. *Bharat Singh*, 20 A. 90

Title to be Corrected.—The provision in this rule requiring the title to be corrected, would apply to a pending suit, and not to a suit in which a final decree has been passed, and in which it only remains to proceed in execution.—*Doorga Mohun* v. *Tahir Ally*, 22 C. 270.

Where minor co-plaintiff attaining majority desires to repudiate suit.

13. (1) Where a minor co-plaintiff on attaining majority desires to repudiate the suit, he shall apply to have his name struck out as co-plaintiff; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit.

(2) Notice of the application shall be served on the next friend, on any co-plaintiff and on the defendant.

(3) The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs.

(4) Where the applicant is a necessary party to the suit, the Court may direct him to be made a defendant. [S. 454]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s. 454, C P. Code, 1882, with some alterations and omissions.

Sub-rule (1) corresponds to para. 1 of s. 454. The words "*where a minor co-plaintiff on attaining majority desires to repudiate the suit, he shall apply*" have been substituted for the words "a minor co-plaintiff, on coming of age, and desiring to repudiate the suit, must apply," which occurred in the beginning of the old section.

Sub-rule (2) corresponds with the first part of para 2 of the old section with the addition of the words "*on any co-plaintiff.*" The words "and it must be proved by affidavit that the late minor has attained his full age," which occurred in the middle of para 2 of the old section, has been omitted.

Sub-rule (3) corresponds to the last part of para 2 of the old section with some verbal changes.

Sub-rule (4) corresponds to part 3 of the old section with change of some words, without any change in the meaning.

Unreasonable or improper suit.

14. (1) A minor on attaining majority may, if a sole plaintiff, apply that a suit instituted in his name by a next friend be dismissed on the ground that it was unreasonable or improper.

"(2) Notice of the application shall be served on all the parties concerned; and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit or make such other order as it thinks fit. [S. 455.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s 455, C. P. Code, 1882, with some alterations and omissions.

Sub-rule (1) corresponds to para. 1 of the old section, which is reproduced here to mark distinction "*If any minor, on attaining majority, can prove, to the satisfaction of the Court, that a suit instituted in his name by a next friend was unreasonable or improper, he may, if a sole plaintiff, apply to have the suit dismissed*"

Sub-rule (2) corresponds to para 2 of s 455, C. P Code, 1882, with the addition of the words "*or make such other order as it thinks fit*" in the last part.

After the dismissal of an administration suit brought by the next friend of a minor plaintiff, the Court ordered the next friend of the minor to pay the costs of the suit, being of opinion that he was the real actor in the suit, and that the suit was unnecessary.—*Devkabai* v. *Jefferson*, 10 B. 248.

When a person acting for a minor has fraudulently withdrawn the minor's suit, without obtaining leave to bring a fresh suit, and by such withdrawal an absolute statutory prohibition is imposed on the minor, from bringing a fresh suit it is open to the minor to relieve himself from the consequences of the fraud in one of the three ways, *viz*, (1) by an application to the Court in the suit in which the withdrawal took place; (2) by a regular suit to set aside the judgment founded upon the withdrawal; or (3) by bringing a fresh suit for the same purpose, and setting up the fraud as an answer to the statutory bar.—*Eshan Chundra* v. *Nandamoni*, 10 C. 357.

Application of rules to persons of unsound mind.

15. The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued. [S. 463.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s 463, C P. Code, 1882, with some additions and alterations The old section is reproduced

below to observe the changes introduced by the present rule. "*The provisions contained in sections* 440 to 462 (*both inclusive*) *shall mutatis* mutandis, *apply in the case of persons of unsound mind adjudged to be so under Act No. XXXV of* 1858, *or under any other law for the time being in force*"

It would appear on a comparison that the words "*and to persons who though not so adjudged are found by the Court on enquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued*" have been added. The additions seem to have followed the principles laid down in 16 B 13, 24 M. 504, and in 33 C. 1904: 10 C. W. N. 517: 4 C. L J. 306, and to set at rest the conflicting rulings, all of which have been considered and discussed in the above Calcutta case. The above amendment has overridden 6 M 380 and 13 B 656 and the other cases in which a contrary view was expressed

"Mental Infirmity."—By the addition of the words "*or mental infirmity*," the scope of the present rule has been enlarged The old section was applicable to persons of "*unsound mind*" only; but the present rule applies to persons of unsound mind as well as to persons who are suffering from any mental infirmity in consequence of which he is incapable of protecting his own interests. In this connection 4 C. L J 11 should be consulted in which the words "lunacy, weakness of intellect and unsoundness of mind" have been clearly explained and distinguished

"The Committee have extended this rule so as to cover the case of a person incapacitated from protecting his interests by reason of his mental weakness or of his being a deaf mute"—*See the Report of the Special Committee.*

Meaning of the Term "unsound mind."—The term "unsound mind" comprehends imbecility, whether congenital or arising from old age, as well as lunacy or mental alienation resulting from disease —*In re Cursetji Beramji*, 7 B. 15.

Distinction between lunacy with lucid intervals, and a state of sound mind, subject to occasional unsoundness arising from accidental and temporary causes, considered.—*In re Nagappa Chetti*, 18 M. 472 (6 C S and 543 *referred to*)

Mere weakness of intellect is not unsoundness of mind. The distinction between the words lunatic, weakness of intellect, and unsoundness of mind explained —*Mazaharuddin Khan* v. *Serajuddin Khan* 4 C L J 115 (24 W. R 124 *approved*).

"Persons adjudged to be unsound mind."—Under the Lunacy Act IV of 1912 a person may be adjudged to be of unsound mind The old Act was Act XXXV of 1858.

Appointment of Next Friend or Guardian Ad Litem of Persons of Unsound Mind.—A person alleged to be a lunatic, though not adjudged to be so under Act XXXV of 1858, may sue through a next friend, and defend through a guardian *ad litem*.—*Nabbu Khan* v. *Sita*, 20 A. 2. In *Uma Sundari* v. *Ramji Haldar*, 7 C. 242. 9 C. L. R. 13, and in *Brindaban Chunder* v. *Kali Dass*. W. R. (1864) 268, it has been held that a p

son alleged to be a lunatic though not found so under Act XXXV of 1858, may appear either by vakeel or in person *See* also, *Pransukhram v. Bai Ladkor*, 23 B. 653 Although s 443 (Or. XXXII, r. 3), read with s. 463, C. P. Code, 1882 (this rule), does not oblige a Court to appoint a guardian *ad litem* for a defendant of unsound mind, except when he has been adjudged to be of unsound mind under Act XXXV of 1858, still upon general principles, and in conformity with the practice of the Court of Chancery, the Court should assign a guardian *ad litem* for the defendant if it finds, on enquiry, that he is of unsound mind so as to be unfit to defend the suit —*Venkataramana* v *Tumappa*, 16 B 132. This case has been followed in *Kadala Reddi* v *Narisi*, 24 M. 504. *See* also, *Lakhya Dasya* v. *Umakanto*, 14 C. W. N. 256 ; *Kamini Kumar* v *Shib Sundari*, 62, I. C. 770 ; *Rasik Lal* v. *Bidhumukhi*, 33 C 1094. 10 C W. N. 719: 4 C. L. J. 306, where all the cases on this point have been referred to. But in *Subhaya* v *Buthaya*, 6 M. 380 and in *Tukaram Anant* v. *Vithal Joshi*, 13 B 656, a contrary view was taken by holding that provisions of s. 463 of the C P. Code (this rule) applied only to those who were previously adjudicated lunatic under Act (XXXV of 1858) These latter cases have been superseded by the amendment.

A guardian of the person only of a lunatic is not competent to sue in respect of the lunatic's estate The manager of the lunatic's estate is the only person who can institute such a suit The word " guardian " in s. 440, C. P Code, 1882 (Or XXXII, rr. 1, 4), when applied to a lunatic, means the manager of his estate Under this rule a person other than the guardian of the estate can also sue with the leave of the Court —*Bai Divali* v *Hira Lal*, 20 B. 403

The mere absence of a formal adjudication of lunacy under Act XXXV of 1858, cannot invalidate the charge assumed by the Court of Wards, and a lunatic is properly represented in a suit brought by the Collector as guardian of the lunatic —*Sanku* v *Puttama*, 14 M. 289 (13 M. 197 *referred to*).

Power of Guardian of Persons of Unsound Mind.—Lunacy Act (XXXV of 1858) does not affect the general provisions of Hindu law, as to guardians who do not avail themselves of the Act, and the managing member of a joint Hindu family, one of the members of which is a lunatic, may, in case of necessity, sell joint family property including the lunatic's share, although he does not hold a certificate under the said Act.—*Kanti Chunder* v *Bisheswar*, 25 C. 585, F B. 2 C. W N. 241 F. B. (4 C. 929 *followed in principle* , 10 B L. R. 364 · 19 W R. 163 *disapproved*)

When a person is appointed manager of a lunatic's estate under Act XXXV of 1858, he can only make a valid alienation in accordance with the provisions of that Act, although he may be a *de facto* manager of the family property.—*Anpurna Bai* v. *Dargapa*, 20 B. 150.

A guardian of a lunatic's person is, in matters connected with the guardianship, subordinate to the District Court which appointed him — *In the matter of Basharat Ali*, 24 C. 133.

A District Judge has power to make an order requiring the guardian to obtain his permission before marrying the lunatic —*Chellahammal* v. *Ammayappa*, 32 M. 253 (21 C. 133, 32 B 50, 12 B 480, *referred to*).

below to observe the changes introduced by the present rule "The *provisions contained in sections 440 to 462 (both inclusive) shall mutatis mutandis, apply in the case of persons of unsound mind adjudged to be so under Act No XXXV of 1858, or under any other law for the time being in force*"

It would appear on a comparison that the words "*and to persons who though not so adjudged are found by the Court on enquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued*" have been added These additions seem to have followed the principles laid down in 16 B 1[illegible] 24 M. 504, and in 33 C. 1904. 10 C. W. N. 517: 4 C. L J. 306, and to set at rest the conflicting rulings, all of which have been considered and discussed in the above Calcutta case. The above amendment has overridden 6 M. 380 and 13 B. 656 and the other cases in which a contrary view was expressed

"Mental Infirmity."—By the addition of the words "*or mental infirmity,*" the scope of the present rule has been enlarged. The old section was applicable to persons of "*unsound mind*" only; but the present rule applies to persons of unsound mind as well as to persons who are suffering from any mental infirmity in consequence of which he is incapable of protecting his own interests. In this connection 4 C. L J 115 should be consulted in which the words "lunacy, weakness of intellect, and unsoundness of mind" have been clearly explained and distinguished

"The Committee have extended this rule so as to cover the case of a person incapacitated from protecting his interests by reason of his mental weakness or of his being a deaf mute."—*See the Report of the Special Committee.*

Meaning of the Term "unsound mind."—The term "unsound mind" comprehends imbecility, whether congenital or arising from old age, as well as lunacy or mental alienation resulting from disease.—*In re Cursetji Beramji*, 7 B 15

Distinction between lunacy with lucid intervals, and a state of sound mind, subject to occasional unsoundness arising from accidental and temporary causes, considered —*In re Nagappa Chetti*, 18 M 472 (6 C 5[illegible] and 543 *referred to*)

Mere weakness of intellect is not unsoundness of mind The distinction between the words lunatic, weakness of intellect, and unsoundness of mind explained —*Mazaharuddin Khan* v. *Serajuddin Khan* 4 C. L J 115 (24 W. R. 124 *approved*).

"Persons adjudged to be unsound mind."—Under the Lunacy Act IV of 1912 a person may be adjudged to be of unsound mind The old Act was Act XXXV of 1858.

Appointment of Next Friend or Guardian Ad Litem of Persons of Unsound Mind.—A person alleged to be a lunatic, though not adjudged to be so under Act XXXV of 1858, may sue through a next friend or defend through a guardian *ad litem*.—*Nabbu Khan* v *Sita*, 21 A 2[illegible]: *Uma Sundari* v. *Ramji Haldar*, 7 C. 212: 9 C. L R. 13, and in *B[illegible] ban Chunder* v. *Kali Dass*, W. R (1864) 268, it has been held that a p[illegible]

ORDER XXXIII.

SUITS BY PAUPERS.

Suits may be instituted *in forma pauperis*.

1. Subject to the following provisions, any suit may be instituted by a pauper.

Explanation.—A person is a "pauper" when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing-apparel and the subject-matter of the suit. [S. 401.]

COMMENTARY.

The rule corresponds to s 401, C. P. Code, 1882, with slight modifications The word "*provisions*" has been substituted for the word "rules" after the word "following," and the word "*institute*" has been substituted for the word "brought" which occurred in the old section.

Object and Scope of the Order.—A person instituting a suit in a Civil Court is bound, according to the ordinary rules, to pay the Court-fee prescribed by law for the plaint and subsequent proceedings in the suit. The object of this order is to enable a person, who is too poor to pay the Court-fee, to institute and prosecute suit without payment of Court-fees —*Jotindro* v. *Dwarka*, 20 C 111 The exemption does not extend to fees for service of process and such fees must under r 8 be paid by him

"Pauper."—Pending the investigation into pauperism under rr 6, 7, the defendant appearing deposited in Court some of the articles claimed by the petitioners to which he admitted they were entitled. The value of the articles deposited was Rs 100. The petitioners admitting that the articles were their property declined to take possession of them. *Held*, that petitioners were not "paupers" as defined in this rule, being possessed of property worth Rs 100, other than the subject-matter of the suit —*Dwarka Nath* v. *Madhavarav*, 10 B 207, *Mahalakshmi Ammal, In re*, 50 M. L. J. 114: 94 I. C 337 A. I. R 1926 Mad 567. But see, *Fatmabai* v. *Dossabhoy*, 34 B 608, in which it was held (*per* Macleod, J.) that in such a case the petitioners could not be said to be entitled to property worth Rs. 100 inasmuch as every application to sue as a pauper may be defeated by the respondent paying into Court Rs 100 out of the amount claimed.

A Hindu widow applied for leave to sue *in forma pauperis* for the recovery of maintenance and her *stridhanam* jewels and cash withheld by the defendant. The defendant admitted liability for the jewels and cash and produced them in Court. It was found that the jewels and cash were more than sufficient to pay the Court fee and the Court dispaupered her. *Held*, on revision, that the order of the Court was improper and it

not be said that owing to the defendants' offer the plaintiff was possessed of sufficient means to pay the prescribed Court-fee—*Bai Balagirn* v *Motilal*, 47 B. 523 25 Bom L. R. 199: A. I R. 1923 Bom 217

In an application to file a suit *in forma pauperis* on a claim which required the Court-fee of Rs. 1,775 on the plaint, it was found that the applicant had property worth Rs 1,600 *Held*, that the possession of Rs 1,600 would not enable the applicant to pay Rs. 1,775 which was the fee prescribed by the law for the plaint.—*Ganga Bai* v. *Shridhar Annaji*, Bom. L R. 642.

The mere fact that the applicant's husband has property is not a sufficient reason for disallowing her application for leave to sue as a pauper—*Sharfunnessa* v *Nazni Khandun*, 3 Pat L. J. 178 44 I. C 723

A person who applies for permission to sue as a pauper is not bound to try and raise funds by mortgaging his claims. Notwithstanding that he might do so, he may be a pauper under this rule.—*Vedanta* v. *Perindevamma*, 3 M. 249.

On an application to sue *in forma pauperis*, the Court is required to deal with the question of the applicant's *pauperism*, with reference to the definition as given in this rule, and in deciding it, to ascertain the exact property, its market value and the title thereto, and then to deal with the case under Or. XXXIII, r 5, irrespective of any surmises as to the reason why the applicant has valued his claim at a high figure.—*Mahammad Hussain* v. *Ajudhya Prasad*, 10 A. 497.

On proof of pauperism, a company represented by its liquidator can be granted leave to sue *in forma pauperis* for the recovery of a debt due to the company. The word " person " in the *Explanation* to Or. XXXIII r 1, includes a company or association or body of individuals whether incorporated or not.—*Perumal Gounden* v. *Thirumalarayapuram J. D Ld*, 41 M 624 34 M L J. 421 45 I C. 164.

" Is not possessed of sufficient means."—A debt which is due to the applicant from a third person cannot be said to be means of which the applicant is possessed The words " is not possessed of " must mean that the applicant has no actual control over it.—*Mamia Khatun* v *Sheikh Satkari*, 45 C L J. 68 A I R. 1927 Cal. 309: 100 I. C 264.

" Other than his necessary wearing apparel."—Ornaments which a woman ordinarily wears are of the same class of personal property as her wearing apparel and cannot be taken into consideration in determining whether he has sufficient means to pay the Court-fees —*Mabia Khatun* v *Sheik Satkari*, 45 C. L J. 68: A. I. R 1927 Cal. 309: 100 I. C. 264

Subject-matter of the Suit.—The words " other than his necessary wearing apparel and the subject-matter of the suit " in the explanation do not qualify that part of the explanation which requires that the person should not be possessed of sufficient means to enable him to pay the fee prescribed by law, but only the condition that the applicant is not entitled to property worth Rs 100.—*Krishnabi Janardan* v. *Manohor Sundaram*, 30 B. 593: 8 Bom. L R. 671.

Where a mortgagor sues the mortgagee for redemption of the mortgage, his equity of redemption is no part of the subject-matter of the suit and its

value therefore should be taken into consideration in determining whether he is a pauper.—*Kapil Deo* v. *Ram Rikha*, 33 A. 238; *Achal Singh* v. *Seth Jibandas*, 19 N. L. R. 165.

Suit Instituted in the Ordinary Form may be Continued In Forma Pauperis.—A Court has power under this Chapter to allow a suit, instituted in the ordinary form, to be continued *in forma pauperis*.—*Thompson* v. *Calcutta Tramway Co*, 20 C. 319 See also, *Nirmul Chunder* v *Doyal Nath*, 2 C. 130: and *Revji Patil* v *Sakha Ram*, 8 B. 615

Pauper Defendant.—Although this Chapter of the C. P. Code only provides for suits to be brought by a pauper, the Court has power to allow a defendant to defend *in forma pauperis*—*Doorga Churn* v. *Nitta Kally*, 5 C. 819: 6 C L. R. 120. But see, *Coates* v. *Secretary of State*, 54 P R. 1905: 121 P. L R. 1905, where it has been held that the defendant cannot be allowed to defend a suit *in forma pauperis*, inasmuch as there is no provision in the Code authorizing such a course

Suit by Next Friend, Administrator, Executor, Trustee, or Legal Representative.—The next friend of a minor who is not himself a pauper may sue *in forma pauperis* on behalf of a pauper minor—*Venkatanarasayya* v. *Achemma*, 3. M 3. *Nanibala* v *Jamini Sundari*, 37 C. L J 394; *Nemi Chand Bhick Chand* v. *Keval Chand*, 26 Bom L. R. 380. A suit can be brought *in forma pauperis* by a next friend who is also a pauper—*Galaupmonee* v *Prosonnomoye*, 11 B L. R 373

Where a guardian obtains permission to sue *in forma pauperis* on behalf of minor, the dismissal of the suit is no ground for throwing the costs of the suit on the guardian.—*Brijessuree* v *Kishoro Dass*, 25 W. R. 316.

A *Shebait* who is not possessed of sufficient means to pay Court-fees both personally and as a *shebait* may apply for leave to sue *in forma pauperis* for recovery of certain endowed properties from his co-*shebaits*.—*Nanda* v. *Dwarka*, 16 C. W. N 93.

The administrator of the estate of a deceased person may apply to sue *in forma pauperis* under the provisions of this Chapter.—*In re Bill*, 7 M. 390.

Where an executor is not in possession of the property of his testator, and cannot get possession of it, and he has not himself the means of paying the necessary fees, he may be allowed to petition for, and, if entitled thereto, to obtain probate *in forma pauperis*—*In the matter of the Will of Dawabai*, 18 B. 237.

The provisions of this Chapter do not preclude a person, who has obtained leave to sue under s. 18 of the Religious Endowment Act (XX of 1863), for the removal of the trustees of a temple, from being permitted to sue *in forma pauperis*.—*Gurusami* v. *Krishna Sami*, 24 M. 419.

There is no necessity for an enquiry, whether an alleged legal representative of an admitted pauper plaintiff is a pauper or not. The Court, if satisfied that he is the legal representative, ought to admit him to carry on the suit.—*Bhagbut Dass* v. *Buloram Dass*, 3 W. R. Mis. 20. But see, *Manaji* v. *Khandoo*, 36 B. 279, in which it was held that in such a case, the legal representative may be permitted to continue the suit *in forma*

pauperis if he himself is a pauper. *See* also, *Lalit Mohun* v. *Satis Chandra*, 33 C 1163: 4 C. L. J 234, followed in *Farzand Ali Khan* v *Mir Ameer Haidar*, 26 I. C. 714: 18 O. C. 64, where it was *held* that the right to apply for leave to sue *in forma pauperis* being a personal right, if the applicant dies before the leave is granted, his legal representative is not entitled to continue the application. *See* also, *Rao Saheb Manaji Rajuji* v *Khandoo*, 13 Bom. L. R. 577.

The plaintiff in a suit brought *in forma pauperis* died, but in ignorance of her death the Court passed a decree in her favour. The defendant appealed, making respondent a lady who he alleged was the legal representative of the deceased plaintiff and an order was passed by consent of the parties sending back the suit for retrial on the merits On re-trial the suit was again decreed. *Held*, that the defendant was estopped from disputing the right of the representative of the original plaintiff to sue as a pauper —*Akbar Husain* v *Alia Bibi*, 25 A. 137.

Plaintiff Suing in Representative Capacity—His Personal Property should Not be Taken into Account.—When a plaintiff sues in a representative character, such as a *mutwalli*, trustee or a *Shebait*, unless it is shown that the plaintiff has in his possession property belonging to the *wakf* estate or trust or the idol for whom he sues, sufficient to enable him to pay the requisite Court-fee prescribed by law, he may be allowed to sue as a pauper even if it is shown that he has sufficient personal property of his own The capacity of a person suing in a representative character must be kept distinct from his personal capacity.—*Mabia Khatun* v. *Sheik Sathan*, 45 C. L J. 68 A I R 1927 Cal. 309: 100 I. C. 264.

Formerly Excepted Suits.—S. 402, C. P. Code, 1882, Which ran as follows. "*No suit shall be brought by a pauper to recover compensation for loss of caste, libel, slander, abusive language, or assault,*" have been omitted.

" The Committee have not preserved s. 402 In the light of the case law it is misleading so far it suggests that a suit will lie for loss of caste or abusive language, and they can see no sufficient reason for withholding from a pauper a right to sue as such in respect of a defamation or assault " —*See the Report of the Special Committee.*

Contents of application.

2. Every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits: a schedule of any moveable or immoveable property belonging to the applicant with the estimated value thereof, shall be annexed thereto; and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings. [S 403.]

COMMENTARY.

This rule corresponds to s. 403, C. P. Code, 1882, with some verbal changes only. Some of the words of the old section have been changed and replaced by more appropriate words. The procedure laid down in r. 2 is to be followed when a suit is proposed to be instituted *in forma pauperis*

Contents of Application.—Where a pauper applicant omits to mention his immoveable property and also fails to submit a list of such property when required, the application is not in proper form.—*Sheo Narain Lal* v. *Mt. Munaqqa*, 9 O. L. J. 610: 74 I. C. 344.

Verification.—Where the petitioner did not verify the contents of the petition at the foot of the petition, but he did so by a separate affidavit in which the statements contained in the several paragraphs of the petition were said to be true and no part of them was false and nothing had been concealed. *Held*, this affidavit being annexed to the petition must be treated as a part of it; *Pirji Ashraf Ali* v. *Rameshwar Nath*, A. I. R. 1923 Lah. 684.

Death of Applicant.—The right to obtain permission to sue as a pauper is only a personal right, and on the death of the applicant his legal representative cannot come in as such and be substituted in his place but if he is a pauper himself he can file a fresh application for leave to sue *in forma pauperis*.—*Lalit Mohan* v. *Satish Chandra*, 33 C. 1163, 4 C. L. J. 234.

Presentation of application.

3. Notwithstanding anything contained in these rules the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.

[S. 404.]

COMMENTARY.

This rule corresponds to s 404, C P Code, with some alterations of a verbal character

The words "*in these rules*" have been substituted for the words "in s. 30," the words "under ss 640 or 641," which stood after the words "from appearing in Court," and the word "duly" which stood before the word "authorized agent" in the old section have been omitted.

"Shall be presented in person."—The provisions of this rule requiring the petition for permission to sue *in forma pauperis* to be presented by the petitioner in person is imperative and must be held to control the provisions of Or. III, r 1—*Ex parte Dergir*, 4 Bom H C 91

Presentation need not be to the Court itself Presentation to the proper officer of the Court is sufficient —*Chidambaram* v. *Kadar Mohideen*, 48 M 785 A I R 1921 Mad 901

This rule which requires an application for permission to sue *in forma pauperis* to be presented (except in certain circumstances) by the appl[illegible] in person, does not apply to an application under s 592, C. P. Code, I- (Or XLIV, r 1), to be allowed to appeal as a pauper.—*Maithi* v. *S*

Baruta, 26 M. 309 *But* see, *in re Narise*, 8 M. 504 (21 W. R. 308 *referred to*).

Authorized Agent.—" Authorized Agent " in r. 3 clearly does not include a recognised agent or pleader. In order to bring him within the rule he must be specially authorized for the purpose.—*Sakina Bibi* v. *Charanjit Singh*, 20 P. L. R. 1915. 28 I. C. 448 (21 W. R. 308 *referred to*)

The Court rejected a petition of appeal presented on behalf of a pauper by a pleader who was retained under an ordinary *Vakalatnama*, but was not specially authorized to sign as attorney for the applicant.—*Bhugobutty* v. *Ganesh*, 21 W R. 308

The mere fact that sveral persons jointly present an application for permission to sue as pauper, does not authorize the Court to entertain it on behalf of the applicants who do not appear in person.—*Burgess* v *Sidden*, 10 M. 193

Pardanashin Woman.—Where an appeal *in forma pauperis* by a *pardanashin* woman, who had sued as a pauper in the first Court, was presented by a person, other than an advocate, vakil or attorney, or by the suitor, but by her duly authorized agent, *held*, that was a good presentation.—*Wazirunnissa* v. *Ilahi Baksh*, 24 A 172.

See Or XLIV, as to Appeal in forma pauperis.

Examination of applicant.

4. (1) Where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant, or his agent when the applicant is allowed to appear by agent regarding the merits of the claim and the property of the applicant.

If presented by agent, Court may order applicant to be examined by commission.

(2) Where the application is presented by an agent, the Court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken. [S. 406]

COMMENTARY.

This rule corresponds to section 406, C. P. Code, 1882, with some verbal alterations. Some of the words of the old section have been changed and replaced by more appropriate words.

Scope of the Enquiry.—*In an enquiry under Or. XXXIII, C. P. Code*, [illegible] evidence of the applicant himself [illegible] s power to the Court to examine the applicant [illegible] claim and the property of the applicant, so that there is no doubt that the applicant himself can be examined not only with reference to the question of pauperism but also with reference to the merits of the claim.—*Jogendra Narayan* v *Durga Charan*, 46 C. 651: 52 I. C. 610.

The Court when making an enquiry under Or. XXXIII, rr. 4 and 7, cannot take any evidence except that of the applicant himself on the merits of the claim. The Court has to determine whether the allegation in the petition and the examination of the petitioner himself discloses a cause of action.—*Sitanath* v. *Radharaman*, 50 I. C 676.

Examination of Applicant.—The C P Code does not authorize the rejection of an application for leave to sue *in forma pauperis* for want of merits when the applicant is found to be a pauper, and his allegations disclose a right to sue. When an application for leave to sue *in forma pauperis* is made, the Court should not go into evidence as to the merits of the claim.—*Ranganavaka Ammal* v. *Venkata Chellapati*, 4 M. 323; *Narani Kuar* v. *Makhan Lal*, 17 A. 526; and *Abbasi Begam* v. *Nanhi Begam*, 18 A. 206. *See* also, 2 C W. N. 474 and 8 C. W. N. 70, noted under r. 5 (*b*) and (*d*).

When a plaintiff applies for permission to sue *in forma pauperis* and is examined under Or. XXXIII, r. 4, the opposite party is entitled to cross-examine the applicant on the merits of his claim to test the statements he makes in his examination; *Radha Raman* v. *Sitanath*, 60 I. C. 738.

Rejection of application.

5. The Court shall reject an application for permission to sue as pauper—

(*a*) Where it is not framed and presented in the manner prescribed by rules 2 and 3, or

(*b*) Where the applicant is not a pauper, or

(*c*) Where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper, or

(*d*) Where his allegations do not show a cause of action, or

(*e*) Where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter. [Ss. 405 and 407.]

COMMENTARY.

Alterations in the Rule.—This rule has embodied the provisions of ss. 405 and 407 of the C. P. Code, 1882, with some additions and alterations.

Clause (*a*) corresponds to section 405 of the old Code with some verbal changes only.

Clause (*b*) is similar to cl. (*a*) of the old section.

Clause (*c*) is similar to cl. (*b*) of the old section with change of some words and phrases.

Clause (*d*) has been substituted for clause (*c*) of the old section, which ran as follows: "*That his allegations do not show a right to sue in such Courts.*" These words gave rise to several conflicting rulings, and in order to set at rest the several conflicting rulings, the words "*cause of action*" have been substituted for the words "right to sue in such court" which occurred in the old section. The conflicting rulings have been noted under clause (*d*). For the meaning of the words "*cause of action,*" see notes under s 20 and Or. XI, r 2.

Scope of Rule.—By the above amendment the scope of the present rule has been enlarged, as the words "*cause of action*" are wide enough to include the cases mentioned in 7 A. 661, 20 A. 299, 19 M. 197, 13 B. 126 and 27 M. 37. The object of the amendment will be clearly understood on reference to the above cases.

Clause (*e*) corresponds to cl. (*d*) of the old section.

Clause (a). Where Application Not Properly Framed.—If an application is improperly framed through misjoinder of causes of action and reliefs, the Court has got the power to amend the application under s. 141, of the C P Code —*Kanakammal* v. *Panchapakesa*, 26 M. L J 343· (1914) M. W N 329 23 I C. 82. But see, *Kalikumar* v. *N. N. Burjorjee*, 20 I C 640· 7 B L. R 60 6 Bur L. T. 141, where it was held that an application ought to be rejected as being improperly framed, where it is not accompanied by a schedule of the applicant's moveable and immoveable properties

Clause (b). Where Applicant Not a Pauper.—On an application to sue *in forma pauperis*, the Court is required to deal with the question of the applicant's pauperism with reference to the definition of that word as given in the explanation to Or XXXIII, r. 1 and, in deciding it, to ascertain the exact property, its market-value, and the title thereto, and then to deal with the case under r. 5, irrespective of any surmises as to the reason why the applicant has valued his claim at a high figure.—*Muhammad Husain* v *Ajudhia Prasad*, 10 A. 467

The Code of Civil Procedure does not authorize the rejection of an application for leave to sue *in forma pauperis* for want of merits when the applicant is found to be a pauper, and his allegations disclose a right to sue When an application for leave to sue *in forma pauperis* is made, the Court should not go into the evidence as to the merits of the claim —*Benji-nayaka Ammal* v *Venkata Chellapati*, 4 M. 323. *See* also, *Debo Dai* v *Mohunt Ram Charan*, 2 C. W. N. 474. Followed in *Gopal Chandra* v *Bigoo Mistry*, 8 C W. N 70.

Where an application is made for leave to sue *in forma pauperis*, the Court is bound to proceed on the valuation put upon the suit by the plaintiff and to investigate whether he has sufficient means to enable him to pay the Court-fee on the plaint as presented by him It is not open to the Court to investigate his claim in order to enable him to sue as a pauper; *Tulsi Mahatani* v *Gajedhar*, 61 I. C. 891.

At an enquiry under this rule, if it be found that the petitioner is possessed of property which is within his reach and can be made use of by him to carry on his litigation, such property cannot be excluded from consideration.—*Dwarka Nath* v. *Madhavrav*, 10 B. 207.

The father as next friend of a minor applied for leave to sue *in forma pauperis* for damages for serious bodily injuries received by her. The Court rejected the application under Or. XXXIII, r. 5, on the ground that the next friend, the father of the plaintiff was not a pauper *Held*, that the order should be set aside and the matter inquired into under Or. XXXIII, r. 6 of the C. P Code —*Mussammat Imirmon* v *Secretary of State*, 23 C. W. N. 955

Clause (d). Where Allegations do Not Show Cause of Action.—It is open to the Court to consider not only the statement made in the plaint but also the statements made in his examination by the applicant before the Court, in determining whether his allegations disclose a cause of action as laid down in Or XXXIII, r 5, cl. (*d*) But the Court cannot examine the witnesses for deciding the question of limitation or any other question other than the pauperism of the applicant —*Jogendra Narayan* v. *Durga Charan*, 46 C 651 52 I C 610 *See* also, *Sita Nath* v *Radharaman*, 50 I. C. 676, *Nawab Bahadur of Murshidabad* v *Harish Chandra*, 13 C. L J. 563 .

The non-existence of a cause of action should appear clearly on the face of the application itself, which alone would justify the Court in rejecting the application The Court would be acting without jurisdiction if it should travel beyond the four corners of the application and take into consideration matters not stated therein or consider any document or other evidence in order to determine whether there is a cause of action or not; *Rama Chandra* v. *Venkiah*, 52 M L J 380 A I R 1927 Mad. 441

Clause (*d*) does not refer solely to a question of jurisdiction, but the applicant must make out that he has a good subsisting *prima facie* cause of action capable of enforcement in Court and calling for an answer, and not barred by *res judicata*, limitation, or any other law —*Chattarpal Singh* v. *Raja Ram*, 7 A. 661 (*followed in* 134 P R. 1919 : 53 I C. 441) *See* also, *Kamarak Nath* v *Sundar Nath*, 20 A. 299 (4 M 323 *dissented from*); *Vijendra Tirtha* v. *Sudhindra Tirtha*, 19 M. 197; *Dulari* v. *Vallab Das*, 13 B. 126; and *Amritham* v *Alwar Manikkam*, 27 M. 37 (20 A. 299 *followed*)

A Court shall reject an application for permission to sue *in forma pauperis*, if it finds the claim barred on the face of it by limitation. The words "*cause of action*" in r. 5 mean a good and subsisting cause of action.—*Govindasami* v. *The Municipal Council, Kumbakonam*, 33 M. L. J. 577 (1917) M. W. N. 585. But it has been held in ... v. *Vadamalai*, A. I. R. 1926 Mad 135, the ... lication for leave to sue *in forma pauperis*, ... on of limitation.

Where application is made for leave to sue *in forma pauperis*, the Court is not bound to give the leave if the allegations made by the petitioner are such that, if true, they would show a good cause of action.—*Sankarama Ayyar* v *Subramania Ayyar*, 27 M. 120.

In an enquiry under Or. XXXIII, r. 5 (*d*), if there is nothing to show from the allegations in the plaint as they stand, that the petitioner has no right to sue, then the Court is justified in rejecting the application. But where a Judge in making an enquiry, finds that the applicant is a pauper and then addresses himself to the merits of the case, to the rights of parties, and to matters which are entirely foreign to the enquiry that he has to make, he exceeds his jurisdiction, and the High Court has power to interfere under s. 622, C. P. Code, 1882 (s. 115).—*Debo Das* v. *Mohunt Ram Charan* 2 C. W. N. 474 (Followed in *Gopal Chundra* v. *Bigoo Mistry*, 8 C. W. N. 70); *Natesa Ayyar* v. *Manogya Ayyar*, 10 L. W. 589 (2 C. W. N. 474 relied on). It is not permissible in a pauper petition to go into an elaborate enquiry on the merits of the plaintiff's case; *Charukonda* v. *Lakshmarri* 97 I. C. 349. A. I. R. 1926 Mad. 1160.

Where an application is made for leave to sue *in forma pauperis* it is open to the Court to dismiss the application on the ground that though the plaint disclose a cause of action, the plaintiffs' case would fail on the merits.—*Polimati Munigadu* v. *Nalla Bapadu*, 18 L. W. 53. 73 I. C. 946 (1923) M. W. N. 412; or that the claim is doubtful, *Mt. Rujibai* v. *Sadashib*, 75 I. C. 744.

Where a petition in a suit *in forma pauperis* had been admitted and the case came on for hearing under Or. XXXIII, r. 7, it was proposed for the defendant to show by examination of the plaintiff that on the facts stated in the petition, she had no cause of action. The Court allowed the plaintiff to be examined to show that, on her own evidence, she had no cause of action, but refused to allow other witnesses to be called upon.—*Taramoney* ... 11 B. L. R. ... *Hurro Mohun*, 11 B. L. R. Ap. 28. But *In re Ganga Dass*, 11 B. L. R. ... note 14 W. R. 281, it was held that where, on the day fixed for hearing evidence on the question of pauperism, the defendant brings to notice of the Court any ground on which it would have been bound to refuse to admit the petition, it is in the discretion of the Court to admit or refuse to receive evidence of such ground. Approved in *Vijendra Tirtha* v. *Sudhindra Tirtha*, 19 M. 197.

An application by a Mahomedan woman for leave to sue her husband for exigible dower *in forma pauperis*, may be taken to express her intention of bringing an action for dower only if she obtains leave to do so as a pauper. Until she has the Court's permission to sue, her application does not amount to a demand by way of action. A counter-petition by the husband objecting to the pauper suit being allowed, and denying his liability to pay the dower does not alter the character of the proceedings, since no opposition on his part can constitute a cause of action, unless there has been a previous demand by the wife.—*Khajarunnissa* v. *Saifulla Khan*, 15 B. L. R. ... 13 W. R. ... P. C., 24 W. R. 163, P. C. (reversing 5 B. L. R. 84; 13 W. R. ...).

The subsequent insolvency of the petitioner is no ground for rejecting the application.—*Chidambaram* v. *Kother*, 48 M. L. J. 491. 87 I. C. 720. A. I. R. 1925 Mad. 791.

Clause (e). Transfer of Interest in Subject-matter—Whether Benamidar Plaintiffs can be Allowed to Sue as Paupers.—The provisions of Or. XXXIII of the C. P. Code have been designed to aid *bona fide* litigants and must be strictly confined to such litigants. It cannot have been the intention of the Legislature that a litigant, fully able to comply with the

terms of the fiscal law, should, by setting up a pauper as a nominee, be entitled to evade the claim of the State. The effect of permitting a benamidar to sue as a pauper would be to give a person who is not a pauper the right to evade the fiscal law and to infringe the provision of Or. XXXIII, r 5 (e) of the C. P. Code.—*Srimoti Charusila* v. *Haran Chandra*, (1919) Pat. 232: 50 I. C. 520.

On an application by two persons for permission to sue *in forma pauperis*, it appeared that they had entered into an agreement with the pleader to pay his remuneration out of the proceeds of the property in dispute after its recovery. *Held*, that such an agreement was within the scope of clause (*e*), and their application to sue as paupers was rejected —*Monohar Ram Chandra* v. *Lakshman*, 9 B. 371 No leave to appeal *in forma pauperis* can be given when at the date of suit there was subsisting an agreement falling within this clause —*Hamja Bai* v *Haji Seddik*, 30 M 547. 17 M. L J 447.

Revision.—A revision petition lies against an order of the Court rejecting an application for leave to sue *in forma pauperis*—*Secy of State* v. *Jillo*, 21 A. 133. *Muhammad* v. *Ajudhia*, 10 A. 467; *Debo Das* v. *Mohunt Ram Charan*, 2 C. W. N. 474 (folld in *Gopal* v *Bigoo*, 8 C. W. N. 70); *Rama Chandra* v. *Venkiah*, 52 M. L. J 380, A. I. R 1927 Mad 441.

Doctrine of Lis Pendens.—Doctrine of *lis pendens* applies to an application for permission to sue *in forma pauperis*, although the application was not numbered and registered as a suit —*Ambika Pratap* v *Dwarka Prasad* 30 A 95.

6. Where the Court sees no reason to reject the application on any of the grounds stated in rule 5, it shall fix a day (of which at least 10 days' clear notice shall be given to the opposite party and the Government pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof. [S. 408.]

Notice of day for receiving evidence of applicant's pauperism.

COMMENTARY.

This rule corresponds to s 408, C P. Code, 1882, with some verbal changes only.

"Notice shall be given to the opposite party."—Where a Munsif disposed of an application for leave to sue as a pauper, without taking such evidence as the opposite party had offered before the Court, and without notice to the opposite party and the Government: *Held*, the Court acted without jurisdiction in dealing with the pauper application, and a revision lay; *Nonikrishna* v. *Nabamonjuri*, A. I. R. 1927 Cal. 461. 100 I. C 720

Evidence in Disproof of Applicant's Pauperism.—A defendant is entitled at the hearing to adduce evidence in disproof of the alleged pau-

perism of the plaintiff Therefore a Court should not allow a plaintiff to sue *in forma pauperis*, without opportunity afforded to the defendant to prove that the plaintiff is not a pauper.—*Zillar Rahman v Gaufar Hossain*, 22 I. C 974 (10 B 207., 30 B 593 8 Bom L. R. 671 relied on).

The only matter in regard to which evidence may be taken is the question of the pauperism or otherwise of the applicant. R 6 does not empower the Court to try the question of the plaintiff's title after taking evidence on that question and in fact to try the suit on the merits before the application for leave to sue is granted (46 C. 651 *applied*; 20 A 299 *distd*), *Mt Shauran Bibi v Abdus Samad*, 45 A 518. 21 A L J 441

7. (1) On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent and shall make a memorandum of the substance of their evidence.

Procedure at hearing.

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in rule 5.

(3) The Court shall then either allow or refuse to allow the applicant to sue as a pauper.

COMMENTARY.

This rule exactly corresponds to s 409 of the C. P. Code, 1882

Scope of Enquiry.—In an enquiry on an application to sue *in forma pauperis* under Or XXXIII, rr. 4, 5 and 7, C. P. Code, the primary question which the Court should consider is the fact of the petitioner's pauperism and the Court should not go into the merits of the petitioner's claim and determine a complicated question of law such as limitation —*Kalliani Amma v Matathil Veetil*, 37 M L J. 309. (1919) M W N 573 53 I C 239 *See also*, *Sitanath v. Radharaman*, 50 I. C 610; *Jogendra Narayan v Durga Charan*, 46 C. 651: 52 I. C. 610, *Bhagwanti v Bua Ditta*, 76 I. C 40.

Mode and Subject of Examination.—The examination of the applicant is to be conducted by the Judge in person and not by any officer of the Court.—*In re Eknath*, 1 Bom. H. C. 102. *See also*, *In re Gangi Pershad* 14 W R 281

Where a Judge in making an enquiry finds that an applicant is a pauper and then addresses himself to the merits of the case, to the status of the parties and to matters which are entirely foreign to the ...

that he has to make, he exceeds his jurisdiction.—*Deba Das* v. *Mohunt Ram Charan*, 2 C. W. N. 474; *Gopal Chandra* v. *Bigoo Mistry*, 8 C. W. N. 70.

"The Court shall hear argument."—Or. XXXIII, r. 7 which provides that "the Court shall also hear any argument which the parties may desire to offer on the question whether on the face of the application and of the evidence the applicant is or is not subject to any of the prohibitions specified in r. 5," enable the parties to argue the question if they so desire but does not preclude the Court if no argument is offered, from considering that question of its own motion.—*Amirtham* v. *Alwar Manikkam*, 27 M. 37.

Evidence.—The evidence to be taken under r. 7 is confined to the evidence which may be adduced by the applicant in proof of pauperism and any evidence which may be adduced in disproof thereof as laid down in r. 6.—*Jogendra v. Durga Charan*, 46 C. 651: 52 I. C. 610 (20 A. 299: 13 B. 126: 13 C. L. J. 598, *followed*). *See* also, *Srimati Charusila* v. *Haran Chandra*, (1919) Pat. 232: 50 I. C. 520.

"The applicant is or is not subject to any of the prohibitions specified in rule 5."—*On this point see notes under clauses (b), (d), and (e) of r. 5.*

Where an application for leave to sue *in forma pauperis* was rejected for want of prosecution, the order rejecting the application is an order under this rule, and operates as a bar under s. 413, C. P. Code, 1882 (Or. XXXIII, r. 15), to the entertainment of the second application in the same right.—*Ranchod Morar* v. *Bezanji Edulji*, 20 B. 86. But in *Kedar Nath* v. *Tula Bibi*, 10 C. W. N. civ (104-*n*), it was held (dissenting from 20 B. 86) that there having been no adjudication on the former occasion on the question of pauperism, this rule was no bar.

Limitation Where Application Refused.—Where an application to sue as a pauper is refused, and a suit in the ordinary way in respect of the same subject-matter is subsequently instituted by the applicant, the suit, for the purposes of limitation, will be deemed to have been instituted on the date on which the plaint is presented, and not the date on which the rejected application was filed.—*Narami* v. *Mohanlal*, 17 A. 526; *Abhoya* v. *Bissesswari*, 24 C. 889; *Keshav* v. *Krishna Rao*, 20 B. 508.

Limitation Where Application is Converted into a Plaint on Payment of Court-fees.—Where a person applies for converting his application for leave to sue as a pauper into a plaint on payment of the necessary Court-fees, the suit will be deemed to have been instituted, for the purposes of limitation, on the day on which the application for leave to sue as a pauper was filed, and not the day on which the Court-fees were paid.—*Sooklal* v. *Dalchand*, 1 Rang. 196: 74 I. C. 835: A. I. R. 1923 Rang. 256; *Janakdhary* v. *Janki*, 28 C. 427; *Narami* v. *Makhanlal*, 17 A. 526.

Appeal from Orders under this Rule.—An order rejecting an application for permission to sue as a pauper, and striking the case off the Court's file, on the ground that the applicant had previously withdrawn the application and entered into a new contract with the defendants, is appealable as a decree.—*Baldeo* v. *Gula Kuar*, 9 A. 129. Referred to in *Ranchod*

Morar v *Bezanji*, 20 B 86 But see, *The Secretary of State* v. *J*?? 21 A 133, where it has been held that no appeal lies from an order rejecting an application for leave to appeal *in forma pauperis*.

Where after consideration of an application for leave to sue as a pauper, the Court of first instance has allowed the suit to be instituted *in forma pauperis*, and has passed a decree in favour of the plaintiff, it is not open to the defendant in appeal to question the propriety of the first Court's order permitting the plaintiff to sue as a pauper.—*Mumtazan* v *Rasulan*, 23 A 364.

Order under this Rule is Subject to Review.—An order under this rule refusing leave to sue as a pauper is subject to review under s 623, C P Code, 1882 (s 114 and Or. XLVII, r. 1)—*Adarji* v. *Manikji*, 4 B 415 See also, *In the matter of the petition of Umasundari*, 5 B. L R App 29; and *Mahomed Gazee* v. *Dullab Bibee*, 5 B. L R. 318-*note* 11 W. R. 22.

Procedure if application admitted.

8. Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any Court-fee (other than fees payable for service of processes) in respect of any petition, appointment of a pleader or other proceeding connected with the suit. [S. 410]

COMMENTARY.

This section corresponds to section 410, C. P. Code, 1882, with some alterations of a verbal character.

An application to sue *in forma pauperis*, which was filed in the Subordinate Judge's Court, was transferred to the Court of the District Judge who granted the application *Held*, that the District Judge, had no power subsequently to transfer the pauper suit thus initiated to the file of the Sub-Judge,—*Nandan Parsad* v. *W. C Kenney*, 24 A. 356

No security for costs ought to be demanded from a person who has been allowed to sue as a pauper under this rule.—*Hafizan* v. *Abdul Karim*, 7 C L J. 312 · 12 C. W. N. 163 (17 W. R. 68 *referred to*)

Mode of Computing Period of Limitation in Pauper Suits.—When an application for leave to sue as a pauper is *granted*, limitation will run from the date of filing the application, and not from the date on which the application is numbered and registered as a suit (s 4, Limitation Act) —*Thangathammal* v. *Iravatheswara*, (1915) M. W. N. 228: 28 I C 54 But when the application is *refused*, and the applicant then institutes a suit on the same subject-matter in the ordinary way, the suit will, for the purposes of limitation, be deemed to have been instituted on the date on which the plaint is presented, and not the date on which the rejected application was filed.—*Naraini* v. *Makanlal*, 17 A. 526; *Keshav* v *Krishnarao*, 20 B 508; *Aubhoya* v. *Bissesswari*, 21 C. 689.

Where an application for leave to sue *in forma pauperis* is made in good faith, but the applicant, before an order is passed under this rule, converts his application into a plaint by paying the necessary Court-fees, the suit would be deemed to have been instituted on the day on which the application was filed and not on the day on which the Court-fees were paid; but if the application is found to have been made in bad faith, the day on which the Court-fees were paid would be taken to be the date on which the suit was instituted.—*Stuart Skinner* v. *Orde*, 2 A. 241, P. C (reversing 1 A 230) Followed in *Janakdhary* v *Janki Koer*, 28 C. 427 (18 A. 206 *dissented from*), and in *Alayakammal* v. *Subbaraya*, 28 M. 493: 15 M. L J. 219. *See* also, *Jamunabai* v *Visson'Das*, 21 B 576; *Bai Ful* v *Desai Manorbhai*, 22 B 849; *Girwar Lal* v. *Lakshmi Narain*, 26 A. 329; and *Durga Charan* v. *Dookhiram*, 26 Cal. 925. But see, *Chunder Mohun* v. *Bhubun Mohini*, 2 C 389; *Bishnath Prasad* v. *Jagarnath Parsad*, 13 A. 305; *Ram Sahai* v *Maniram*, 5 C 807; 6 C. L R. 223; *Keshav* v. *Krishnarao*, 20 B 508; *Naraini* v. *Makhan Lal*, 17 A. 526, *Abbasi Begum* v *Nanhi Begum*, 18 A. 206; *Aubhoya* v. *Bissesswari*, 24 C. 889 (20 B. 508, 17 A 526, 18 A. 206, *followed*, 2 A. 241, P. C. *distinguished*)

Where a petition to sue *in forma pauperis* was presented in a wrong Court, the time spent in that Court was to be deducted in computing the *period of limitation.—Skinner alias Mirza* v. *Orde*, 6 N. W. P. 225.

There is no limitation of time within which a mere applicant to sue as a pauper is bound to apply for the substitution of the name of a dedeceased opponent's heir, in place of such opponent.—*Janardan* v. *Anant*, 7. B 373

Exception from Liability to Pay Further Court-fee.—Where an application for review is presented in a suit *in forma pauperis*, that application, like the plaint in the suit, is not liable to pay any Court-fee.—*Umda Bibi* v. *Naimo Bibi*, 20 A. 410

Under this rule, a pauper cannot claim exemption from liability to pay any further stamp duty or penalty in respect of a document on which he relies, and which, owing to a defect in the stamp, is inadmissible as evidence in the suit —*Golam Guffoor* v. *Ekram Hossain*, 10 W. R. 358.

Appeal from Orders under this Rule.—*See notes under rule 7.*

Doctrine of lis pendens *applies to an application for permission to sue as a pauper, see* 29 A. 95, *noted under rule* 5.

9. The Court may, on the application of the defendant, or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

Dispaupering.

(*a*) if he is guilty of vexatious or improper conduct in the course of the suit;

(*b*) if it appears that his means are such that he ought not to continue to sue as a pauper; or

Morar v *Bezanji*, 20 B 86. But see, *The Secretary of State* v J" 21 A 133, where it has been held that no appeal lies from an order rejecting an application for leave to appeal *in forma pauperis*.

Where after consideration of an application for leave to sue as a pauper, the Court of first instance has allowed the suit to be instituted *in forma pauperis*, and has passed a decree in favour of the plaintiff, it is not open to the defendant in appeal to question the propriety of the first Court's order permitting the plaintiff to sue as a pauper.—*Mumtazan* v *Rasulan*, 23 A. 364.

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Where an application for leave to sue *in forma pauperis* is made in good faith, but the applicant, before an order is passed under this rule, converts his application into a plaint by paying the necessary Court-fees, the suit would be deemed to have been instituted on the day on which the application was filed and not on the day on which the Court-fees were paid ; but if the application is found to have been made in bad faith, the day on which the Court-fees were paid would be taken to be the date on which the suit was instituted.—*Stuart Skinner* v *Orde*, 2 A 241, P C (reversing 1 A. 230). Followed in *Janakdhary* v *Janki Koer*, 28 C 427 (18 A. 206 *dissented from*), and in *Alayakammal* v *Subbaraya*, 28 M 493· 15 M. L. J. 219. *See* also, *Jamunabai* v. *Visson Das*, 21 B 576, *Bai Ful* v. *Desai Manorbhai*, 22 B 849 , *Girwar Lal* v. *Lakshmi Narain*, 26 A. 329 ; and *Durga Charan* v. *Dookhiram*, 26 Cal. 925. But see, *Chunder Mohun* v *Bhubun Mohini*, 2 C 389 ; *Bishnath Prasad* v. *Jagarnath Parsad*, 13 A. 305 , *Ram Sahai* v *Maniram*, 5 C 807 , 6 C L R. 223 ; *Keshav* v. *Krishnarao*, 20 B 508 , *Naraini* v. *Makhan Lal*, 17 A. 526 ; *Abbasi Begum* v *Nanhi Begum*, 18 A 206 , *Aubhoya* v *Bisseswari*, 24 C. 889 (20 B 508, 17 A 526, 18 A 206, *followed*, 2 A 241, P. C. *distinguished*).

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Dispaupering.

9. The Court may, on the application of the defendant, or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

(*a*) if he is guilty of vexatious or improper conduct in the course of the suit ;

(*b*) if it appears that his means are such that he ought not to continue to sue as a pauper ; or

(c) if he has entered into any agreement with reference to the subject-matter of the suit, under which any other person has obtained an interest in such subject-matter. [S. 414.]

COMMENTARY.

This rule corresponds to section 414, C. P. Code, 1882, with change of some words and phrases. No change has been made in the meaning.

Object and Scope of Rule.—The object of this rule is, that if after the permission to sue *in forma pauperis* has been granted, it is found that, [on] the grounds mentioned in the rule, the applicant should not be allowed to continue the suit *in forma pauperis*, then on the application of the defendant or of the Government pleader, the Court may order the plaintiff to be dispaupered.

"If it appears that his means are such that he ought not to continue to sue as a pauper."—The word "means" in this clause is to be interpreted with the help of the definition of "pauper" in Or. XXXIII, r. 1. To apply clause (b) of r. 9, the Court could dispauper her when her means are such as to enable her to pay the Court-fee of Rs. 3,000 upon the plaint in the case.—*Srimati Savitri* v. *Secretary of State for India*, 2 Pat. 879: 4 Pat. L. T. 538.

The mere fact that the plaintiff was appearing through eminent counsel would not be sufficient to dispauper the plaintiff.—*Srimati Savitri* v. *Secretary of State for India*, 2 Pat. 879: 4 Pat. L. T. 538.

Where a person found to be a pauper on the date of her application had received a large sum immediately after, which she alleged, she had paid away to a creditor. *Held*, that having been in possession of funds after her application, her plea as a pauper failed and it was not relieved by her paying the money away. The court had no jurisdiction to grant her leave to sue *in forma pauperis*, once it had ascertained that she had ceased to be a pauper after the date of her application.—*Gadigi Muddappa* v. *Rudramma*, 13 L. W. 76: 61 I. C. 958.

"Vexatious or improper conduct."—Though concealment of property may amount to improper conduct which by itself would entitle the Court to dispauper a plaintiff under Or. XXXIII, r. 9, the facts which came to light in this case only demanded a further scrutiny by the Court to ascertain whether the plaintiff had means so that he ought not to be allowed to continue the suit as a pauper.—*Shankarabhat* v. *Shankarabhat*, 24 Bom. L. R. 734.

"Agreement with reference to subject-matter of suit."—This provision is not limited to an agreement by way of champerty or maintenance, but is intended rather to prevent a party continuing his suit as a pauper after a third party, not necessarily a pauper had for any cause whatever obtained an interest in the subject-matter of the suit and consequently an interest in paying the Court-fees due to Government.—*Edulji Cowasji* v. *Dadabhoy*, 7 S. L. R. 52 (18 B. 464 *referred to*)

Appeal in forma pauperis.—Compromise of suit pending appeal and withdrawal of appeal—Application by Government pleader for payment of all costs payable to Government on account of institution fees, etc —Opposition by parties to [illegible] by Government pleader to dispau[illegible] *Held*, that the appeal having been [illegible] either under s. 412 (Or XXXIII, r. 11) or under s 414 (Or XXXIII, r 6), C P Code, 1882.—*Bai Chandaba* v *Kuver Saheb*, 18 B 464

10. Where the plaintiff succeeds in the suit, the Court shall calculate the amount of court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; such amount shall be recoverable by the Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit. [S. 411.]

Costs where pauper succeeds.

COMMENTARY.

This rule exactly corresponds to s 411, C P Code, 1882

Right of Government to Realize Court-fees.—The Crown has the first claim to the proceeds of a pauper suit to the extent of the amount of the Court-fees that would have been payable at the institution of the suit had the plaintiff not been a pauper —*Ganpat Patya* v *Collector of Kanara*, 1 B. 7: followed in *Gayanoda Bala* v *Butto Krishna*, 33 C. 1010 10 C. W. N. 857; *Gulzari Lal* v *Collector of Bareilly*, 1 A 596 But in the Full Bench case of *Dost Mahommad* v *Mani Ram*, 29 A 537 4 A L J. 720, it has been held that the sale subject to a mortgage of property belonging to the defendant in a suit brought in *forma pauperis* for the purpose of realizing the Court-fee payable to Government by the plaintiff, does not preclude the mortgagee from bringing to sale the same property in execution of a decree for sale on his mortgage (2 A 196 *overruled*, 1 B. 7 *distinguished*)

Where a pauper plaintiff succeeded only partially in the suit he brought and the amount decreed to him was less than what he had to pay the defendant as costs under the decree *Held*, that the Government could recover nothing out of the amount decreed towards the Court-fees due to it.—*T. V Chakrapani* v *The Government of India*, (1921) M W N 805: 14 L W 529

Costs Where Plaintiff Succeeds.—The defendant is liable to pay Court-fees proportionately where plaintiff succeeded only in part and failed as regards the rest of the claim.—*Ganga Dahal* v *Gaura*, 14 A L J 657 38 A. 469

Mode of Recovery of Court-fees by Government.—The amount of stamp in a pauper case cannot be claimed as a lien or charge upon the decree in favour of Government, but is recoverable in the same manner as the costs of the suits—Government being, as regards its claim in such a case, in no higher position than an ordinary judgment-creditor —*Prankrista* v *Collector of Moorshidabad*, 15 W R 205 But in *Puthia Valapil* v *Veloth Assenar*, 25 M 733, a contrary view seems to have been taken

in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, or

(b) because the plaintiff does not appear when the suit is called on for hearing.

the Court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper. [S. 412.]

COMMENTARY.

Alteration in the Rule.—The word "withdrawn" has been newly added, and para. 2 of the old section, which contained the provision for the punishment of the pauper, has been omitted. The old section is reproduced here for observing the changes introduced by this rule.—"*If the plaintiff fails in the suit, or if he is dispaupered, or if the suit is dismissed under section 97 or 98, the Court shall order the plaintiff or any person made, under section 32, co-plaintiff to the suit, to pay the Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; and if it finds that the suit was frivolous or vexatious, it may also punish the plaintiff with fine not exceeding one hundred rupees, or with imprisonment for a term which may extend to a month, or with both.*"

"Where the suit is withdrawn."—The above change has been introduced on account of several conflicting rulings regarding the meaning of the expression "*if the plaintiff fails in the suit,*" as will apear from the cases noted below. In some of the Bombay cases, it was held, that section 412 of the old Code applied only to cases of adjudicated failure (15 B. 77 and 17 B. 464); and in some cases doubts were expressed as to whether "*failure*" includes withdrawal of suits *With a view to clear away this conflict, the word* "withdrawn" *has been added in the present rule, adopting the law as laid down in the Full Bench case in 31 B 10, by which 15 B 77 and 18 B. 464 have been overruled*

Where a pauper plaintiff withdraws from a suit without permission under s. 373, C P. Code, 1882 (Or XXIII, r. 1) as the result of a compromise, by which he obtains a substantial part of the relief claimed, he fails in the suit within the meaning of this rule —*Secretary of State* v. *Bhagirathi Bai*, 31 B 10, F. B . 8 Bom. L. R 689 (15 B 77 and 18 B. 464 *overruled*)

The words "if the plaintiff fails in the suit" in s 412, C P. Code, 1882 (Or. XXXIII, r 11), apply to the withdrawal of a suit under s. 373, C. P. Code, 1882 (Or. XXIII, r. 1) Where a pauper plaintiff withdraws a suit with liberty to bring fresh suit, he is liable to pay to Government Court-fees —*Secretary of State* v. *Narayan Balkrishna*, 29 B 102 (15 B. 77 and 18 B 464 *distinguished; 21 M 113 referred to*)

If the plaintiff fails in his suit brought *in forma pauperis*, he is liable to pay Government the amount of Court-fees.—*Balwant Singh* v. *Roshan Singh*, 18 A. 253, p. 255

"The Court shall order the plaintiff to pay the Court-fees."—The terms of this rule are mandatory, and it is obligatory upon the Court when passing the decree, to provide in the decree for the payment of Court-fees —*Secretary of State* v. *Bhagwanti Bibi*, 13 A. 326, 329 When the Court omits to pass such an order, it is now provided by r 12 that the Government has the right to apply to the Court for an order as to costs at any time Under the old Code it was [illegible] party to the suit, it had no right of [illegible] could proceed only by an application [illegible] v. *Janardan*, 6 B 590, *Collector of Canara* v. *Krishnappa*, 15 B [illegible] *Chandara* v. *Kuver*, 18 B. 464.

Where an application to sue *in forma pauperis* was rejected solely on the ground of the minority of the plaintiff, and that such minor was not properly represented by a next friend or guardian, without any enquiry as to his pauperism, and the Court ordered all costs to be paid out of the minor's estate *Held, that, as no enquiry* was made as to the pauperism of the minor, the order for costs against the minor's estate could not be passed under this section, and that the order was illegal and ultra *vires* —*Amichand Talakchand* v. *Collector of Sholapur*, 13 B 231

Costs.—This rule does not deal with the cost of successful defendant in a pauper suit The costs of defendant in such a case are to be dealt with under s 35, C P Code, and the Court of original or appellate jurisdiction has full power to give and apportion costs in any manner it thinks fit.—*Jetha Mulchand* v *Gulraj Jasrup*, 8 B. 577.

Government may apply for payment of court-fees.

12. The Government shall have the right at any time to apply to the Court to make an order for the payment of court-fees under rule 10 or rule 11. [New.]

COMMENTARY.

This rule is new It has been framed to meet the following case In 4 M 155, it was held that an application by Government for the payment of Court-fees is governed by three years' rule of limitation But under the present rule the Government shall have the right to apply at any time No question of limitation will arise.—See, *Shaw Mohammed* v *Mohammed Ali Khan*, 2 B. L R App 22; 11 W. R 6[illegible] where it has been held that the right of Government to recover the stamp fees in pauper suits is not affected by the rule of three years' limitation laid down in the Limitation Act.

"At any time."—See, *Secretary of State* v. *Narayana*, 13 Bom L R 686 35 B. 448

Appeal.—An order under this rule is appealable as an order under s 47 —*Secretary of State* v. *Narayana*, 35 B 448· 13 Bom. L R 686.

13. All matters arising between the Government and any party to the suit under rule 10, rule 11 or rule 12 shall be deemed to be questions arising between the parties to the suit within the meaning of section 47. [New.]

Government to be deemed a party.

COMMENTARY.

Object and Scope of Rule.—This rule is new. It has been framed to set at rest the following conflicting decisions under the old Code by providing that though the Government is not actually a party to the suit, it shall be deemed to be a party to the suit for the purposes of s. 47 of the C. P. Code.

Where a decree in a pauper suit did not contain any order as to the payment of stamp-fees, and the Government applied to have the decree amended in that respect. *Held*, that the Government, not being a party to the suit, had no right to be heard in the matter.—*In the matter of the petition of Secretary of State*, 2 C. L. R. 461. But see, *Collector of Kanara* v. *Krishnappa*, 15 B. 77, where it has been held that the Government, though not a party to the suit, was entitled to move the High Court under section 622, C. P. Code, 1882 (s. 115), on the question of Court-fees. *See* also, *Collector of Kanara* v. *Ram Bhat*, 18 B. 454 (6 B. 590 *followed*).

In a suit *in forma pauperis* the Court decreed the plaintiff's claim in part and dismissed it in part, but omitted to make any provision for payment to Government of the Court-fee on the portion dismissed. The Government preferred an appeal in respect of the Court-fee on the portion of the claim dismissed. *Held*, that such an appeal would lie.—*Secretary of State* v. *Bhagwanti Bibi*, 13 A. 326 (9 A. 64 *referred to*). But see, *Collector of Kanara* v. *Ram Bhat*, 18 B. 454, where it has been held, on the authority of *The Collector of Ratnagiri* v. *Janardan*, 6 B. 590, that no appeal by Government would lie in such a case, and that in the exercise of its extraordinary jurisdiction, the High Court would rectify the decree by directing the plaintiff to pay the costs of Government. The Bombay cases have been followed in *Collector of Trichinopoly* v. *Sivarama Krishna*, 23 M. 78.

14. Where an order is made under r. 10, r. 11 or r. 12, the court shall forthwith cause a copy of the decree to be forwarded to the Collector. [New.]

Copy of decree to be sent to Collector

COMMENTARY.

This rule is new.

Under the old Code the copy of the decree had to be given to the Government pleader. A copy of a decree passed in favour of a pauper should be delivered to the Government pleader within seven days from the day the decree is signed.—*See*, Calcutta High Court's Circular Order No. 4, dated 16th February, 1878.

Refusal to allow applicant to sue as pauper to bar subsequent application of like nature

15. An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper. [S. 413]

COMMENTARY.

This rule corresponds to s. 413, C. P. Code, 1882, with some modifications. The words "*an order refusing to allow*" have been substituted for the words "an order of refusal made under s. 409" which occurred in the old section; and the words "*and by the opposite party*" have been added after the word 'Government,' as there was no express provision in the old Code for the payment of costs of the successful defendant. *See*, 8 P. 577, noted under r. 11.

Object and Scope of Rule.—Order XXXIII, r. 15 is to be read along with the provisions of rr. 5, 6 and 7. Rule 5 contemplates a summary rejection by the Court at the earliest stage of the proceedings. Rule 7 contemplates a refusal of the application to sue as a pauper on the fourth ground mentioned in r. 5, namely, that the allegations of the petitioner do not show a cause of action. Rule 15 contemplates the refusal of a second application *when it is in respect of the same right to sue*; that is, the right to sue which formed the basis of the previous application.—*Ratnamala v. Kamalshyanath*, 31 C. L. J. 351.

Subsequent Application.—An application for leave to sue *in forma pauperis* for redemption of a mortgage was rejected with costs for want of prosecution. Subsequently the plaintiff applied for leave to sue as a pauper for the redemption of the same mortgage. The application was granted, and was registered as a suit. *Held*, that the order rejecting the plaintiff's first application was an order under Or. XXXIII, r. 7, and that it operated as a bar under this rule to the entertainment of the second application.—*Ranched Morar v. Bezanji Edulji*, 20 B. 86. (*Followed in Mt. Begum v. Jafar Hassan*, 73 I. C. 897)

This rule does not bar a second application when the first application was rejected under r. 5 (*a*) as not having been accompanied by a schedule of moveable and immoveable property.—*Mussammat Bal Kaur v. Sh. Das*, 1 Lah. 151 (42 I. C. 803) F. B.; *referred to*, 33 I. C. 812 *dissd.*

Where an application to sue *in forma pauperis* is summarily rejected under Or. XXXIII, r. 5 (*a*), a second application to sue as a pauper is not barred by the provisions of this rule.—*Chinnammal v. Papathi Ammal*, 71 A. I. R. 1925 Mad. 986; *Krishnamoorthy v. Ramayya*, 51 M. L. J. 71, 96 I. C. 962. A. I. R. 1926 Mad. 875.

Where an application for permission to sue *in forma pauperis* was dismissed on the ground that the application was not framed and presented

in accordance with the rules, and a subsequent application for the same purpose was dismissed for default, neither side appearing at the hearing *Held*, that a third application to sue as a pauper was not barred by the two earlier applications because they had not reached the stage of refusal within the meaning of this rule, and that such an application is expressly provided for by Or. IX, r. 4.—*Ma Sein v. Ma Kya Hmyin*, 4 Rang 245 · A. I. R. 1926 Rang. 200

A dismissal of an application to sue in *forma pauperis* for default is not an order refusing permission to sue as a pauper and hence is no bar to an application —*Maung Aung Tun* v. *Ma. E. Kin*, 2 Bur. L J. 217

Where the petitioner claims maintenance from the opposite party, her husband, and applies for leave to sue in *forma pauperis* but her appplication is dismissed under r 5 (*d*) as disclosing no cause of action and she applies more than two years after such dismissal for leave to sue *in forma pauperis* to recover maintenance for a period subsequent to the date when her first application was filed *Held*, that the subsequent application to sue *in forma pauperis* was not barred under this rule.—*Ratnamala* v *Kamalshya*, 31 C L J. 351 Though in such a case it was open to the applicant to file a suit in the ordinary way on payment of costs —*Srimati Barada Dasi* v *Upendranath*, 52 I C. 562.

Where there has been no refusal of the application to sue as a pauper, but it was dismissed for default by non-appearance, the applicant may revive his application for leave to sue.—*Bhoj Singh* v *Mahakonwer*, 3 Agra Mis 1

A Court has power to entertain an application under s 114 to review an order refusing under r 7 a petition for leave to sue *in forma pauperis* The provisions of this rule do not affect the right of a person, against whom such order has been made, to obtain a review.—*Adurji Edulji* v. *Manickji Edulji*, 4 B 414; *In the matter of the petition of Umasundari*, 5 B. L R. App. 29, and *Mahomed Gazee* v. *Dullab Bibee*, 5 B L R. 318-*note.*

There is a marked distinction between " a right to sue " and a right to make an application for permission to sue as pauper; and this distinction is clearly indicated in this rule The right to make such an application is obviously a personal right, and cannot survive in the legal representative who may or may not be a pauper himself.—*Lalit Mohan* v. *Satish Chandra*, 33 C. 1163 · 4 C L J 234

The bar to a subsequent application being a bar to the jurisdiction of the Court, the Court is competent and bound to take notice of it at any stage of the suit —*Ramchod* v *Bezanji*, 20 B. 86; *Ali Afzal* v. *Purna*, 40 C L J 188 84 I C. 703. A. I R. 1924 *Cal.* 1039.

Costs Incurred.—Under this rule, a person whose application to sue *in forma pauperis* has been rejected, must, in order to institute a suit in the ordinary way in respect of the same right, first pay the costs due to Government, but the suit ought not to be dismissed for default in payment of such costs unless demand for payment has been made either on behalf of the Government or by the Court —*Mrinalini* v. *Tinkauri*, 16 C. W N 641.

The following sections of the Transfer of Property Act IV of 1882 have been repealed: Sections 85 to 90, inclusive, 92 to 94 inclusive, 95, 97, 99, and in s. 100 the words: "and all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property."—See, *the Fifth Schedule*.

The word "shall" has been substituted for the word "must," which occurred in the old section; and the reason for the omission will appear from the following cases:—In *Bhawani Prasad* v. *Kallu*, 17 A. 537 (555) it was held that the word *must* is one of the strongest words of compulsion which a Legislature can employ, and the Courts are bound to give effect to it and not to ignore it or its significance. Again in *Matadin* v. *Kazim Husain*, 13 A. 432, in *Janaki Prasad* v. *Kishendat*, 16 A. 478, and in *Ghulam Kadir* v *Mustakin Khan*, 18 A. 109, it was held that non-joinder of persons interested in the mortgaged property is a fatal defect in the suit, unless cured by the action of the Court under s 32, C. P. Code, 1882 [Or. I, r. 10 (2)]. Under the present rule, the Court may, acting under the rules contained in Or. I, add necessary parties in mortgage suits at any stage of the proceeding.

From the language of the old section it would appear that it was only subject to the provisions of s. 437 of the Code of 1882 (Or. XXXI, r. 1), but in the present rule the words "s 437" have been omitted, and by the omission all the rules of the present Code relating to the addition, substitution, and transposition of parties will be equally applicable to and control all mortgage suits. Therefore under Or. I, r. 9 of the present Code, a mortgage suit is not liable to be dismissed for non-joinder or defect of parties but under s 85 of the T. P. Act, non-joinder of necessary parties in mortgage suits was a fatal defect, if the plaintiff had notice of such interest

The cases above referred to, in which it was held, that non-joinder of necessary parties in mortgage suits was a fatal defect, have been to that extent overridden by the present rule. The Legislature seems to have adopted the views expressed in *Kundan Lal* v *Faquirchand*, 27 A. 75; 2 A. L. J 476, and in 21 M 22 and 22 M. 207.

The explanation attached to this rule is new. It has been inserted to meet the several conflicting rulings on the point, adopting the principles laid down in the cases of *Debendra Narain* v. *Ram Taran*, 30 C. 599 F. B.; 7 C W N 766; *Ram Narain* v. *Bandi Pershad*, 31 C 737, *Sarju Ram Marwari* v *Barmadeo Pershad*, 1 C. L. J. 337 (351), and *G[illegible] Singh* v *Chandrika Singh*, 36 C. 193: 5 C. L. J. 611. In all these cases it has been held that in a suit to enforce a second mortgage, the first mortgagee is not a necessary party.

The expression "*all persons having an interest*" in this rule, includes persons in an undivided Hindu family governed by *Mitakshara*, a prior or subsequent mortgagee or any person who may sue for redemption.—*Bhawani Prasad* v *Kallu*, 17 A. 537 (555).

Object of the Rule.—The object of this rule in requiring all persons having an interest either in the mortgage security or in the right of redemption to be joined as parties is to avoid multiplicity of suits—

Lala Suraj Prosad v. *Golab Chand*, 28 C. 517, 529, 530; *Venkataramona* v. *Comperty*, 31 M. 425: 18 M. L. J. 298; *Gokul Chandra* v. *Rasheswari*, 14 C. L. J. 108; *Parshadi Lal* v. *Laiq Singh*; 21 A. L. J. 701.

Necessary Parties in Suits for Sale.—In a suit to enforce a second mortgage, the first mortgagee is not a necessary party.—*Gurdeo Singh* v. *Chandrika Singh*, 36 C 193: 5 C. L J 611 (1 C L. J. 337 (351), *followed*). *See* also, *Ram Narain* v. *Bandi Pershad*, 31 C 737; *Debendra Narain* v *Ram Taran*, 30 C. 599, F B : 7 C W N. 766, F. B.; *Raj Coomary* v. *Preo Madhub*, 1 C. W. N 453; *Srinivasa* v *Vemunabhai*, 29 M. 84 · 16 M. L. J. 50; *Nawab Waziri Begunm* v *Sashi Bhusan*, 4 Pat L T 546 · 74 I. C. 820.

Under s. 85, T. P. Act, a plaintiff mortgagee was not so allowed to frame his suit as to draw into controversy the title of a third party, who is in no way connected with the mortgage, and who has set up a title paramount to that of the mortgagor and mortgagee —*Jati Prasad* v. *Aziz Khan*, 31 A. 11: (1908), A W. N. 263; but Or. XXXIV, r. 1, C. P Code, does not prohibit a person claiming a title paramount or opposed to that of a mortgagor being made a party to a mortgage suit —*In re Obalampalli*, (1914) M. W N. 623: 22 I C 976 · 4 P. L W 417; *Jaggessor* v. *Bhuban*, 33 C 425; *Gobardhan* v. *Mannalal*, 40 A 584 .16 A. L. J. 639; *Hari Das* v. *Girindra*, 33 C. L J 301; *Galstaun* v. *Mirza Abid Husain*, 10 O L J 263: 73 I. C. 428; *Nirode Knata* v *Nripendra*, 96 I. C. 698: A I. R 1926 Cal. 1192

Order XXXIV, r. 1 requires that not only a person having an interest in the mortgage security but also a person having an interest in the right of redemption shall be joined as a party to any suit relating to the mortgage But s 85 of the T P. Act which is repealed by Or XXXIV, r 1 required that a person having an interest in the mortgage security only should be made a party to such a suit —*Shanabda Chandra* v *Srinath*, 17 C. W. N 871 17 I C 432

Whether or not s 85 of the T P Act 1882, refers solely to persons interested in the equity of redemption, it is not essential to join a party defendant, in a suit for sale on a mortgage, a person whose interest in the mortgaged property, if it exists, would be antagonistic to the claims of both mortgagor and mortgagee —*Khairati* v *Banni Begam*, 30 A 240 · 5 A. L. J 604 (33 C 425 *followed*) But see, *Gokul Chandra* v *Rasheswari*, 14 C. L J 108, in which it has been held that the rule laid down in *Jaineswar* v *Bhoobun Mohan*, 33 C 425, that in a suit to enforce a mortgage, persons claiming under a title adverse to that of both the mortgagor and the mortgagee are not proper parties, is not inflexible

Not only the mortgagor but all persons deriving title from him subsequent to the mortgage and bound thereby as holders of different fragments of the equity of redemption are necessary and proper parties to a suit to enforce the mortgage. The only persons who are proper parties to a suit to enforce a mortgage are persons having an interest in the property comprised in the mortgage, that is, the interest which a mortgagor is competent to transfer by way of mortgage at the date of the transaction.—*Jajneswar Dutt* v *Bhoobun Mohun*, 33 C 425 3 C. L. J. 205.

Where a mortgagee brings a suit for sale upon his mortgage without impleading as party to the suit a purchaser of a portion of the equity of redemption, he cannot by purchasing the property in execution claim possession as against the purchaser of the equity of redemption.—*Kristo-pada* v. *Chaitanya*, 49 C. 1048: 28 C. W. N. 92.

Omission to join all the heirs of a purchaser of the mortgaged property within the period of limitation, is no ground for dismissal of a suit, unless it is found that the mortgagor was aware, at the date of the suit, of the interest of those persons in the mortgaged property. The proper procedure was to add those heirs as parties, and, if it appeared, that at the date of the suit, the plaintiff was not aware of their interest in the property to ascertain what proportion of the debt was due by the heir who had been made a party in time, and to pass a decree against his share for that amount.—*Basiruddin* v. *Debendra Nath*, 12 C. W. N. 911 (18 A. 1045, 30 C. 755, 7 C. W. N. 723, *referred to*); *Har Chandra* v. *Mahomed Husain*, 25 C. W. N. 594. *See* also, *Shahasaheb* v. *Sadashiv*, 43 B. 575: 21 Bom. L. R. 369, in which it has been held that the test both under Or. XXXIV, r. 1 and s. 22 of the Limitation Act is the same: Was the suit properly constituted at date of the plaint so as to enable the Court to adjudicate as between the parties impleaded?

A decree obtained by a prior mortgagee who had no knowledge of puisne mortgagees is not bad because the latter were not made parties.—*Bunwari Jha* v. *Ramjee Thakur*, 7 C. W. N. 11.

In a suit on a mortgage of joint family property by the managing members of a joint Hindu family, the remaining members of the family are proper parties to a suit for sale based on such mortgage.—*Jai Ram* v. *Sher Singh*, 25 A. 162 (21 A. 301; 22 A. 307 and 391, *referred to*) and 25 A. 407, P. C. *See* also, *Sidheshuri Prasad* v. *Dharamjit*, 41 C. 727: 19 C. L. J. 437: 22 I. C. 570. But see, *Baijnath* v. *Dalup Narain*, (1917) Pat. 261.

In a suit for sale on a mortgage of joint family property executed by the father and three of his sons, the plaintiff made defendants, besides the executants, the fourth son, who was a minor, and four grandsons, also minors. *Held*, that the non-executant members of the family were properly arrayed as defendants in the suit.—*Debi Dat* v. *Jadu Rai*, 24 A. 459 (9 A. 493 *held to be no longer law*). *See* also, *Suraj Prasad* v. *Golab-chand*, 28 C. 517; *Dharam Singh* v. *Angan*, 21 A. 301; *Rama Chandra* v. *Kandyya*, 24 M. 555 and *Badri Prasad* v. *Madan Lal*, 15 A. 75, F. B.

The object of making a second mortgagee a party *defendant* in the suit of the first mortgagee, is that the property may be sold free of his incumbrance, not to enable him practically to obtain a decree against the principal defendant (mortgagor) without bringing a suit properly framed for that purpose.—*Mackintosh* v. *Watkins*, 1 C. L. J. 31. *See* also, *Mewa Singh* v. *Gokul Singh*, 35 A. 484: 11 A. L. J. 749, in which it has been held that the second mortgagee having an interest in the equity of redemption is a necessary party to the suit within the meaning of Or. XXXIV, r. 1.

The rule that all persons interested in the actual subject of the suit should be before the Court, in order that, as between them, complete justice might, as far as possible be done, cannot be taken as authorising

Court to complicate a suit by a mortgagee, by introducing into it controversy, in which the mortgagee is not really interested —*Krishna Ayyar* v. *Muthukumarasawmiya*, 29 M. 217.

Quaere—Whether this rule requires such persons whose rights are admitted to be made parties?—*Srinivasa* v. *Vemunabhai*, 29 M. 84: 16 M. L. J. 50.

Where in a suit upon a mortgage the purchaser of one of the mortgaged properties from the mortgagor, was not made party having been released by the plaintiff mortgagee. *Held*, that the suit could not be dismissed The mortgage should be treated as having been split up and the release of one of the properties by the mortgagee should be held to have the same effect as if the mortgagee had himself bought it and the mortgage debt apportioned between that property and the other mortgaged property —*Hari Kissen* v. *Seikh Velait Hossein*, 30 C. 755. 7 C. W. N 723. *See* also, *Ponnusami* v *Srinivasa*, 31 M 333.

A mortgagee is not bound to sue in respect of the whole of the mortgaged property. He may confine his suit to a portion of the property, by giving up his claim to the rest, and implead those only interested in that portion.—*Sheo Tahal* v. *Sheodan*, 28 A 174. 2 A L J 630 But by so doing he cannot release his lien upon one, so as to increase the burden upon the other —*Hakim Lal* v *Ram Lal*, 6 C L. J 46

This rule does not require the joinder in a suit on a prior mortgage of a subsequent mortgagee whose mortgage was only executed subsequent to the filing of such suit —*Ishaq Ali* v *Chunni*, 21 A 149

In a suit on a mortgage executed by the father of a joint Mitakshara family, the sons are necessary parties The sons who are not made parties to the suit are not bound by the decree obtained against the father, and are entitled to sue for a declaration of their rights to and to recover possession of their shares in the mortgaged properties —*Ramasamayyan* v *Virasami*, 22 M 222; *Palani* v *Rangayya*, 22 M 207, *Hira Lal* v *Parmeshar Rai*, 21 A 356; *Kanhaia Lal* v. *Raj Bahadur*, 24 A 211

A suit by a *Karta* of a Mitakshara joint family on behalf of all the members is a valid suit under Or XXXIV, r 1, and it is not necessary that the *Karta* should mention expressly that the suit is instituted by him in his capacity as *Karta*, provided the fact that the suit is brought by him in his representative capacity is obvious from the pleadings in the case —*Jag Sah* v *Ramchandra*, 2 Pat L T 553 63 I. C 664, *Shaikh Abdul Rahman* v *Shib Lal*, 2 Pat L T 572

In a suit to enforce a mortgage, the mortgagee made one only of two persons, who represented the estate of the mortgagor, a party defendant, not having notice of the existence of the other *Held* that the latter was bound by the decree obtained by the mortgagee and his interest passed at the sale held in execution of the mortgage decree —*Ram Taran* v *Rameswar Malia*, 11 C W N 1078 6 C L J 716 *See* also, *Ram Autar* v *Nursing Narain*, 3 C L J 12

Where property belonging to a joint Hindu family has been sold in execution of a decree obtained upon a mortgage executed by the father of the joint family it is open to the sons to sue for the recovery of their

shares in the property sold, if they were not made parties to the suit in which the decree against the father was obtained, provided that the mortgagee had notice of their interests in the property.—*Debi Singh* v *Jia Ram*, 25 A. 214, F. B (22 A. 377 *overruled*). Sons are not necessary parties to suits on mortgages of self-acquired properties executed by the father. In a suit on such a mortgage, the other members are not necessary parties.—*Vadi Lal* v. *Shah Kausal*, 27 B. 157.

A *subsequent purchaser of the mortgaged property* either at an execution or at a private sale is a necessary party to a mortgage suit *See*, 22 A. 212, 21 A. 235, 19 A. 541, 17 A. 48, and 21 M. 64. But when in the course of a mortgage suit, the purchaser of a portion of the mortgaged property is made a party defendant after the prescribed period of limitation, the suit as against him is barred by limitation. *Quaere*—Whether the portion of the mortgaged property in the hands of the added defendant is thereby exempted from liability under the mortgage —*Ram Kinkar* v *Akhil Chunder*, 11 C. W. N. 35, F B : 5 C. L. J. 242

Subsequent to the execution of a simple mortgage, the mortgagor sold the property to defendants who remained in possession Thereafter the mortgagee brought a suit on the mortgage without impleading the defendants and in execution of the decree purchased the property. *Held*, that the mortgagee purchaser was not entitled to possession of the property against the defendants —*S P. S Chetty Firm* v. *Maung Pyan Gyi*, 60 I. C. 562.

A person who is named in a mortgage deed as a mortgagee although in fact merely a *benamidar* for those beneficially interested can institute a suit in his own name, either for foreclosure or sale and the suit should not be dismissed merely because the beneficial owner is not added as a party The principle extends to a mortgage taken by some only of the members of a joint Hindu family who unlike as in the cases of a *benamidar* have a beneficial interest themselves in addition to their authority to act on behalf of the family.—*Hij Lal* v. *Jiboo Mahton*, 75 I. C 378

The real owner as well as the *benamidar* is a necessary party to a mortgage suit *See*, 18 A. 69, 21 A. 380, 24 C 34 and 644, 22 B 672 *See* also, the cases noted under Or. I, r. 1.

A *putnidar* is a necessary party to a mortgage suit, so that he may have a right of redemption —*See*, 8 C. 79, 9 C. L R 173, 10 C. L R 11, 21 C 116, noted at page 120. *See* also, *Kokil Singh* v. *Dul Chand* 5 C L R 249 But see, *Sripati* v. *Mohip Narain*, 9 C. 643: 13 C L R 119 A *zurpeshgidar* of the mortgaged property is also a necessary party — *Radha Pershad* v *Manohar Das*, 6 C. 317: 7 C. L. R. 293. A permanent lessee is also a necessary party.—*Raghunandan* v. *Ambika*, 29 A 677 A. L. J. 703 A person having merely a *raiyati* interest is not a necessary party, as his interest is not such as will entitle him to redeem —*G* ... *Chunder* v *Juramoni De*, 5 C W N 83

Having regard to the provisions of Or. XXXI, r 1, C P Code Trustees, Executors and Administrators may now bring suits for foreclosure, sale, or redemption without making their beneficiaries parties

A *puisne mortgagee* is a necessary party to a suit by a prior mortgagee to enforce his mortgage, as he is entitled to redeem and ...

made a party, his right to redeem is not affected by the decree.—*Hetram* v. *Shadiram*, 40 A. 407, P. C.: 22 C. W. N. 1033: 35 M. L. J. 1; *Ram Narain* v. *Bandi Pershad*, 31 C. 737; *Umesh Chundra* v. *Zahur Fatima*, 18 C. 164, P. C.; *Janki* v. *Kishen Dutt*, 16 C. 478; *Namdar* v. *Karam Raji*, 13 A. 315; and 9 A. 125, 23 A 1, 26 M. 537, 23 A 25, and 31 B. 112 *See* also, *Alam Singh* v. *Gokul Singh*, 35 A. 484. 11 A. L J 749.

A *puisne mortgagee* who has also a prior mortgage when impleaded as a necessary party as puisne mortgagee is bound to appear and to set up his prior mortgage as well as his subsequent mortgage.—*Kishen Dayal* v. *Mahomed Amirul Hussain*, 19 C. W. N. 942. 26 I C. 673 (39 C. 527: 22 M. L. J 468, *distd.*).

It is obligatory upon a mortgagee to bring before the Court all persons interested in the equity of redemption, of whose interest he has notice; if he omits a party of whose interest he has no notice, the decree obtained by him, does not thereby become infructuous A party excluded from a mortgage suit and who has not been afforded opportunity to redeem, is entitled to exercise his right of redemption upon the same terms, as if he had been made a party to the original suit The principles upon which a puisne mortgagee, who has been left out of a prior mortgagee's suit, is entitled to have his liability determined, are explained.—*Ganga Das* v. *Jogendra Nath*, 5 C. L J. 315. *See* also, *Ganpat Lal* v. *Bindabasini*, 18 M L. J. 555 P. C. 12 L W 59. 56 I. C. 274; *Musst Sukhi* v *Munshi Ghulam Sajdar Khan*, (1921) M. W N. 445 43 A 469. 48 I A. 465 P. C, *Prabhulinappa* v. *Gurunath Balaji*, 22 Bom L. R. 389 45 B 453.

If a person interested in the mortgaged property has not been joined as a party to the suit by the mortgagee and he comes in before foreclosure or sale, he has all the right of redemption that his interest in the property gives him. In a suit for sale under a mortgage the mortgagee failed to effectively implead certain persons, interested in the mortgaged property A decree was passed and the mortgaged property was sold under it and was purchased by the mortgagee In a suit by the persons who should have been impleaded for a declaration that their right to redeem was not extinguished. *Held*, that after the sale has taken place, the mortgagee held as purchaser and was entitled to raise all the defences that belonged to him as such and that unless the claim to set aside the sale were made in a properly constituted action and properly raised, the Court could not interfere with the possession which had been given him by the purchase; *Ganpat Lal* v *Bindbasini Prasad*, 47 C 924 P C 24 C W. N 954 47 I A. P. C., *Sheikh Kalu Sharif* v *Abboy Charan*, 25 C. W N. 253

If a puisne incumbrancer is not made a party to a suit upon prior incumbrancer, the puisne incumbrancer's right to redeem will not thereby be affected by the decree in the suit —*Namdar Chaudhri* v *Karam Raji*, 13 A. 315. *See* also, *Sital Prasad* v *Asho Singh*, (1922) Pat 326

Suit by first mortgagee—Failure to join second mortgagee as party—Decree and sale thereunder—Purchase by first mortgagee—Subsequent suit for partition and possession *Held*, that the plaintiff was not entitled to obtain possession without paying off the second mortgage, and it was immaterial whether the plaintiff's failure to join the second mortgagee as a party of the previous suit was wilful or due to ignorance of the fact that

a second mortgage existed.—*Rangasamy* v. *Kommarammal*, 26 M 4; *Mt Dhanwanti* v. *Hargobind*, 5 Pat. L. T. 103. As to puisne mortgagee's right of sale, see *Debendra Narain* v. *Ram Taran*, 30 C. 599, F. B.; 7 C. W. N 766 (4 C W. N. 541 *overruled*); *Jageshwar* v *Moti*, 66 I. C 637.

In a suit by sub-mortgagee for sale of the mortgaged property, the mortgagor and the mortgagees are necessary parties.—*Ahmed Ali* v. *Bihu Rai*, 5 A. L. J. 402: (1908) A. W. N. 191.

A sub-mortgagee may sue to enforce the original mortgage against the mortgagor, impleading the mortgagee as a party.—*Muthu* v *Venkatachallam*, 20 M 35; *Ram Subhay* v. *Nursingh*, 27 A. 472

Necessary Parties to Suits for Foreclosure.—The object of a suit for foreclosure being to put an end to the equity of redemption only those persons are necessary parties to the suit, who have the right of redemption of the property sought to be foreclosed. A plaintiff in a foreclosure suit is entitled to exempt from his claim the portion of the property which belongs to persons, who are not impleaded in the suit. He is not bound to attempt to enforce a claim against property, the title of which was in dispute or was doubtful There is no obligation on him to proceed against the whole of the property; he is equally competent to sue for foreclosure of a part of the mortgaged property; in the same way as a simple mortgagee can omit from his suit any part of the mortgaged property and the owners of the equity of redemption of the property omitted need not be made parties.—*Sheo Tahal* v *Sheodan Rai*, 28 A. 174: 2 A. L. J. 630

Order XXXIV, r. 1 does not prohibit the joinder of any person as a party but merely lays down that subject to the provisions of this Code all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties. The transferee of mortgaged property in breach of a covenant against alienation may be made a party to a foreclosure suit.—*Vej Singh* v. *Patiram*, 55 I. C. 433.

In a suit for foreclosure by a puisne mortgagee, the prior mortgagee should be made a party to the suit. Where a prior mortgagee was not a party, the Court at the hearing of the suit ordered that he should be made a party.—*Sorabji* v. *Rattonji*, 22 B 701.

A mortgagee of a joint family property obtained a decree for foreclosure against the father who alone executed the mortgage. At the time of the suit the mortgagee knew that there were sons and grandsons jointly interested with the mortgagor in the mortgaged property, but, notwithstanding this, the mortgagee omitted to make them parties *Held*, that the sons and the grandsons were not precluded from instituting a suit for redemption.—*Ram Prasad* v. *Manmohan*, 30 A. 256: 5 A. L. J 267 (17 A 537 *referred to*; 25 A. 214 *distinguished*).

Where a decree for foreclosure was obtained against S. who was the executor of his father's estate, and subsequently A, a brother of S. and M, a purchaser of some of the mortgaged properties from A, made an application to be made parties and to redeem. *Held*, that they were not entitled to be made parties.—*Mohanand* v. *Akhoy Kumar*, 6 C W. N 488

"A creditor who purchases under an execution against the general assets of a testator's estate, takes subject to a mortgage created in pursuance of a power contained in the will; and in a suit to foreclose, the purchaser is rightly made a party.—*Nil Kant* v. *Peary Mohun*, 3 B. L R 7 11 W. R. 21.

An attaching creditor has a right to redeem and is a necessary party to a suit for foreclosure or sale —*Ghulam Husain* v. *Dina Nath*, 23 A. 467 and 26 A. 464.

Necessary Parties to a Suit for Redemption.—Under Or. XXXIV, r. 1, in a suit for redemption of a mortgage only those parties should be joined who claim an interest in the mortgage security or in the right to redeem, outsiders who claim a title to the property independently of the rights of the mortgagor and the mortgagee need not be made parties —*Satagauda* v. *Satappa*, 22 Bom L. R 815.

Every attaching creditor under a money decree against mortgagor is entitled under Or XXXIV, r 14, to redeem the mortgage —*Maghraj Marwari* v. *Kesheo Gopal*, 6 N. L J 181 73 I C 8.

A co-heir of the plaintiff having an interest in the mortgage at the time of the redemption suit, is a necessary party to it, but not otherwise.—*Trimbak Jivaji* v. *Sakharam Gopal*, 16 B 599

In a suit for redemption, all persons jointly entitled to the right of redemption, *e g*, all the heirs of a mortgagor, must be joined —*Bhandin* v. *Ismail*, 11 B. 425.

In a suit for redemption of a mortgage, persons who are alleged to be the tenants of the mortgagee are proper parties —*Krishna* v. *Vithal*, 28 Bom. L. R 759 96 I C 843 A I R 1926 Bom 522

Where in a suit for redemption of a mortgage effected in favour of three persons, the mortgagor-plaintiff withdrew the suit as against one of them, *held*, that the suit was liable to be dismissed under Or XXXIV, r. 1, for non-joinder of parties —*Dhuri Patak* v *Timal Sing*, 4 Pat L W 391: 45 I. C 650.

Where a joint family property, though held in certain shares by the several co-parceners, was mortgaged as a whole and redeemable on payment of the whole sum *Held*, in a suit by one of joint tenants, or tenants in common to redeem the whole estate, that all persons in whom portions of equity of redemption were vested must be made parties to the suit.—*Naro Hari* v *Vithalbhai*, 10 B 648

Where out of three properties subject to one mortgage two had been redeemed by payment of a proportionate part of the mortgage-debt and the third alone was the subject of a suit for redemption upon payment of the balance of the mortgage money, a person, having an interest in one of the properties already redeemed, is not a necessary party to such a suit —*Nazir Husain* v *Nihalchand*, 2 A. L J 628 (1905), A W N 156

Part owners of a mortgaged property who did not execute the mortgage deed nor received the mortgage money are not necessary parties to a suit for redemption, as they were not interested in the equity of redemption of the mortgaged property.—*Monmohini* v *Parvati Nath*, 32 C 716

In a suit for redemption where there are several persons ... entitled to redeem, they are all necessary parties, either as plaintiff or defendant, provided that they can be ascertained —*Ram Baksh v. Ram Lal*, 21 W .R. 428. But see, *Hurdeo v. Guneshee Lall*, 1 Agra 36, where it has been held that any one of the mortgagors or his legal representative is, if the mortgage-debt has been repaid, entitled to sue for redemption, and to be put in possession of his own share of the estate, whatever his co-parceners may choose to do in the matter.

A sub-mortgagee may be impleaded as a defendant in a suit for redemption by the mortgagor, to which the mortgagee or his legal representatives are necessary parties —*Padgaya* v. *Baji*, 20 B 459.

The general rule is that the mortgage-debt being indivisible and the mortgaged property being held in its entirety as security for the debt and every part of it, the property can only be redeemed in its entirety on payment of the whole debt. *If the right of redemption is vested in several persons, one of them may redeem the whole mortgage on payment of the whole debt.—Narohari v Vihtalbhai*, 10 B. 648, *Mora* v. *Ram Chandra*, 15 B 24 (*referred to* in 21 B. 619, *distinguished* in 20 M. 295) But one of them cannot, on offering to pay his share of debt claim to recover a proportionate share of the property.—*Nil Kant* v. *Suresh Chandra*, 12 C 422, P C.: 20 A. 23

The reversionary heirs of the deceased husband of a Hindu widow, in possession of the husband's property are not persons who have such interest in the mortgaged property, as would entitle them during the lifetime of the widow to redeem the mortgage made by the husband.—*Ram Chandar* v. *Kallu*, (1908), A. W. N. 225: 5 A. L. J. 631.

Any person entitled to a maintenance charged upon the property should be made a party The mere fact that a person is entitled to be maintained out of the income of the property is not sufficient.—*... Singh* v *Balwant Singh*, 22 A. 191, P. C. (affirming 18 A. 253).

Preliminary decree in foreclosure suit.

2. In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a decree—

(*a*) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or

(*b*) declaring the amount so due at the date of such decree

and directing—

(*c*) that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the

mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property, but

(d) that, if such payment is not made on or before the day to be fixed by the Court, the defendant shall be debarred from all right to redeem the property.

[S. 86.]

COMMENTARY.

This rule corresponds to section 86 of the T. P. Act, IV, of 1882, with some alterations and additions The old section is reproduced below for the purpose of comparison.—"*In a suit for foreclosure, if the plaintiff succeeds, the Court shall make a decree, ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree, and ordering that, upon the defendant paying to the plaintiff or into Court, the amount so due, on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the plaintiff shall deliver up to the defendant or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims; and shall, if necessary, put the defendant into possession of the property; but that, if the payment is not made on or before the day to be fixed by the Court, the defendant shall be absolutely debarred of all right to redeem the property.*"

Clauses (a) and (b) correspond to the first para of the old section with some change of words only

Clause (c) corresponds to para 2 of the old section with some modifications The words "*that if the defendant pays into Court the amount so due*" have been substituted for the words "that upon the defendant paying to the plaintiff or into Court the amount so due," which occurred in the beginning of para 2 of the old section, and the words "*and shall, if so required, re-transfer the property*" have been substituted for the words "transfer the property" which occurred in the old section after the words, "mortgaged property", and the words "*free from mortgage*" have been added before the words "all incumbrances" The other changes are merely verbal

Clause (d) is almost similar to para 3 of the old section with the omission of the word "absolutely" which stood before the word "*debarred*" in the old section The omission seems to have been made

in view of sub-rule (3) of r. 69, Or. XXI, which is applicable to all s under this Code including sales of mortgaged property

"The Committee have inserted the words 'if necessary' before 'transfer,' as, according to muffasil practice, a re-transfer is not ord[illegible] required and they think this practice should be altered."—See, *the Re[illegible] of the Special Committee*

"The Committee have omitted the provisions as to the defen[illegible] paying money to the plaintiff. They think it better that in every ca[illegible] should pay it into Court."—See, *the Report of the Special Committ[illegible]*

Right to Foreclosure or Sale.—A suit to obtain a decree that the [illegible] gagor shall be absolutely debarred of his right to redeem the mortg[illegible] property, is called a suit for foreclosure. A suit to obtain a decree t[illegible] the property be sold, is called a "suit for sale."—*See*, s 67, Tra[illegible] of Property Act Rules 2 and 3 relate to decree in suits for forecl[illegible] Rules 4 and 5 relate to decrees in suit for sale. A suit for forecl[illegible] can only be brought where the mortgage is an English mortgage [illegible] mortgage by conditional sale. A suit for sale can only be brought w[illegible] the mortgage is an English mortgage or a simple mortgage A mortg[illegible] by conditional sale cannot institute a suit for sale. A simple m[illegible] cannot institute a suit for foreclosure. An usufructuary mortgagee ca[illegible] not institute a suit either for foreclosure or sale.—*See*, Transfer of P[illegible] perty Act, s 67.

Right to Redemption.—The mortgagor has, at any time after th[illegible] mortgage money has become payable by him, a right, on payment [illegible] tender of the mortgage money, to require the mortgagee to deliver up [illegible] him all documents in the mortgagee's possession relating to the mortg[illegible] property, and to re-transfer the property to him. The right is call[illegible] "right to redeem" A suit to enforce this right to redeem is call[illegible] suit for redemption Rules 7 and 8 porvide for decrees in suits for r[illegible] demption.—*See*, Transfer of Property Act s. 60.

"That an account be taken of what will be due."—The scheme [illegible] intention of the T P. Act IV of 1882, was that a general account sh[illegible] be taken once for all, and an aggregate amount be stated in the d[illegible] for principal, interest and costs due on a fixed day, and that after th[illegible] expiration of that day, if the property should not be redeemed, the p[illegible] should pass from the domain of contract of that of judgment, and th[illegible] rights of the mortgagee should henceforth depend, not on the contents [illegible] the bond, but on the directions in the decree.—*Sundar Koer* v *Rai S[illegible] Kishen*, 34 C. 150, P. C.: 11 C. W. N. 249: 5 C L J. 106

When a mortgagee undertakes to collect rents from the tenants [illegible] the property compromised in his security and to apply them in sa[illegible] tion of his dues, if he himself is one of the tenants he must, when accounts are taken, allow credit for the rents payable by him, although, if, at the time, a suit was brought for recovery of the rent, it might be held [illegible] be barred by limitation —*Ram Nath* v. *Brahmamoyi*, 1 C L J [illegible] *See* also, *Sheo Saran Singh* v. *Mahabir Pershad*, 32 C. 567. 2 C. L J [illegible]

Where a mortgage deed is silent as to possession, and there is [illegible] agreement to the contrary, a mortgagee, who takes possession, takes the the obligation upon him to account for the rents and profits [illegible]

time he is in possession.—*Madari* v *Baldeo Prasad*, 27 A 351, F. B. *See* also, *Ganga Mulk* v *Bayaji*, 6 B 669, 670.

Where a person who had an interest in the mortgaged property was not made a party in the suit brought by the mortgagee, his rights are not *affected and he is still entitled to redeem In allowing him to redeem*, accounts must be taken on the footing of a mortgage which subsists and which it is sought to redeem and not merely on payment of the decretal amount. In calculating the amount payable, interest should be made payable at the mortgage rate up to the date fixed in the decree for redemption — *Janendra Nath* v *Shorashi Charan*, 49 C 626

In a suit for redemption of an usufructuary mortgage, the mortgagee is not responsible for the amount of the gross rental as shown in the *jamabandi*, but only for such sums as were actually received by him or on his behalf and such sums, if any, as might have been received by him, but for his own neglect or fault —*Banarasi Parshad* v. *Ram Narain*, 7 C. W. N. 514, P. C.

In a suit for redemption, mode of taking accounts and calculating interest pointed out.—*Nandu Sahu* v *Ram Lakan*, 9 C L. J. 633.

A mortgagor seeking to redeem must prove how much of the debt and interest has been repaid The duty of the mortgagee in possession is to keep a full, true and accurate account of the actual receipts and disbursements The mode of taking accounts pointed out.—*Kundar Mal* v. *Kashibai*, 26 B. 363.

Ordinarily, a suit for an account upon a mortgage cannot be maintained by a mortgagor unless he asks for redemption also.—*Hari* v *Lakshman*, 5 B 614 and *Shankarapa* v *Danapa*, 5 B. 604.

The fact that a purchaser of the equity of redemption received a certain sum for payment to the mortgagee does not preclude him from claiming from the mortgagee an account of the income of the mortgaged property —*Jafree Begum* v *Gunga Ram*, 3 Agra 91

In a redemption suit, a mortgagee is entitled to credit for reasonable costs of repairs, if he renders an account of rents and profits.—*Lakshman* v. *Hari*, 4 B 584

Under the ordinary law of mortgage, the mortgagor is bound, so long as the equity of redemption remains with him, to indemnify the estate against expenses incurred in protecting the title.—*Damodar* v *Vamanrav*, 9 B. 435 See, *Pokree Saheb* v *Pokree Beary*, 21 M. 34.

In a suit for account and redemption, if the mortgagee, on taking the accounts, is found to have been overpaid, the general practice is to order the payment, by him, of the balance due to the mortgagor with interest from the date of the institution of the suit —*Janoji* v *Janoji*, 7 B. 185.—*See* also, *Ram Chandra* v. *Janardan*, 14 B. 19

In a suit by a mortgagor for redemption, the assignee of a mortgagee is bound by the state of the account between the mortgagor and the mortgagee, where the assignment was made without the knowledge of the mortgagor.—*Chinnayya* v. *Chidambara Chetti*, 2 M. 212.

Where a mortgagee in possession pays the Government revenue which was payable by the mortgagor, he has a right to tack on the amount so paid in his mortgage debt —*Imdad Hasan* v. *Badra Prasad*, 20 A 4[illegible]. *Kamaya Naik* v. *Devapa*, 22 B. 440.

A mortgagee in possession is bound to produce the accounts of collection and disbursement and to swear to them —*Makund Lal* v. *Goluck Chunder*, 9 W. R. 592; *Goluck Chunder* v. *Mohun Lal*, 5 W. R. 27[illegible], *Ram Lochun* v. *Kunhya Lall*, 6 W. R. 81, and *Ramphal* v. *Waked* [illegible], 14 W. R. 66.

As to the mode of taking accounts where the defendant is mortgagee in possession, see, *Hunooman Pershad* v *Munraj Koonweree*, 6 M I A 393 18 W. R. 81-*n*

Principal and Interest on the Mortgage.—In a suit on a mortgage bond the plaintiffs are entitled to recover the agreed rate of interest without any deduction.—*Fattehma Begum* v. *Mohamed Ausur*, 9 C [illegible]

Interest on money lent was contracted to be payable, "even if a suit should be instituted," at the rate fixed for the period for which the money was lent *Held*, the interest must be decreed at this rate, according to the contract, down to the institution of the suit.—*Balgobind Das* v. *Narain Lal*, 15 A 339 P C (p. 352).

Interest after due date of suit is in the discretion of Court, notwithstanding that a fixed rate [illegible] payable up to realization in the bond sued [illegible] *Roy*, 12 C [illegible] *See* also, *Deendoyal Lall* [illegible] W. R 189 [illegible] see, *Rama Chandra* v *Devu*, 12 M. 485, and *Surya Narain* v *Jogendra Narain*, 20 C. 360, in which it has been held that the terms of s [illegible] Transfer of Property Act (IV of 1882), exclude the discretion conferred on the Court by s. 209, C. P. Code, 1882, in cases coming under the Transfer of Property Act, and that interest at the stipulated rate must be computed down to the date fixed for payment. In *Achalabala Dasi* v *Surendra Nath*, 24 C 766. 1 C. W. N 550 (dissenting from *Amrit Ram* v *Lachmi Narain*, 19 A. 174), it has been held that the Court has power under a decree in a mortgage-suit to allow interest subsequent to the date of decree, and the date fixed by the decree for payment, until realization This case has been followed in *Bakar Sajjad* v. *Udit Narain*, 21 A 361, F B (over-ruling 19 A 174). *See* also, *Subbaraya* [illegible] *mindu* v *Ponnusami Nadar*, 21 M. 364 and *Jogendra Nath* v. [illegible] *Abraham*, 6 C W N 769; *Rameswar Prosad* v. *Rai Sham Kishen*, [illegible] 43 The same principle has been laid down in *Commercial Bank of India* v. *Attendrulayya*, 23 M 637; *Saminathan* v. *Senappa*, 29 M 170; 16 [illegible] L J 133, *Rameswar Kaer* v. *Mahomed Mehedi Hossein*, 26 C 39 P C 2 C W N. 633, P. C in *Maharaj of Bharatpur* v. *Rani Kanno* [illegible] 5 C W N 137, P C 23 A. 181, P. C.; *Raja Balwant Singh* v. [illegible] *Ram*, 28 A 223, P. C 3 C L J. 85; in *Ganga Ram* v *Jailal*, [illegible] C 953; *Manoo Lal* v. *Durga Prasad*, 5 C. W. N 653: *Prayag Kumari* v *Shyam Lal*, 31 C 138

The prevailing practice in mortgage cases is to allow interest at the contract rate up to the date fixed for payment by the decree and thereafter interest at the usual Court rate of six per cent per annum

The words " the date of realization " in the decree mean the date fixed for payment by the decree that is, a date within and not after the period of grace.—*Maha Pershad Singh* v. *Surendra Mohan*, 9 C L J. 288. *See* also, *Rani Sundar Koer* v. *Rai Sham Kishen*, 34 C. 150, P. C . 11 C. W. N 249. 5 C. L. J. 106; *Lachmi Narain* v. *Uman Dat*, 29 A 322· 4 A. L J. 209. *Gokuldas* v *Ghasiram*, 35 C 221, P. C.· 12 C. W N 369. 7 C. L. J. 233. In *Meghraj Marwari* v *Narsingh Mohan*, 33 C. 846, meaning of the words " up to the date of realization " in the decree, explained. *See* also, *Tekait Krishna Prasad* v *Surendra Mohan*, 2 Pat. L. T. 78: 5 Pat L J. 598

Interest at the stipulated rate should be allowed up to the date fixed for payment in the decree, and after that at the contract rate.—*Rameswar Prasad* v. *Rai Sham Kishen*, 29 C. 43, *Jogendra Nath* v *Methana Abraham*, 6 C. W. N. 769.

In a suit by a mortgagee to recover the money due on his mortgage the plaintiff is entitled to interest at the rate specified in the mortgage-deed up to date of decree, and a Court has no discretion to refuse to award such interest —*Chaturbhai Karsan* v. *Harbhanji*, 20 B. 744.

The discretionary power as to awarding interest conferred on the Courts by s. 209, C. P. Code, 1882 (s. 34), may be exercised without reference to the law of *damdupat*.—22 B 86 (20 B 721 *referred to*).

Where there is an express covenant to pay interest at a certain date after the stipulated date of payment, the Court is bound to allow interest at that rate up to the date of decree —*Chab Nath* v *Kamta Prasad*, 7 A. 333 (1 A. 603 *referred to*)

A puisne *mortgagee seeking to redeem prior incumbrances must pay* the interest at the rate agreed upon in the mortgage; there being no authority under s 209, C P Code, 1882 (s 34), to reduce it to the Court rate —*Umes Chandra* v *Zahur Fatima*, 18 C. 164, P C.

A usufructuary mortgagee who allows his mortgagor to retain possession of a part of the mortgaged property and makes no claim in respect of the stipulation *in the mortgage-deed which provides* for payment of interest, his claim, for interest is barred by acquiescence —*Jhenku Singh* v. *Chhotkan Singh*, 31 A 325 (6 A L J. *referred to*).

See, *the cases noted under s* 34

Interest Post Diem.—Where there is no agreement fixing the rate of interest after due date, the question as to the amount of interest to be allowed after that date should be treated as one of damages —*Jaula Prasad* v. *Khaman Singh* 2 A 617 *See* also, *Bishen Doyal* v. *Udit Narain*, 8 A 486; *Mansab Ali* v *Gulab Chand*, 10 A. 85, *Bhagwant Singh* v. *Daryao Singh*, 11 A 416; and *Niwas Ram* v *Udit Narain*, 13 A. 330.

Where the decree *nisi* in a mortgage suit allowed no interest after the expiry of the period of grace, it is not open to the Court, upon the application of the decree-holder to insert any provision for further interest which was not made in the decree *nisi* —*Maha Prasad* v. *Ramani Mohun*, 13 C. W. N 741. *See* also, *Udit Narayan* v. *Jasoda*, 27 C. L J. 578.

When a mortgage bond contains no stipulation for the payment of interest after due date, interest is payable by virtue of the Interest Act (XXXII of 1839)—*Moti Singh* v. *Ramo Hari*, 24 C 699, F. B (19 C [illegible] *approved*, 19 C. 39, P C, and 21 C 274 *referred to*) Considered in *Ghantayya* v *Papayya*, 23 M 534.

Where a mortgage-bond does not provide for interest *post diem*, the mortgagee is entitled to receive such interest by way of damages—*[illegible] mal Das* v *Brij Bhukhan*, 17 A 511, P. C. (1 A. 603, and 7 A [illegible] *referred to*) *See* also, *Badi Bibi* v. *Sami Pillai*, 18 M. 257; *[illegible] Ammal* v *Lakshmi Ammal*, 18 M 331; *Nityananda* v. *Radha [illegible]*, 20 M 371, *Pedda Subbaraya* v *Ganga*, 20 M. 149. But whether such *post diem* interest would constitute a charge on the mortgage property or not, there is a difference of opinion In *Bikramjit Tewary* v. *Durga Dyal*, 21 C. 274, in *Rama Reddi* v *Appaji Reddi*, 18 M. 248; in *Kristna Reddi* v *Varadarajul Reddi*, 18 M 338-note, it has been held that such *post diem* interest would constitute a charge on the mortgaged property But in *Narindra Bahadur* v *Kadim Husain*, 17 A. 581; in *Gudre Koer* v *Bhubaneshwari Coomar Singh*, 19 C 19; in *Rikhi Ram* v. *Sheo Prakash*, [illegible] A 316, it has been held that such *post diem* interest does not constitute a charge on the mortgaged property. These latter cases seem to have been disapproved by the Judicial Committee in *Mathura Das* v *[illegible] Bahadur*, 19 A 39, P C followed in *Sarada Dasi* v. *Jogendra [illegible]*, 28 C. 246 *See* also, *Bindeshri Naik* v *Ganga Saran*, 20 A 171, P C

Interest Subsequent to the Date Fixed for Payment.—There is no provision made in this rule for interest after the date fixed in the decree for payment, as there is in rule 4, which relates to a decree for sale. The reason is to be sought in the difference between a foreclosure and sale. In the former case interest stops because the mortgagee gets the property in lieu of his debt, whereas a sale must be subject to some substantial delay and in many cases is subject to long delays —*Maharaja of Bharatpur* v *Kanno Dei*, 23 A. 181 · 28 I. C 35

Where in a decree for foreclosure, interest subsequent to the [illegible] was included in the amount made payable to the plaintiff *Held*, [illegible] such future interest supposing it could be properly payable, could not be treated as a charge upon the land —*Bhawani Prasad* v *Brij Lal*, 16 A 269 *See* also, *Rajkumrai* v *Bisheshar*, 16 A. 270

Besides the cases noted above, see the cases under s 31

Costs.—Whether the suit be one for foreclosure, sale or redemption, the mortgagee is entitled to all costs properly incurred by him, including costs subsequent to the decree; *Maharaja Bahadur Singh* v *[illegible]* 41 C L J 607 A I R 1925 Cal. 1135

In a mortgage suit it is open to a Court of appeal to direct that [illegible] costs as it may award against the unsuccessful appellant may be [illegible] able from him personally, but if there is no such express direction the costs are, as a matter of ordinary practice, sanctioned by Or XXXIV rr. 2, 4, and 10 of the Code of Civil Procedure, added to the mortgage money and are in the first instance recoverable from the mortgaged property after the decree is made final —*Mahomed Hidullah* v *[illegible] Lal* 15 A. 630, 21 A L J. 617.

Preliminary Decree in Foreclosure Suit.—The decree passed under this rule is not a money decree. The order absolute for foreclosure, so far from directing the payment of the mortgage-debt, has the effect of discharging the debt. If, in a foreclosure suit, the mortgagor thinks fit to pay the mortgage-debt, and thus save his interest in the property, he does so by reason of the obligation, which he undertook when he executed the mortgage security, and with a view to preserve the property, and not in obedience to the order of the Court. Any payment made by him will not be in execution of the decree The decree *nisi* puts him under no obligation to pay the debt, but simply declares what the consequences of the non-payment will be.—*Sham Sunder* v. *Mohammad Iptisam Ali*, 27 A. 642: 2 A L. J. 180 F. B.

Where in a suit upon a mortgage by conditional sale, the plaintiff mortgagee prayed that the defendant should be debarred from the right to redeem in case the money was not paid within a certain time and the Court passed a decree in the following terms, " that the claim be decreed with costs and interests and that the defendant do pay to the plaintiff the decretal money within two months " *Held*, that the decree though irregular as to the form, was, in effect, a decree for foreclosure within the meaning of this rule and that after the decree had been made absolute, it was not open to the defendant to object to the delivery of possession. *Jogendra Chandra* v. *Rama Nath*, 4 C. L. J. 533.

Pendency of an appeal against a preliminary decree made under this rule does not prevent the Court which passed the decree from making it absolute.—*Madan Mohan* v. *Ram Hari*, 1 C. W. N. 197.

A foreclosure decree obtained by a prior mortgagee was redeemed by a puisne mortgagee, who was party to the suit. *Held*, that the puisne mortgagee acquired all the rights and powers of the prior mortgagee as such; but the rights so acquired were not such as could be worked out in execution of the decree made in favour of the prior mortgagee, that decree having been discharged by payment. A separate suit to enforce the rights was not barred by s 244, C. P. Code, 1882 (s. 47). The form of order given in this rule contemplates a suit between one mortgagee and the mortgagor only and should be treated as a common form not to be literally followed in every suit for foreclosure, but to be adopted to the particular circumstances of each case.—*Gopi Narain* v. *Babu Bansidhar*, 9 C. W. N. 577, P C. L. R. 32 I. A. 123 (24 A. 179 *reversed*).

The object of this rule is to prevent mortgagees from realizing their securities, except in the way prescribed by the Act. Sections 86 and 88, T. P. Act, 1882, prescribe for the nature of decrees that should take place in each particular form of mortgage. In respect of a mortgage by conditional sale, foreclosure is the only remedy, and in respect of an English mortgage, foreclosure and sale are alike open, while in a simple mortgage, sale is the only remedy.—*Chunder Nath* v. *Barroda Sundary*, 22 C. 813

A suit for foreclosure was partly decreed and partly dismissed, and the plaintiff appealed against the portion of the claim dismissed. The appeal was also dismissed and within three years from the dismissal of the appeal the decree-holder applied for an order absolute for foreclosure. *Held*, that the application was not barred; the proceedings to foreclosure

must be proceedings to foreclose the mortgage as a whole. There can be no partial foreclosure.—*Sahm Sundar* v. *Muhammad Ihtisahm*, 27 A. 91; 2 A. L. J. 110.

In case of several incumbrancers, the second mortgagee has the first right to redeem, and is liable to be foreclosed in default of payment. After the foreclosure of the second mortgagee, the third mortgagee is entitled to redeem on payment of the amount originally certified to be due to the first mortgagee together with the subsequent interest and costs due to the first mortgagee. In default, he is foreclosed. The process continues in this way until the mortgagor is reached, and if the mortgagor fails to redeem, the mortgaged property becomes vested in the mortgagee free from all incumbrances.—*Narayan Venkoba* v. *Pandurang*, 7 B. ...; *Tulsa* v. *Khub Chand*, 13 A. 581; *Auhindra* v. *Chunnoo Lal*, 5 C. 101 and *Narayan* v. *Ganoji*, 15 B. 692; *Muthu Vejia* v. *Venkatachellam*, 20 M. 35, 22 C. 100 and *Gokul Das* v. *Debi Prasad*, 28 A. 638, 3 A. L. J. 518.

Sub-mortgagee.—A sub-mortgagee may sue for foreclosure or sale to the same extent as the mortgagee himself; *Muthu Vijiya* v. *Venkatachallam*, 20 M. 35.

Six Months' Time to Run from the Date of First Court's Decree—Where, in a suit on a mortgage, the decree of the Appellate Court simply dismisses the appeal, leaving the decree of the first Court untouched, the time for redemption would run from the date of the decree of the first Court.—*Bhola Nath* v. *Kanti Chundra*, 25 C. 311 (11 B. 172 distinguished) Approved in *Faizuddi Sardar* v. *Asimuddi Biswas*, 11 C. W. N. 679 *Basanta Kumar* v. *Sri Radharani*, 26 C. W. N. 410; 36 C. L. J. 159

When a decree gives a right of redemption within a certain specified period with a certain specified result to follow, if redemption is not made within such period, the mere fact of an appeal being preferred against it will not suspend the operation of such a decree, and, unless the Appellate Court extends the period limited by the original decree, the right of redemption will be barred if not exercised within the period so limited. *Chiranji Lal* v. *Dharam Singh*, 18 A. 455 (18 A. 223 applied)

Final decree in foreclosure-suit.

3. (1) Where, on or before the day fixed, the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in r. 10, the Court shall pass a decree—

(*a*) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required,

(*b*) ordering him to retransfer the mortgaged property as directed in the said decree,

and also, if necessary,

(c) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property :

Power to enlarge time.

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for such payment.

Discharge of debt.

(3) On the passing of a decree under sub-rule (2), the debt secured by the mortgage shall be deemed to be discharged. [S. 87.]

COMMENTARY.

This rule corresponds to s. 87 of the T. P. Act, IV of 1882, with several additions and alterations. The old section is reproduced below for comparison: "*If payment is made of such amount and of such subsequent costs as are mentioned in s 94, the defendant shall (if necessary) be put into possession of the mortgaged property. If such payment is not so made, the plaintiff may apply to the Court for an order that the defendant and all persons claiming through or under him be debarred absolutely of all right to redeem the mortgaged property, and the Court shall then pass such order, and may, if necessary, deliver possession of the property to the plaintiff Provided that the Court may, upon good cause shewn, and upon such terms, if any, as it thinks fit from time to time postpone the day appointed for such payment. 'On the passing of an order under the second paragraph of this section, the debt secured by the mortgage shall be deemed to be discharged. In the Code of Civil Procedure, Schedule IV, No. 129, for the words 'Final decree,' the words 'Decree absolute' shall be substituted.*"

Sub-rule (1) corresponds to para. 1 of the old section, with several additions and alterations Clauses (*a*) and (*b*) are new.

Sub-rule (2) corresponds to para 2 of the old section with several modifications. The most important change seems to be the omission of the word "*absolutely*" which stood after the word "debarred" in the old section. The omission seems to have been made in view of sub-rule (3) of r. 79, Or. XXI, as that rule is applicable to all sales under this Code. The proviso is almost similar to the proviso to the old section; the only change made in it is the substitution of the word "*fixed*" for the word "appointed," which occurred in the old section.

Sub-rule (3) corresponds to para. 4 of the old section with some verbal changes only.

The last para. of the old section has been omitted as unnecess

Cl. 1 (a). Delivery of Title Deeds.—Where the preliminary the final decree in a mortgage suit directed defendants to deliver plaintiffs all documents in their possession or power relating to the property but did not provide for an alternative relief, viz., payme damages, in the event of non-delivery. *Held*, that the Court could grant such alternative relief by way of execution; *Marath Sivaram Sesha Pattar*, 42 M. L. J. 356: 16 L. W. 589

Partial Foreclosure.—Where several parties have an interest mortgage, it is not competent for one of them to foreclose in resp his fractional share.—*Bhora Ray* v. *Alilach Roy*, 10 W. R. 476.

Where the whole of mortgage debt was due to the persons cl under the mortgage jointly and not severally, and a person entitle one moiety of the debt foreclosed the mortgage as to that moiety, sued the different mortgagors for possession of a moiety of their inte in the mortgaged property in virtue of the mortgage and foreclos *Held*, that the foreclosure was invalid and the suit was not mainta —*Bishan Dial* v. *Manee Ram*, 1 A. 297. *See* also, *Ohadika Singh* *Phokar Singh*, 2 A. 906. But see, *Bisheshar Singh* v. *Laik Singh*, 257.

Redemption of Mortgage Before Order Absolute.—In a forecl action the mortgagor can redeem at any time until the order absolu made under this rule—*Paresh Nath* v. *Ram Jadu*, 16 C. 246; *Sumer Ram Krishna*, 27 C. 705 4 C. W. N. 690; *Narayana* v. *Papayya*, 2 133; *Nihali* v. *Mittar Sen*, 20 A. 446; *Ali Mea* v. *Roshun Ali*, 3 C 533. *Ysaf Ali* v. *Kasim Ali*, 26 C. W. N. 532 In *Salig Ram* v. *dan*, 25 A. 231 (following 20 A. 446 and 27 C. 705), it has been held that the mortgagor is not deprived of his right to redeem by that under an order of the Court, not being an order under s. 87 of T. P. Act, the mortgagee has been put into possession of the mortg property.

If an Order Absolute for Foreclosure or Sale can be Made With Notice to the Mortgagor.—An order absolute for the foreclosure this rule cannot be made without previous notice to the mortg *Venkata Narayana*, v. *Papayya*, 22 M. 133: 8 M. L. J. 205; *Tara Pr* v. *Bhobodeb*, 22 C. 931. But see *Krishna* v. *Muthusami*, 23 M *Pandu Prabhu* v. *Jule Lobo*, 27 M. 40; *Tarapada* v. *Kamini*, 29 C and *Malikar Junadu* v. *Linga Murti*, 25 M. 244 and 300; *Mahs Soba Nath*, 24 A. L. J. 914: 97 I. C. 277: A. I. R. 1926 All. 757, a contrary view was taken In the Full Bench case of *Bibee Tasliman Harihar Mahato*, 32 C. 253, F. B.: 9 C. W. N. 81, it has been where an order absolute has been made under s. 87 or s. 89 of the T Act, without notice to the mortgagor, the Court has an inherent to deal with an application to set aside the order made ex parte, and set it aside upon proper case being substantiated (29 C. 611 d *from*) Followed in *Suderi Debi* v. *Soraram*, 10 C. W. N. *Hira Lal* v. *Premmoyee Debi*, 2 C. L. J. 306, p. 309 In v. *W. A. Thomas*, 4 C. L. J. 317, it has been held that no notice mortgagor is necessary before an order absolute for sale and that the Bench case of *Bibee Tasliman* v. *Harihar Mahato*, 32 C. 253,

lay down any such rule. See, *Bechu Singh* v *Bicharam Sahu*, 10 C. L. J. 91, *noted under rule* 5.

Power to Enlarge Time.—In granting time, the Court should take into consideration the magnitude of the sum involved, the arrears of interest and the value of the security, and whether the mortgagor has prospects of raising the required money —*See Fisher on Mortgages*

In the case of a decree for redemption or for foreclosure, both of which decrees stand in this respect upon the same footing, no extension of time limited by the decree for payment of the decretal amount can be made except for good cause shown.—*Ram Lal* v. *Tulsa Kuar*, 19 A. 180 (16 C. 246 *dissented from;* 16 M. 214 *distinguished*) *See* also, *Rajaram* v. *Chunni Lal*, 19 A 205; *Harjas Rai* v. *Rameshar*, 20 A 354; *Akkach Mondal* v. *Aminuddi Mullik*, 23 C. W N. 439: 50 I. C 937. But see, *Kedar Nath* v. *Kali Charan*, 25 C. 705.

An application to extend the time fixed by a preliminary decree for foreclosure made after the expiry of that time is entertainable. The question of the sufficiency of cause for granting an extension is a question of fact to be decided according to the circumstances of each particular case. —*Kanhai Singh* v. *Karu*, 54 I. C. 864.

Until an order for foreclosure absolute has been made under s. 87 of the T. P. Act, IV of 1882 (this rule), the mortgagor may be allowed, on a proper application, to redeem the mortgaged property.—*Narayana* v. *Papayya*, 22 M. 133, *Malkarjunadu* v *Lingamurti*, 25 M 244, 289, *Vedapurath* v. *Vallabha*, 25 M 300, *Nandram* v *Babaji*, 22 B. 771; *Ishwar* v. *Gopal*, 28 B. 102; *Shaik Somesh* v. *Ram Krishna*, 4 C. W. N. 699 (16 C 246, 22 M. 133 *referred to*).

The proviso to Or. XXXIV, r. 3 (2) gives the Court a discretionary power to extend the time for the payment of the decretal amount, but a mortgagor has no absolute right to pay the money after the expiry of the specified period even though no final decree has up to the time of such payment been made.—*Ratnakar* v *Chamra*, 4 Pat L. J. 347, 51 I. C. 881; *Muragesa* v *Ramasami*, 39 M 882 31 I C 200

This rule does not allow the Court to postpone the date of payment on the application of an outsider The provision regarding the power of the Court to postpone the date of payment relates to matters as between the mortgagor and mortgagee.—*Akshaya Kumar* v. *Surja Kumar*, 6 C W. N. 654

The mere fact that an appeal has been lodged is not sufficient ground for enlarging the time.—*Ishwargar* v *Chunda Sama*, 13 B. 109; *Aminabi* v. *Sidu*, 17 B. 547 *See* also, *Ram Golam* v. *Barsati Singh*, 10 C W. N. 910, where it has been further held that a Court has no power, of its own motion, to extend the time provided in s 89 of the T. P. Act, for making an order absolute If the mortgagor deposits the redemption money into Court before the passing of the final decree, though after the date fixed for payment and the deposit is accepted by the Court it becomes an effectual deposit.—*Bepin Behary* v. *Mokunda Lal*, 36 C 122

Appeal.—An order under r 3 or 8 of Or XXXIV refusing to extend the time for the payment of mortgage money is appealable. *See* Or. XLIII, r. 1, cl. (o).

See the cases under r. 8

Effect of Foreclosure Decree and Discharge of the Debt.—Foreclosure proceedings to which a purchaser from the mortgagor is not made a party, cannot affect the purchaser.—*Braja Nath* v. *Khilat Chundra*, 8 B L R 104 P. C · 16 W. R. 33 (on appeal from 6 W. R. 269)

Until foreclosure, the vendee, under a bond of conditional sale, holds the lands, the subject of the bond, only as a security for the money lent. The effect of foreclosure is to put an end to the original conditional sale and to make the property *ab initio* the immoveable property of the person who advanced the money —*Sham Narain* v. *Roghoobur Dyal*, 3 C 508 1 C. L. R 343.

The mortgage security does not lose its character until an order absolute for foreclosure is passed. It remains a debt secured upon the property It is only when the order absolute for foreclosure is passed that the debt is discharged and, in lieu of it, the mortgagee acquires the absolute ownership of the property.—*Sham Sundar* v. *Mohammad Ihtisam Ali*, 27 A. 632 F. B.: 2 A L. J. 180.

In the case of a mortgage by way of conditional sale until the order in terms of sub-rule (2) is made by the Court on an application by the mortgagee debarring the mortgagor absolutely from redeeming the property, the mortgagor is entitled to redeem, even though an order absolute in terms of s 89 of the T P Act, 1882, has been made.—*Ali Mea* v *Roshan Ali*, 3 C. L J. 533.

Where land was sold with an agreement to re-purchase, it was held to be a mortgage by the conditional sale. In such a mortgage it is not necessary that the mortgagor should make himself personally liable for the repayment of the loan. The mortgaged property is the only security which the mortgagee must look to for the satisfaction of his debt There is no covenant on the part of the mortgagor by conditional sale, to indemnify his creditor for the inadequacy of his security.—*Balkishen Das* v. *W. F. Legge*, 22 A. 149, P. C : 4 C. W. N. 153, P C. (19 A 43 *confirmed*).

Form of Decree in Foreclosure Suit—Provision for Costs.—For Form of Decree, *see* Appendix D, Form No. 10.

Form of decree in a suit for foreclosure or sale, where the mortgage is in the English form, and all parties concerned are English —*Manly* v *Patterson*, 7 C 394

A mortgagee who has obtained an order absolute for foreclosure may proceed against the mortgagor personally for the costs of the suit — *Shaffar Khan* v. *Satyanunda Das*, 13 C. W. N. 742 (14 C 185, 10 A 179, *followed*, 20 A 523, 35 C. 431, 12 C. W. N 364 *distinguished*)

Preliminary decree in a suit for sale.

4. (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in clause (*a*), (*b*) and (*c*) of rule 2 and also directing that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient

part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid, together with subsequent interest and subsequent costs, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same.

Power to decree sale in foreclosure suit.

(2) In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff or of any person interested either in the mortgage-money or in the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit including the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance of the terms. [S. 88.]

COMMENTARY.

This rule corresponds to s. 88 of the T P Act, 1882, with some modifications.

In sub-rule (1), the words, *what is declared due to the plaintiff as aforesaid* have been substituted for the words "what is found due to the plaintiff" which occurred in the old section; and the words, *together with subsequent interest and subsequent costs*, have been added before the words 'and that the balance (if any).'

In sub-rule (2) the words "if it thinks fit" which occurred after the word "including" in the old section have been omitted. The other changes are merely verbal The old section is reproduced here for comparison:—

"*In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of section 86, and also ordering that, in default of the defendant paying as therein mentioned, the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court, and applied in payment of what is so found due to the plaintiff, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same*

"*In a suit for foreclosure, if the plaintiff succeeds, and the mortgage is not a mortgage by conditional sale, the Court may at the instance of the plaintiff, or of any person interested either in the mortgage-money or in the right of redemption, if it thinks fit, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including, if it thinks fit the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of sale, and to secure the performance of the terms*"

Who may Obtain Decree for Sale?—Only the simple mortgagee, the English mortgagee, the equitable mortgagee, and the holder of a charge

as defined in s. 100 of the T P. Act, IV of 1882, can sue for sale. Under clause (a) of s 67 of the T P. Act, usufructuary mortgagee as such has no right to institute a suit for foreclosure or sale. There is, however, difference of opinion as to the right of a usufructuary mortgagee, to claim an order for sale. In *Venkatasami* v. *Subramanya*, 11 M 88; in *Ramaya* v. *Guruva*, 14 M. 232 and in *Sivakami Ammal* v. *Gopala*, 17 M 131 it has been held that a decree for sale may be obtained by usufructuary mortgagee. But these cases have been dissented from in *Luchmeshwar Singh* v *Dookh Mochan Jha*, 24 C. 677 (11 A. 367 *referred to*), and in *Kashi Ram* v. *Sardar Singh*, 28 A. 157, where it has been held (distinguishing 21 A 4) that a usufructuary mortgage with personal covenant to pay the mortgage debt on demand unaccompanied by any hypothecation of property cannot give the mortgagee a right to sell in the event of non-payment of the mortgage debt. In *Kangaya Gurukul* v. *Kalimuthu*, 27 M 526, F. B., it has been held that where there is a combination of simple and usufructuary mortgage and a covenant to pay personally or to realize the mortgage-money by sale, the mortgagee has a right to a decree for the mortgage-money and for sale.

Simple mortgage, mortgage by conditional sale, usufructuary mortgage, and English mortgage are all defined in clauses (a), (b), (c) and (d) of s 58 of the T. P. Act, IV of 1882.

English Mortgage.—In English mortgage there is a conveyance by the debtor of his property to the creditor and a covenant to pay the debt within a certain time, and a proviso, that on this condition being fulfilled the property shall be reconveyed by the mortgagee to the mortgagor. The three essentials of an English mortgage, as defined in s 58 (e) of the T. P. Act, are: (1) that the mortgagor should bind himself to repay the mortgage-money on a certain day, (2) that the property mortgaged should be transferred absolutely to the mortgagee, (3) that such absolute transfer should be made subject to a proviso that the mortgagee will re-convey the property to the mortgagor, upon payment by him of the mortgage-money on the day on which the mortgagor bound himself to repay the same. See, *Narayana Ayyar* v. *Venkata Ramana*, 25 M. 220, F B. English mortgage is somewhat similar to mortgage by conditional sale. The main distinction between these two classes of mortgages is, that in English mortgage, the possession usually remains with the mortgagor and it is not essential to the mortgagee's title that he should take possession English mortgages made between Hindus in the mofussil have been treated as mortgages by conditional sale.—*Shurnomoyee* v. *Srinath Das*, 12 C 614.

Equitable Mortgage.—Equitable mortgage has not been defined in s 58 of the T. P Act, but its validity has been recognized in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon in the last para. of s. 59 of the T P Act. An equitable mortgage is created by deposit of the title deeds of property, in order to secure the advance of money required to prevent the sale of such property. In order to give the creditor an equitable mortgage it must appear that money had already been advanced when the deposit took place, and then it is not material that they were deposited for the purpose of having a mortgage executed, nor is it necessary that all the title deeds should be deposited.

Where a loan is taken in Calcutta by deposit of title deeds of property, in order to secure the advance of money required to prevent the sale of such property. *Held*, there is an equitable mortgage in favour of the creditor.—Priority of a subsequent simple mortgage over a prior equitable mortgage.—*Giridhari Lal* v. *Poresh Nath*, 4 C. L. J. 495. 11 C. W. N. 1

The defendant borrowed money from the plaintiff by deposit of title deeds relating to immoveable properties situate inside and partly outside the town of Calcutta, as collateral security *Held*, that the mortgage was valid as an equitable mortgage, and the appropriate remedy for such a mortgage is a decree for sale —*Raja Sreenath* v. *Gadadhar Das*, 24 C. 348; 1 C W. N. 225 (14 B. 238 and 269, *referred to*). *See* also, *Madho Das* v. *Ram Kishan*, 14 A. 238, and *Himalaya Bank* v. *Quarry*, 17 A. 252.

In India, there is no such distinction between legal and equitable estates as is known in English law. The deposit of mortgage deeds by a mortgagee with the agent of his creditors at Calcutta as security for the debts due to the creditors created a good equitable sub-mortgage and the mortgage is concluded on the day the deposit is made and is a valid mortgage. A deposit of title deeds of certain property under a verbal arrangement to secure payment of a debt, is not an oral agreement or declaration within the meaning of s. 48 of the Registration Act. A letter containing an admission of a previous mortgage as having been already made does not require registration —*Gokul Das* v *The E M. Co., Ltd*, 33 C. 410. 10 C. W. N 276; 4 C. L J. 102 (31 C. 57, 8 C. W. N. 41, 11 C. 158, *referred to as to registration*, 20 W. R 150 *followed*).

Execution of mortgage deed for Rs. 21,000.—Subsequent advance of Rs. 8,000 on a promissory note and it was agreed that the said sum should constitute a further charge on the properties included in the mortgage, the title deeds of which were in the possession of the mortgagee. *Held*, that a mortgage with deposit of title deeds will cover future advances if such is the agreement when the first advance is made —*Grinder Coomar* v. *Kumud Kumari*, 25 C. 611· 2 C. W. N. 356

Anomalous Mortgage.—Besides the mortgages described in s. 58 of the T. P. Act, there is another class of mortgage called "anomalous mortgage" which has been defined in s 98 of the T P Act (IV of 1882) As to the nature and effect of such mortgages and the rights and liabilities of parties under them, see, *Hikmatulla* v. *Imam Ali*, 12 A. 203; *Visvalinga* v. *Palaniappa*, 21 M. 1, *Amar Chand* v *Kila Morar*, 27 B. 600; *Neela Kandan* v *Anantha Krishna*, 30 M 61 16 M L. J. 462; *Gopalan Nair* v. *Kunpan Menon*, 30 M. 300· 17 M L J 189, *Tukaram Bin* v. *Ram Chand*, 26 B. 252.

When a plaintiff, in the case of an anomalous mortgage providing both for foreclosure or for sale at his option, sues for foreclosure only, the mortgagor cannot compel him to accept a decree for sale There is nothing in Or. XXXIV, r. 1, cl. 2, which can override the provisions of s. 98 of the T P. Act.—*Nawab Saiyad Baquar Hussain* v *Babu Balak*, 18 I. C. 24.

Decree for Sale in a Foreclosure Suit.—The second paragraph of this rule has been borrowed from the English Conveyancing Act, 1881 (44

and 45, Vict. cl. 41, s. 25) and can apply to English mortgages. Where there are several conflicting claimants to the mortgaged property the proper course is to direct a sale of the mortgaged property and to distribute the sale proceeds amongst the several incumbrancers according to their respective rights and priorities; the surplus, if any, being paid over to the ultimate owner of the equity of redemption.

In a suit upon an English or an equitable mortgage the Court may in its discretion order sale instead of foreclosure. The Court will direct a sale in cases where there is such a complication that the ordinary decree cannot conveniently be worked out; but not where it would likely cause injury or be oppressive to the mortgagor or to other person interested.

The instances in which the Court in the exercise of its discretionary power should pass a decree for sale instead of foreclosure, are clearly stated in *Daniell's Chancery Practice*, pp. 1409-1411.

Preliminary Decree in a Suit for Sale—Court's Power to Adjust Equities.—A *bona fide* purchaser for value of portion of the mortgaged property without notice of such mortgage, has no right, in a suit by the mortgagee to enforce his mortgage, to insist that the portion not sold to him must be proceeded against first, and the portion purchased by him must be sold only for the balance, if any due. But it is competent to the Court under s 88, T P Act, 1882 (r. 4), to order a sufficient part of the mortgaged property to be sold; and if the portion not sold by the mortgagor is sufficient, and if the mortgagee will not be prejudiced, the Court may by its decree direct such unsold portion to be sold first, and if the decree directs the sale of the whole property, the Court, in execution, may first bring to sale the portion unsold and if the sale proceeds be sufficient, stop the sale of the portion sold by the mortgagor.—*Appa* ... v. *Rangayya*, 31 M. 419: 18 M. L. J. 229 (29 M. 217 *explained*; 17 ... 435 *referred to*).

It is competent to the Court in executing a mortgage decree to exercise its control in bringing different items of the property comprised in the decree to sale in a particular order to adjust the equities of the parties before it who are interested.—*Krishna Ayyar* v. *Muttu Kumaraswamy*, ... 29 M. 117. *See* also, *Jatadhari Singh* v. *Baldeolal*, 3 Pat L J 2... 51 I. C 441

A decree on a simple mortgage directing the sale of mortgaged property on default of payment within a fixed period is substantially a decree *nisi* or a conditional decree and cannot be executed unless it is made absolute under rule 5.—*Ram Lal* v. *Narain*, 12 A. 539; *Sira Persad* v. ... *Nundo Lal*, 18 C 139; *Paresh Nath* v. *Ram Jadu*, 16 C. 246, ... 23 A 331 ... *Prosad* v *Bhobodeb*, 22 C 931; *Chunni Lal* v. *Abdul Ali*, ...

Though Or XXXIV, r. 4, contemplates the sale of the properties mortgaged, the decree must be suitably modified when the mortgaged properties have already been converted into money.—*Narendra* v. *Jogendra* ... 19 C. W. N 537 20 C. L. J. 469: 27 I. C. 139.

Until a final decree is passed, all proceedings following a preliminary decree in a mortgage suit are proceedings in a pending suit and an application made therein is not an application for execution.—*Bhuteshwar* v. *Tarachand*, 33 C L. J. 115: 25 C. W. N. 505

Order in which Properties should be Sold.—Power of Court to Direct.—rdinarily, the right of selling a property in a particular order rests with e decree-holder and in the absence of any contract between the parties, e decree-holder may proceed to sell the properties in whatever order he inks best so as to facilitate his realization of his mortgage-debt. But e Court can in the circumstances of a case and in view of the equities rising in various parties, direct the order in which the properties should sold; *Raj Keshwar Prasad* v *Mahomed Khalil-ul-Rahman*, 5 Pat. L 223

Award.—An arbitrator is not bound by this rule. A decree in terms f an award may order the sale of the property mortgaged, although no reliminary decree under this rule or final decree under rule 5 has been assed.—*Nripendra* v. *Jhumak*, 3 Pat. 221: 80 I C. 588. A. I R. 1924 Pat. 263

Consent-decree.—In the case of a consent-decree, an order for the of the mortgaged property may be made, although no preliminary ree under this rule or final decree under rule 5 has been passed—*mendra* v. *Fakir Chand*, 50 C. 650. 74 I C. 929: A. I. R. 1923 Cal. ; *Ishan* v. *Nilratan*, 2 Pat. 538: 72 I C 1049: A. I R 1923 Pat. ; *Sital Singh* v *Baij Nath*, 44 A. 368: 75 I. C 485: A. I R. 1922 . 383.

inal decree in suit sale.

5. (1) Where on or before the day fixed, the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

(*a*) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

d, if so required,

(*b*) ordering him to re-transfer the mortgaged property as directed in the said decree,

d also, if necessary,

(*c*) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall, on plication made in that behalf by the plaintiff pass a decree that e mortgaged property, or a sufficient part thereof, be sold, and at the proceeds of the sale be dealt with as is mentioned in rule 4. [S. 89.]

COMMENTARY.

This rule corresponds to s. 89 of the T. P. Act IV of 1882, with several lditions and alterations. The old section has been recast and re-arrang-

ed, and the changes introduced by the present rule will appear more [illegible] on comparison of this rule with the old section. The words "*for an order absolute*," which occurred in the old section, and the last sentence of the old section which ran as follows, "*and thereupon the defendant's right to redeem and the security shall both be extinguished*," have been omitted Section 89, T. P. Act, 1882, ran as follows: "*If in any case under section 88, the defendant pays to the plaintiff or into Court on the day fixed as aforesaid the amount due under the mortgage, the costs (if any) awarded to him, and such subsequent costs as are mentioned in s. 94, the defendant shall (if necessary) be put in possession of the mortgaged property; but, if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in s. 88, and thereupon the defendant's right to redeem and the security shall both be extinguished.*"

The above omissions seem to have been made for the reason that the provisions of the C. P. Code of 1908, relating to execution and [illegible] shall now apply equally to mortgage decrees. The word "*absolute*" has been omitted because even after the final decree for sale, the defendant will be able to prevent the sale by paying the decretal amount under Or. XXI, r. 69 (3) to the officer conducting the sale (*see* 31 C 863 F B.; 31 M. 354 and 19 A. 205).

The concluding sentence of the old s 89 of the T. P. Act, 1882, has been omitted for the reason that even after the passing of the final decree under this rule, the judgment-debtor by making a deposit under s. 310 [illegible] of the C P. Code, 1882 (Or. XXI, r. 89), will be able to set aside the sale and get back the mortgage security, as by the wording of the present r. 5, the passing of the final decree will not deprive the judgment-debtor of the remedies provided by the rules above referred to. In this connection, *see* 19 A. 205, 20 A. 354, 25 B. 104, 28 A. 778, 31 M. 354, and 31 C. 863, F B The concluding words of s. 89 of the T. P. Act, (IV of 1882) were subject to much discussion in all the Indian High Courts, and they have agreed in holding that those words relate to the actual sale and distribution of the proceeds and not merely to the passing of the order absolute for sale. In other words, by the passing of a final decree for sale, neither the mortgagee's right to redeem nor the mortgage-security will be extinguished The Allahabad High Court, in *Shiam Lal v. Fakir-uddin*, 28 A 788, observed as follows: "It is not easy to say what was in the contemplation of the framers of the T. P. Act, in introducing the concluding word of s. 89 of the T. P. Act." In *Krishnaji v. Mahadev*, 25 B 104, it has been held that provisions of s. 310-A. of the C P. Code, 1882, are applicable to sales held in execution of mortgage decree passed under the T. P. Act; in *Rajaram v Chunni Lal* 19 A 205, it has been held that ss. 291 and 310-A of the C. P. Code, 1882, will apply to a sale held by virtue of an order absolute for sale passed under s 89 of the T. P. Act. This case has been followed in *Harjas Rai v. Rameshar*, 20 A 354. A similar view has also been taken in *Adipuranam v. Gopalan*, 31 M. 354 In *Bibijan Bibi v. Sachi Bewaha*, 31 C. 863, F. B., it has been held that the concluding words of s 89, T. P. Act, relate to the actual sale and distribution of the proceeds and not merely to the passing

f the order absolute for sale. In view of the rulings mentioned above, ie Legislature has probably considered it useless to retain the words *absolute* " and the concluding sentence of s. 89 of the T. P. Act, and ence they have been omitted from the present rule. The effect of the mission is that the mortgage is kept alive for all purposes as regards ersons having an interest but not made parties to the mortgage suit.—*'enkat Reddy* v. *Kunjappa*, 46 M L. J. 391.

" The Transfer of Property Act does not contain any provision for he passing of a final decree in cases where payment is made in accordance rith the terms of the preliminary decree This is in our opinion an omission, and we have provided in r 3 (1), 5 (1) and 8 (1) for the passing of a nal decree in such cases."—*See the Report of the Select Committee.*

Scope and Object of Rule.—This rule prescribes the procedure to be dopted in the case of a decree for sale. If on or before the day fixed he defendant pays into Court the amount declared to be due under r , together with such subsequent costs as are mentioned in r. 10, the Court hall pass a decree in accordance with the directions contained in clauses a), (*b*) and (*c*) of this rule No attachment is necessary for the sale of he mortgaged premises, as the direction for sale in the decree is in itself ufficient authority for the sale.—*See the cases noted under Or. XXI*, . 54.

The sale will now be regulated under the Code of Civil Procedure nd it may be stopped on the amount of debt and costs being tendered o the officer conducting the sale. *See* Or XXI, r, 69 (3), which is now pplicable to all sales including the sales of mortgaged property This ule does not lay down, as rule 3 does, that on the passing of the final lecree the mortgage debt shall be deemed to be discharged Therefore, if he proceeds of the sale be found insufficient, then the mortgagee may roceed against the mortgagor personally or against his other properties y adopting the procedure laid down in r. 6

Difference between Order XXXIV, Rule 5, and Section 89, T. P. Act —There is a substantial difference between the provisions of s 89 of the r. P. Act and Or. XXXIV, r 5, C. P. Code, and the former provision overns sales held before the new C P. Code As soon as an order absolute was made, the mortgage security was extinguished and the relative ights of the mortgagor and the mortgagee were regulated by the decree But it does not follow that thereafter the mortgagee is debarred from roving that the description of the property mentioned in the schedule o the decree was itself erroneous —*Nand Lal* v *Jogendra*, 28 C W. N 103.

Final Decree When can be Passed.—A final decree in a mortgage suit can be passed only when the preliminary decree has become conclusive etween the parties If there is an appeal pending from the latter, the final decree should be passed only after the disposal of the appeal ; *Lalman* v. *Shiam Singh*, 92 I C 603 A I R 1926 All 291

Final Decree and Right of Mortgagor to Redeem.—The mere passing of a final decree in a mortgage suit does not extinguish the mortgagor's right to redeem until a sale has actually taken place in pursuance of the decree.—*Syed Shah Mahdi Hasan* v *Ismail Hasan*, 18 A L J. 622. 55 I. C. 172.

Under Or. XXXIV, r. 5, a mortgagor has no right to redeem the mortgage after a decree absolute for sale.—*Dharam Singh* v *Gang Ram*, 43 I. C. 399.

Notwithstanding the passing of a final decree in a mortgage suit it is open to the mortgagor to pay up the mortgage amount and redeem the mortgage until the sale is held and the proceeds distributed. It is settled law in equity that though a personal covenant is extinguished by a judgment a charge subsists notwithstanding the judgment which does not determine the security or put an end to the charge.—*Maulvi Mahomed Musa* v *Edal Singh*, 3 Pat. L. T 233: 65 I. C. 801

Right of Sub-mortgagee and Pulsne Mortgagee to Obtain a Decree for Sale.—Ordinarily the right to obtain a decree for sale belongs to an English and Simple mortgagee. The Madras High Court has held that a sub-mortgagee is entitled to a decree for the sale of the original mortgagor's interest in cases and in circumstances which would have entitled the original mortgagee on the date of the sub-mortgage to claim such relief.—*Muthu Vija* v. *Venkatachallam*, 20 M 35 In *Matadin* v. *Kazim Husain*, 13 A 432; in *Ganga Prasad* v *Chunni Lal*, 18 A. 113, it has been held that the term "property" as used in the T. P. Act, means an actual physical object and does not include mere right relating to physical objects and that bare equity of redemption cannot be sold A sub-mortgagee therefore has no right to obtain a decree for sale. In *Ajudhia Prasad* v *Man Singh*, 25 A. 46, a similar view seems to have been taken In *Palgaya* v. *Baji*, 20 B. 549, the right of sale is denied on the ground that there is no privity between the original mortgagee and the sub-mortgagee. But in *Jageswar Dutt* v *Bhuban Mohan*, 33 C. 425: 3 C L J. 25, it has been held that the term "property" as used in s. 85 of the T P Act, 1882, indicates not the actual physical object but denotes rather the rights in such object which form the subject-matter of the transaction (1 C. L. J. 337 *followed*, 13 A 432 *dissented from*). In *Ramsaran* v *Ganesh Parshad*, 29 A 385, F. B.: 4 A. L. J. 273, it has been held that a sub-mortgagee of mortgage rights in immoveable property is entitled to a decree for sale of the mortgage rights of his mortgagor. The words "*mortgaged property*" in the T. P. Act, mean *the interest in* specific immoveable property, which the mortgagor professes to transfer whatever that interest may be. If the mortgage be a mortgage of the absolute estate in the land, then the land itself, and *if it* be a puisne mortgage then the interest in the land of the mortgagor, that is, the equity of redemption. In this Full Bench case, all the rulings of the several High Courts have also been referred to, and discussed and several Privy cases have also been referred to It has overruled 13 A. 432 and 18 A. 113. It would thus appear that all the High Courts have now recognised the rights of sub-mortgagee and puisne mortgagee to bring the mortgaged property to sale.

The Allahabad High Court has also held that a puisne mortgagee has no right to obtain a decree for sale without offering to redeem all the prior [illegible] *Harcharan*, 12 A. 548; *Kali Charan* v. *Abdul* [illegible] v. *Ghaffar*, 21 A. 272. But in [illegible] 8 M 216, and in *Gangadhar* v. *Sivarama*, [illegible] 22 C. 33, it has been held that a puisne mortgagee is entitled to obtain a decree for sale subject to the right of the

prior incumbrancer. It has also been held in 22 C. 33 that the words "immoveable property" in s. 58 of the T. P. Act, (IV of 1882), denote not only the property itself, but include the mortgagor's equity of redemption in such property.

One of the objects which a Court of equity ought always to have in view is to minimize the number of cases which may arise out of the relation between the parties to a mortgage The equities between the parties may be adjusted in one suit by allowing the sub-mortgagee to bring the property mortgaged to sale for the amount of the original mortgage —*Bansi Lal* v. *Durga Prasad*, 9 C. L J. 429 *See* also, *Venkataramana Iyer* v. *Comperts*, 31 M. 425.

In a properly constituted suit, a sub-mortgagee is entitled to a decree for the sale of the mortgaged property The mortgagor in a suit must be impleaded as also the mortgagees so that the former may have an opportunity to redeem and the latter may be able to safeguard their interests in regard to the claim put forward by the sub-mortgagee and see that the amount claimed is due —*Ahmed Ali* v. *Bilas Rai*, 5 A. L. J. 402: A. W. N. (1908) 191.

Application for an Order for Sale—General Cases.—Where a subsequent mortgagee seeks to bring to sale the property mortgaged to him and there are parties defendants to the suit, who have purchased the property and paid off prior mortgages, the plaintiff is not entitled to an order for sale unless he pays to such defendants the amount paid by them in respect of the prior mortgages together with the full amount due on such mortgages.—*Sri Ram* v. *Kesri Mal*, 26 A 185.

A prior mortgagee obtained a decree for sale upon his mortgage in a suit to which the puisne mortgagee was a party The prior mortgagee's decree being partly satisfied by sale of portion of the mortgaged property, the balance was paid by the puisne mortgagee, who then applied for an order absolute for sale of the property comprised in the prior mortgage and also of some other property comprised in his own mortgage *Held* that he was not entitled to any order in respect of his own mortgage —*Jamna Das* v. *Misri Lal*, 26 A 504 (24 A. 179 *referred to*)

One of joint decree-holders cannot alone certify satisfaction of the whole decree; if he does so, the other decree-holder can obtain an order absolute for sale in respect of his own share of the mortgage-debt —*Tamman Singh* v. *Lachmin Kunwari*, 26 A 318.

Applications for order absolute for sale under s 89, T. P Act are applications for execution of the decree under s 88, T. P. Act. To such applications section 258, C P Code, 1882 (Or. XXI, r 2), is applicable, and bars recognition of payments made out of Court unless such payments are certified in the manner prescribed by the section —*Halim Singh* v. *Ram Singh*, 30 A. 218. 5 A L J 272 (28 M 473, F B, *followed*; 8 C W. N. 102 *dissented from*) *See* also, *Harish Chundra* v *Jagabandhu*, 12 C. W. N. 282: 7 C L J 581 But see, *Pramatha Chundra* v *Khettra Mohan*, 29 C 651.

So long as an order under s 89, T P Act, 1882, making a decree absolute for sale under s. 88 of the Act subsists, it is enforceable and its

validity cannot be questioned by the judgment-debtor in execution proceedings. If the order under s. 89 is defective, the remedy of the judgment-debtor is to get it set aside in accordance with law.—*Ramjas* v. *Sheo Prasad*, 28 A 193 (3 A. 424, 13 A. 278, 21 C. 19 *distinguished*)

Form of Decree in a Suit for Sale.—In a suit by a mortgagee against the mortgagor and the purchasers of the mortgaged property, *held*, that the proper decree in the suit should be a money decree against the mortgagor only, with a declaration that the mortgaged property is liable to be sold free of subsequent incumbrances —*Bhairub Chandra* v. *Nadyar Chand* 3 B. L R 557; 12 W. R. 291.

In a suit for recovery of mortgage money by sale where it appeared that the decree was in substance a decree for sale of the mortgaged properties though not in the prescribed form, *held*, that the decree was to be regarded as a mortgage decree under the T. P. Act, IV of 1882—*Lal Behari* v. *Habibar Rahaman*, 26 C. 166 (24 C. 473, 25 C. 580 *referred to*).

A suit on a mortgage was adjusted and a decree made treating a *salenamah* filed by the parties as a part of the decree. It was agreed that the amount due should be paid in instalments and that the mortgaged property should be sold in default of payment. *Held*, that though the form of the decree is not strictly in accordance with the provisions of this section, still the decree is a valid one and the mortgaged property should be sold to satisfy the decretal amount Whether an order under s. 89 of the T P. Act, is necessary or not the Court has general jurisdiction to direct a sale of the property. Section 89 of the T. P. Act, contemplates a certain state of things, but where such a state of things does not exist that section does not exclude other ways of enforcing a decree, if such decree is otherwise valid in law —*Abir Paramanik* v. *Jahar Mahammad*, 34 C 856: 11 C. W. N. 879: 6 C. L J 95 A similar view has also been taken in *[illegible] Singh* v *Becharam*, 10 C L. J. 91 where it has been further held that the provisions of s. 89, T P. Act, are not applicable to consent decrees

A mortgage decree under s 88 of the T. P Act (r. 4), cannot impose personal liability for costs. It may contain a declaration of the personal liability of the defendant for principal or costs, but such a declaration is not part of the usual form of decree under the T. P. Act, and is enforceable only under r. 6.—*Kamalamma* v. *Komandur*, 30 M. 404. 17 M. L J [illegible]

In a suit by the mortgagee, against a Mitakshara father and son, to enforce a mortgage-bond executed by the father, within six years from the due date fixed by the mortgage, it was not proved that there was any legal necessity for the loan, or that the loan was contracted for illegal or immoral purposes *Held*, that the mortgagee was entitled to have the mortgage enforced as against the share of the mortgagor and also against the share of the son in the ancestral property.—*Kishun Pershad* v. *Tipan Singh*, 34 C 735; 11 C. W. N 613, 5 C L J. 569.

A combined decree under ss 88 and 90 of the T. P. Act (rr. 4 and 6) is contrary to the procedure prescribed by that Act Where such a decree is passed and the decree-holder proceeds to execute it for the realisation of the balance after the mortgaged property has been sold, the provisions of s 230, C. P. Code, 1882 (s. 48), will apply.—*Chandi Charan* v. *[illegible]*

haran, 31 C. 702 (25 A. 541 *dissented from*). *See* also, *Damodar* v. *'yaku*, 31 B. 244: 9 Bom. L. R 109, and *Sadho Singh* v *Maharaja of 'enares*, 29 A. 12, in which it has been held that where a decree in suit for sale of hypothecated property is both a decree for sale and a per-)nal decree, there is no need for the decree-holder to apply for a separate ecree under s. 90 of the T. P. Act (1. 6), and if he does so and his appliation is rejected this will not operate as a bar to his executing the decree gainst the judgment-debtor personally.

In a mortgage suit a decree may be passed for the sale of the mortaged property subject to a charge for maintenance, in favour of a particular erson, the plaintiff in such a suit does not occupy the position of a second ortgagee.—*Lalman* v. *Mohar Singh*, 29 A. 205 3 A L J. 848 (13 A' 32 *distinguished*).

Form of decree discussed, where a person who at a sale in execution of mortgage decree has purchased a portion of the mortgaged property, ings a suit for that portion against the assignee in possession as mortgor.—*Bepin Behari* v *Brojo Nath*, 8 C. 357.

UNREGISTERED MORTGAGE INVALID—MONEY DECREE.

Where a mortgage is held invalid on the ground that the requirements s 59 of the T. P. Act, regarding registration were not complied with, a oney decree can be made upon the covenant in the bond.—*Tofaluddin eada* v. *Maharali*, 26 C. 78.

In a suit on a mortgage, for an account and sale of the mortgaged operty, where a puisne mortgagee, who is made a defendant appears and oves his mortgage and asks that the decree sought to be obtained by the aintiff may also provide for an account on the footing of his mortgage, id for payment of the amount found due to him out of the sale-proceeds, ie practice of the Court is, where no issue is raised as between the defenints and no question of priority arises, on proof of the subsequent mortige, to make a decree directing an account on the footing of each of the ortgages, and fixing one period of redemption for all the defendants.—*issory Mohun* v. *Kally Churn*, 22 C. 100 (5 C 101 *referred to*) *See* so, *Kissory Mohun* v *Kally Churn*, 24 C. 190. This case has been *ex'ained* and *distinguished* in *Debendra Nath* v *Abdul Somad*, 10 C. L 150.

In a suit on a mortgage by a second mortgagee, to which the prior ortgagee, was a party, and in which the plaintiff prayed that the amount ie to him might be realized by a sale of the mortgaged property *Held*, iat the plaintiff was entitled to a decree for sale of the mortgaged property ibject to the lien of the prior incumbrancer —*Kanti Ram* v *Kudbuddin*, 2 C. 33 *Referred to* in *Madhub Mohapatra* v *Surendra Mohun*, 23 C 15. *See* also, *Durga Dharan* v *Chandra Nath*, 4 C W N 541

Suit by second mortgagees against purchaser of equity of redemption ho had paid off a prior mortgage—Suit ignoring lien of purchaser of equity redemption—Form of decree in such a suit —*Kalicharan* v *Ahmad hah*, 17 A 48 *Followed* in *Muhammed Niamat* v *Ghaffar*, 21 A 272: ut see, *Saligram* v *Harcharan*, 12 A 548 (8 A 105 *referred to*)

Rights of persons advancing money to pay off prior mortgage—Suit to sell mortgaged property under mortgage—Form of decree in such a suit—*Tulsa* v *Khubchand*, **13 A. 581.**

First and second mortgagees—Second mortgagee not made party to suit by first mortgagee for sale of mortgaged property—Form of decree in such a suit —*Muhammad Samiuddin* v. *Man Singh*, 9 A. 125

In a suit on a usufructuary mortgage a decree was passed for the payment of the mortgage money, or in default for the sale of the mortgaged property. *Held*, that the decree for sale was the right decree —*Venkatasami* v. *Subramanya*, 11 M 88.

A sub-mortgagee is entitled to a decree for the sale of the original mortgagor's interest in cases and in circumstances which would have entitled the original mortgagee on the date of the sub-mortgage to claim such relief —*Nathu Vipa Raghunatha* v. *Venkatachellam*, 20 M 35

Decree on first mortgage, a puisne mortgagee not being joined—Purchase of mortgaged property by decree-holder for inadequate price—Rights of puisne mortgagee—Form of decree.—*Rangyya* v. *Parthasarathi*, 20 M 120

A mortgagor stipulated that if the mortgaged properties be sold for arrears of revenue, or for other causes, the money advanced might be recovered by execution against the person or other property of the mortgagor. *Held*, that no sale having taken place, the mortgagee could only obtain a decree against the mortgaged properties —*Bunseedhur* v *Sujut Ali*, 16 C 540 (10 C. 740 *referred to*).

Decree for sale—Provision in the decree for interest at contract rate until six months from date of decree is correct.—*Commercial Bank of India* v. *Ateendrulayya*, 23 M. 637 (26 C. 39, P. C., and 21 A. 261 *referred to*)

Construction of Mortgage Decree.—Where the plaintiff sued on a mortgage-bond by enforcement of lien on the property hypothecated, and obtained a decree in the following terms: "Decree for plaintiff in favour of his claim with costs" without any specification in it as to the relief being sought by charging the hypothecated property. *Held*, that the decree was to be regarded as a simple money decree, and not for enforcement of such lien —*Thaman Singh* v. *Gangaram*, 2 A. 342; *Harsukh* v. *Majhraj*, 2 A. 345, *Janaki Prasad* v *Baldeo*, 3 A. 216. But see, *Debi Charan* v. *Pothi Din*, 3 A 388, F B.; and *Ram Prasad* v. *Raghunandan*, 3 A 229, and *Ramanath Das* v *Baloram*, 7 C 714; 9 C. L. R. 353.

Where the decree contained the following terms: "The property hypothecated in the bond being also held liable for the whole amount thus awarded" *Held*, that the decree was in reality a decree for sale —*Pillai* v *Thangathammal*, 20 M. 78

A decree on a mortgage-bond ordered that the amount be realized from the mortgaged property without any provision to realize the money from any other property. *Held*, that the decree-holder's right was limited to the mortgaged property alone —*Solano* v. *Moran & Co.*, 4 C. L. R. 11. See also, *Pran Kuar* v. *Durga Prosad*, 10 A. 127; *Badan* v. *Ram Charan*, 11 B. 537.

In a decree for sale of hypothecated property and against the judgment-debtor personally, the decree-holder is entitled to proceed either against the person or against the mortgaged property, whichever he may think best — *Johari Mal* v. *Sant Lal*, 9 A. 484 (4 A. 497 *explained*). *See* also, *Luchmi Dai* v. *Asman Singh*, 2 C. 213, 25 W R. 421 *Followed* in *Ram Baran* v. *Gobind*, 28 A. 295 4 A. L J. 95 But the mortgaged property must be sold first.—*Gopal Das* v *Ali Muhammad*, 10 A 632

The promise to repay the mortgage-money carries with it a personal obligation Where there is in the mortgage nothing to the contrary, the remedy of the mortgagee is not restricted to the mortgaged property only; the mortgage merely gives the mortgagee an additional security in the shape of the pledged property —*Bhugwan Das* v *Parmeswari Prasad*, 5 C. L J. 287. *See* also, *Parbati Charan* v *Gobinda Chandra*, 4 C L J. 246 (19 W R. 281, 12 C. 389 *referred to*, 10 C 740, P. C, 16 C. 540 *distinguished*); *Abbakke Heggaddthi* v *Kinhiamma*, 29 M 491 (22 A. 453, p. 461, *referred to*) and *Mushab Zaman Khan* v *Inayatulla*, 14 A. 513

In a mortgage decree, the debtor can at once pay off the mortgage debt before the expiry of 6 months to avoid payment of interest.—*Chotoo Lall* v. *Miller*, 7 C L R. 267, *Monzoorad Dowlah* v *Mehidi Begum*, 7 C. L. R 206

Where, in a suit on mortgage, the decree of the lower Court is confirmed in appeal, the time for redemption would run from the date of the decree of the first Court.—*Bholanath* v. *Kanti Chandra*, 25 C 311 · 1 C. W. N. 671 But see, *Daulat Jugjivan* v *Bhukandas*, 11 B. 172.

Where by consent decree in second appeal the time for redemption is extended from that fixed in the first Court, interest should be allowed up to the date of extension —*Rafikunnissa Bibi* v *Tarini Churn*, 20 C. 279.

On default in payment on a simple mortgage, a Court, instead of passing a decree for sale, passed a decree for possession by the mortgagee after a period of grace *Held*, that the decree for possession did not amount to a decree for foreclosure, or preclude redemption —*Papamma Rao* v. *Vira Pratap*, 19 M 249, P. C

Where a decree directs the payment of money into Court within a limited time, it is a sufficient compliance with such decree, if the judgment-debtor brings the money into Court within the time and takes the necessary steps required by the departmental rules for its actual payment into the treasury —*Gujadhur* v *Naik Pauree*, 8 C. 528.

Under the terms of a compromise decree in a mortgage suit the judgment-debtor was directed to pay the debt due to the decree-holder by certain instalments specified therein, and it was also further provided that in default of the judgment-debtor paying the money as therein mentioned, the property mortgaged by him to the decree-holder should be sold. *Held*, on a *construction of the decree, that it was not a preliminary one within* the meaning of Or XXXIV, r 4, C P. Code, but a final decree directing the sale of the property of the judgment-debtor on default of payment. *Kora Lal* v *Punjab National Bank Ltd.*, 5 Lah L. J. 67.

Where a mortgage decree omits to reserve rights of such persons whose *rights are admitted*, it ought to be construed with *reference* to the

admission contained in the pleadings or made in the course of the case and ought not to be so construed as to grant a larger measure of relief than is prayed for so as to negative rights admitted by all parties.—*Srinivasa* v. *Yamunabhai*, 29 M. 14.

A decree for sale under s. 88, T. P. Act, 1882 (r. 4), is a final decree and all subsequent proceedings are proceedings in execution of that decree and to them the provisions of the C. P. Code are applicable.—*Adinarayana* v. *Gopalasami*, 31 M. 354: 18 M. L. J. 239.

Application for final Decree If Necessary—Nature and Effect of such an Application.—An order absolute for sale is not indispensably necessary as a condition precedent for the sale of mortgaged property in execution of a mortgage decree; it is sufficient that there is an order for sale passed on the application of the decree-holder.—*Phul Chand* v. *Nursingh Pershad*, 28 C. 73 (18 C. 139, 22 C. 931 *referred to*).

An application for an order absolute for sale of mortgaged property under the provisions of s. 89, Transfer of Property Act (IV of 1882), is not an application for execution of decree, and need not therefore be in the form prescribed by s. 235, C. P. Code, 1882 [Or. XXI, r. 11 (2)].—*Ajudhia Pershad* v. *Baldeo Singh*, 21 C. 818 (16 C. 216 *referred to*). *See* also, *Sir Jehangir Cowasji* v. *The Hope Mills Ltd.*, 33 B. 273. *See*, however, *Oudh Behari* v. *Nageshar Lal*, 13 A. 278 and *Ali Ahmad* v. *Naziram Bibi*, 24 A. 542, where it has been further held that such an application is governed by art. 181 of the Limitation Act.

Proceedings to get a final decree for sale in a mortgage suit are not proceedings by way of execution but are proceedings in the suit (13 A. L. J. 448 *foll'd*); *Sital Singh* v. *Baij Nath*, 20 A. L. J. 602: 44 A. [illegible]

An application for execution should not be treated as an application to make the decree final.—*Saker Chand Warsidas* v. *Yacoob*, 73 I. C. [illegible]: A. I. R. 1923 S. 14.

Where a decree upon a hypothecation-bond allows satisfaction of the debt from the hypothecated property and also from the judgment-debtor personally, and contains no condition that execution shall first be enforced against the property. *Held*, that the decree-holder is entitled to proceed against the property or person as he might think fit.—*Joharimal* v. *S*[illegible] *Lal*, 9 A. 484 (4 A. 497 *explained*). *See* also, *Luchmi Dai* v. *Asman Singh*, 2 C. 213: 25 W. R. 421.

A conditional decree for the sale of mortgaged property under s. 88, Transfer of Property Act (IV of 1882), cannot be executed unless and until it is made absolute by an order passed under s. 89 of the Act.—*Ram* [illegible] v. *Narain*, 12 A. 539; *followed* in *Tara Prosad* v. *Bhobodeb Das*, 22 C. 931 (18 C. 139 *distinguished*, 16 C. 216 *referred to*). *See* also, *Mata Prasad* v. *Sital Singh*, 10 A. 520 (13 A. 278 *referred to*); *Jehangir Cowasji* v. *The Hope Mills Co., Ltd.*, 33 B. 273, and *Har Dayal* v. *Chail Lal*, 7 A. 194. *See*, however, *Phul Chand* v. *Nursingh Pershad*, 28 C. 73, where it has been held that an order absolute for sale is not indispensably necessary as a condition precedent for the sale of a mortgaged property in execution of a mortgage-debt (22 C. 931, and 1 C. W. N. [illegible]

It is open to the mortgagor to waive a final decree before execution can be levied. Where, pending an appeal from the preliminary decree in a mortgage suit, the parties compromised the suit and a decree for a smaller amount payable in two years was passed with a provision that the property was to be sold in default of payment. *Held*, it was the intention of the parties that the mortgagee should realise the amount by sale of the property immediately on the expiry of the two years.—*Raja Hemendra Lal Singh Deo* v. *Fakir Chand*, 27 C. W. N. 621.

An application under s 89 of the T. P. Act, is, in effect, an application or execution of the decree passed under s. 88 of the Act (r. 4), and an order made thereon is appealable under s. 244, C. P. Code, 1882 (s. 47) —*Iallikar Junadu* v. *Linga Murti*, 25 M 244 (21 C. 818, 22 C. 931 *dissented*). *See* also, *Pramatha Chandra* v *Khetra Mohan*, 29 C. 651 (27 I. 244, *dissented from;* 22 C. 925 and 931 *relied upon*).

In a suit for sale on a mortgage in which there were prior mortgages o be redeemed, the plaintiff obtained a decree for sale on condition of his edeeming the prior mortgages within two months, but he redeemed the prior mortgages after four months. *Held*, that the defendant having aken no steps to redeem, the plaintiff was entitled to an order for sale, although made after time.—*Debi Prasad* v *Jaikaran Singh*, 24 A. 479 (20 A. 375 and 446, 19 A 180, 24 A 44, *distinguished*).

If an order absolute for sale for a portion of the mortgaged property has been obtained and the sale-proceeds of that portion prove insufficient to satisfy the decretal debt, he can obtain on application for further order absolute for sale of another portion of the mortgaged property, provided that his application is made within the period of limitation.—*Balkrishnaji* v. *Mithu Lal*, 25 A. 212. Where an appeal is made against an order for sale of portion of the mortgaged property, the decree-holder, after the dismissal of the appeal, can obtain a further order for sale of the entire property for an amount including interest accrued pending the appeal —*Satnarain* v. *Radha Krishna*, 25 A. 264.

The pendency of an appeal against a decree under s. 88, T. P. Act (r. 4), is of itself, no ground for refusing to make an order absolute for sale under s. 89, T P. Act (r. 5).—*Ram Gopal* v. *Barasati Singh*, 10 C. W. N. 910.

An application by the holder of a mortgage for an order absolute under s. 89 of the T P. Act, 1882, is an application for execution of the decree and is subject to the provisions of s. 235, C. P. Code, 1882 [Or. XXI, r. 11 (2)], and falls within art. 181 or 182 of the Limitation Act: when such an application is defective only in minor particulars, it may be treated as an application for execution in accordance with law and a step-in-aid of execution to save [illegible] *adir Bacha Sahib*, 31 M. 68 17 M. L. J. [illegible] *referred to*). But see the observations of *Mo* [illegible], at page 97, where he observed that rr. 4 and 5 of Or. XXXIV show, that what was previously described as a decree *nisi* is now to be *treated* as a *preliminary decree* in a suit for sale, and what was previously called an order absolute is now *to be called* a *final decree* in a suit for sale. The Legislature by re-enactment of the provisions of the T. P. Act with necessary alterations has recognized the construction adopted by this Court and that

admission contained in the pleadings or made in the course of the case and ought not to be so construed as to grant a larger measure of relief than is prayed for so as to negative rights admitted by all parties.—*Srinivasa v Yamunabhai*, 29 M. 14.

A decree for sale under s. 88, T. P. Act, 1882 (r. 4), is a final decree and all subsequent proceedings are proceedings in execution of that decree and to them the provisions of the C. P. Code are applicable.—*Adipurusha v Gopalasami*, 31 M. 354: 18 M. L. J. 259.

Application for final Decree If Necessary—Nature and Effect of such an Application.—An order absolute for sale is not indispensably necessary as a condition precedent for the sale of mortgaged property in execution of a mortgage decree; it is sufficient that there is an order for sale passed on the application of the decree-holder.—*Phul Chand v. Nursingh Persad*, 28 C. 73 (18 C. 139, 22 C. 931 *referred to*).

An application for an order absolute for sale of mortgaged property under the provisions of s 89, Transfer of Property Act (IV of 1882) is not an application for execution of decree, and need not therefore be in the form prescribed by s. 235, C. P. Code, 1882 [Or XXI, r. 11 (2)].—*Ajudhia Pershad v. Baldeo Singh*, 21 C. 818 (16 C. 246 *referred to*). See also, *Sir Jehangir Cowasji v. The Hope Mills Ltd.*, 33 B 273. See however, *Oudh Behari v. Nageshar Lal*, 13 A. 278 and *Ali Akmal v. Naziram Bibi*, 24 A 542, where it has been further held that such an application is governed by art. 181 of the Limitation Act

Proceedings to get a final decree for sale in a mortgage suit are not proceedings by way of execution but are proceedings in the suit (15 A. L. J. 448 *folld*); *Sital Singh v. Baij Nath*, 20 A. L. J. 602: 44 A 668.

An application for execution should not be treated as an application to make the decree final.—*Saker Chand Warsidas v. Yacoob*, 73 I. C. 311: A. I. R. 1923 S 14

Where a decree upon a hypothecation-bond allows satisfaction of the debt from the hypothecated property and also from the judgment-debtor personally, and contains no condition that execution shall first be enforced against the property *Held*, that the decree-holder is entitled to proceed against the property or person as he might think fit.—*Joharimal v. Sant Lal*, 9 A 484 (4 A. 497 *explained*). *See* also, *Luchmi Dai v. Asman Singh*, 2 C. 213 25 W R. 421.

A conditional decree for the sale of mortgaged property under s. 88, Transfer of Property Act (IV of 1882), cannot be executed unless and until it is made absolute by an order passed under s. 89 of the Act.—*Ram Lal v Narain*, 12 A 539, *followed* in *Tara Prosad v. Bhobodeb Ray*, 22 C. 931 (18 C 139 *distinguished*, 16 C. 216 *referred to*). *See* also, *Mahabir Prasad v Sital Singh*, 19 A. 520 (13 A 278 *referred to*); *Jehangir Cowasji v The Hope Mills Co., Ltd.*, 33 B. 273, and *Har Dayal v Chadmi Lal*, 7 A 194. *See*, however, *Phul Chand v. Nursingh Pershad*, 28 C. 73, where it has been held that an order absolute for sale is not indispensably necessary as a condition precedent for the sale of a mortgaged property in execution of a mortgage-debt (22 C. 931, and 1 C. W. N. 703, *referred to*)

the applicant should be assisted to attain his purpose.—*Becha Singh* v. *Bicharam Sahu*, 10 C. L J. 91.

Notice to Judgment-debtor If Necessary Before Passing of Final Decree.—Notice to the judgment-debtor is not prescribed by law before making a final decree on the application of the decree-holder but in practice it is given on the principle that it is just and proper to hear the opposite party ; *Baboji* v. *Ram Gopal*, 19 N. L. R 124 · 73 I C. 32.

Limitation for Application for Final Decree and for Execution of such Decree.—An application for decree absolute for sale being an application in the suit for a final decree is not an application for execution and is governed by Art 181 of the Limitation Act.—*Gajadhar Singh* v *Kishenjiwan Lal*, 39 A 641 · 15 A. L J. 734, *Nazamuddin* v *Bohra Bhaim Sen*, 40 A 203 16 A L J 85, *Ahmed Khan* v. *Gaura*, 40 A. 235 *See* also, *Thathara Naunabha* v *Krishnammal*, 14 M L T 194. 16 I. C. 794; *Jayanti Venkayya* v *Damisetti*, 44 M 714 41 M L J 117, in which it has also been held that an application for order absolute in respect of a mortgage-decree is an application made under Or XXXIV, r. 5, C. P. Code, and is governed, for purposes of limitation, by Art 181 of the Limitation Act Also *Mummadi Venkatiah* v *Boganatham*, 42 M. L. J. 51. (1922) M W N 11 · But see, *Somar Singh* v *Deo Nandan*, 8 P L T 379 A I R. 1927 Pat. 215, where it has been held that applications for enforcing final decrees for sale in mortgage suits are applications for execution and are governed by Art 182 and by Act. 181 of the Limitation Act.

Appeal from Order Refusing to Make Order Absolute—Court-fee.—*Ad valorem* Court-fee on the value of the appeal should be paid on the memorandum of appeal from an order refusing an application to make order absolute under s 89, T P Act, 1882 —*Charu Chandra* v *Bhagirath Pershad*, 12 C W N 1028 ; *Bajrang Lal* v *Mahabir Kuar*, 35 A. 476 F. B , 11 A L J. 801 21 I. C. 498 *See* also, *Bechu Singh* v. *Bicharam*, 10 C. L J 91 , *Mussammat Mathura Kuar* v *Lal Singh*, 57 I. C 67

Recovery of balance due on mortgage.

6. Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass decree for such amount. [S. 90.]

COMMENTARY.

This rule corresponds to section 90 of the T. P. Act, (IV of 1882) with some additions and alterations. No material change has been made in the meaning as will appear on a comparison of this rule with the old section which ran as follows: "*Where the net proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum.*"

The words "*amount due to the plaintiff*" have been substituted for the words "due for the time being on the mortgage," which occurred in the old section The reason for the substitution seems to be, that the costs incurred by the plaintiff in a suit for sale are not properly amounts due upon the mortgage (See *Ram Lal* v. *Sil Chand*, 23 A 439 and 26 A 507), and in view of the observations made in the above rulings, the words of the old section have been changed. From the above rulings it is also clear that the word "*defendant*" in this rule, means the mortgagor defendant, and not a puisne mortgagee or any other person who is made a co-defendant in the suit under r. 1.

Scope of the Rule.—The personal liability of a mortgagor arises only *after exhausting all remedies against the property* of the mortgagor but this does not mean that in a case where a portion of a mortgaged property is destroyed there can be no personal liability.—*Chand Mall* v. *Ban behari*, *50 C. 718*.

Right to Personal Decree.—A mortgagee who obtains a decree for sale but fails to execute it is not entitled to apply under Or. XXXIV, r 6, to obtain a decree over, as that rule contemplates that the property should be put to sale in execution of the decree before an application under its provisions can be made.—*Darbari Lal* v. *Moola Singh*, 18 A L J. 628. 56 I C. 139 *See* also, *Sham Lal* v *Sheobaran Singh*, 20 I C 320 (29 A 260 *referred to*). The holder of a mortgage-decree can proceed against the other property of the mortgagor, only if the mortgaged properties do not belong to the mortgagor. A mortgage-decree directing payment within a fixed date and in default ordering the sale of the hypothecated property is a personal decree and the decree-holder can proceed against the person and other property of the judgment-debtor without obtaining a decree under Or XXXIV, r. 6—*Periasami* v. *Muthia*, 38 M 677: 15 M L T 232

Where the mortgagor covenants to transfer the hypothecated properties indefeasibly to the morgagee, with the usual clause for redemption and further covenants to pay the mortgage-debt with interest to the mortgagee, his heir and assigns, the latter clause is a personal covenant to pay out of properties other than the hypothecated properties, as the latter clause would be entirely superfluous, if the parties had no intention that the mortgagor should be personally liable to pay to the mortgagee the money due to him Therefore in such cases, the mortgagee is entitled to a decree for sale but also to a personal decree against the mortgagor—*Asharan Boid* v *Gobordhan*, 26 C. W. N. 318.

"**The Court may pass a decree.**"—It is the decree that is passed under this rule that is executable against the mortgagors personally, and in the absence of such a decree, the mortgagee is not entitled to proceed against the property of the mortgagors other than those covered by the mortgage The preliminary decree under Or. XXXIV, r. 4 is not itself capable of execution and cannot therefore give a personal remedy against the mortgagors—*Bullee Bee* v. *Kaka Haji Muhammad*, 50 M L J. 30 93 I. C 99 A I R 1926 *Mad. 415*.

"**Are found to be insufficient.**"—Where after sale of mortgaged property in execution of mortgage decree, the sale is set aside and mortgagee is required to refund the proceeds to the purchaser, he can apply under

this rule, as the proceeds in such a case are *nil* and therefore insufficient —*Badal Singh* v. *Debi Saran*, 25 A. L. J. 485: 100 I. C. 775: A. I. R. 1927 All. 395 (*Pirbhu Narain* v. *Baldeo*, 29 A 260 *not followed*; *Kedar Nath* v. *Chandumal*, 26 A. 25 *followed*.)

The sale contemplated by s. 89, T P. Act, 1882 (r 5), is the sale of the whole or of a sufficient portion of the mortgaged property. A personal decree under this rule can only be made where the net sale proceeds are insufficient to pay the amount due on the mortgage. A mortgagee may release a portion of the mortgaged property from the debt, but he cannot by so doing impose upon the mortgagor a personal liability to which otherwise he would not be subject The condition precedent to enable a Court to pass a decree under this rule is the sale of the whole or a sufficient portion of the mortgaged property Where the mortgagee released substantial portions of the mortgaged property and also the purchasers of those portions from the mortgage debt, there being no consent or acquiescence on the part of the mortgagor and there being nothing to show that the amount which the purchasers paid to the mortgagee was the full and true value of the property, which they purchased *Held*, that the mortgagor was entitled to claim to have the mortgaged property sold before a decree could be passed against him under s. 90 T. P. Act —*Ram Rajan* v. *Indra Narain*, 33 C. 890· 16 C. W. N 862, 3 C L. J. 83-*n*; *Satish Ranjan Das* v *Mercantile Bank of India*, 45 C. 702. 48 I. C. 322. *Badri Das* v. *Inayat Khan*, 22 A 404 But see, *Shew Prasad* v *Behari Lal*, 25 A 79; *Ghafur Hassan* v *Muhammad Kifayatulla*, 28 A. 19: 2 A. L. J. 413, *Shiam Sunder* v. *Ganesh Prasad*, 28 A 674: 3 A. L. J. 465· 465 *Kedarnath* v *Chandu Mal*, 26 A 25, *Pirbhu Narain* v. *Amir Singh*, 29 A. 369 In these Allahabad cases it has been held that a mortgagee is entitled at any stage to abandon his claim against any portion of the mortgaged property and then obtain a decree under this section for any balance due It would thus appear that there is difference of opinion on the point. *See* also, *Rakhal Chandra* v *Sidhinath*, (1919) Pat 390 53 I C 922.

Where a mortgage decree-holder has, in execution of his decree, sold *some* of the properties covered by the decree *but has not realised sufficient* to pay off the amount due, and is unable to sell the remaining properties by reason of their being situated in a Native State which will not execute the decree of a British Indian Court, the decree-holder is entitled to a personal decree —*Somanta Jagarnath* v *Lokenath*, 2 Pat L. J. 106: 2 Pat L T 736

Recovery of Balance Due on Mortgage.—The holder of a mortgage decree, which simply directs the sale of the mortgaged property, and contains no other directions for realization of the balance from the person or other property of the mortgagor, in case the sale-proceeds prove insufficient to satisfy the decree, may on the proceeds proving insufficient, ask for and obtain a decree under this rule for realization of the balance from the other properties of the debtor.—*Sonatun Shaw* v. *Ali Newas*, 16 C. 123. Discussed in *Musaheb Zaman* v *Inayatulla*, 14 A. 513. *See* also, *Lalla Tirhum* v. *Lalla Hurruck*, 21 C 26.

The decree contemplated by this rule can be made in the suit in which the decree for sale was passed; and it is not necessary to institute a

fresh suit to obtain such decree.—*Rajsing* v *Parmanand*, 11 A 486 See also, *Durga Dai* v. *Bhagwat Prasad*, 13 A. 356.

A decree for sale of the mortgaged property cannot be treated as money decree. The mortgagee must first sell the mortgaged property and if the sale-proceeds be insufficient, then the balance may be recovered and he can then recover the balance from the person or other property of the mortgagor, if it is legally recoverable —*Gopal Das* v. *Ali Mohammad*, 10 A. 632. *See* also, *Surja Kumar* v. *Promada Sundari*, 17 C W N. 1039. 20 I. C. 829, *Arunachella* v. *Vekatarama*, 38 M. L. J 93 26 M L T 192

In order to make the remedy provided by this rule available, it is necessary that the mortgaged property should have been sold by the decree-holder in execution of his own decree and not in execution of a decree of some other person —*Badri Das* v. *Inyat Khan*, 22 A 404

Mortgagee cannot sell the mortgaged property in execution of an ordinary money-decree in satisfaction of a claim not arising under *the mortgage*. Section 99 of the Transfer of Property Act (IV of 1882) limits the *right of a decree-holder in such a case*, and provides that he shall not bring the mortgaged property to sale otherwise by instituting a suit under s 67 of the Act.—*Jadub Lall* v *Madhub Lall*, 21 C 34; *Karen* v *Ananthyya*, 10 M 129, *Azimullah* v *Najmunnissa*, 16 A. 415.

Where the original decree is a mortgage decree as well as a personal decree against the mortgagor under which the mortgagee can, *in execution* proceed against the person or any property of the mortgagor, no supplemental decree under this rule is necessary —*Dinanath* v *Bejoy Krishna*, 7 C W N 744, *Durga Dai* v. *Bhagwat Prasad*, 13 A 356, *Batak Nath* v *Pitambar*, 13 A 360, *Lalji Lal* v. *Barber*, 15 A 334, *Sadho Singh* v. *Maharaja of Benares*, 29 A. 12. *See*, however, *Lutshef Zaman* v *Inayutullah*, 14 A. 513; and *Lalla Trihim* v *Lalla Hurruck Narain*, 21 C. 26

Where on a previous occasion a mortgage decree was executed *against the other property of the judgment-debtor* without an order under this rule, and the judgment-debtor after service of notice *upon him* did not raise any objection *Held*, that the judgment-debtor was estopped from raising the objection in a subsequent *application for execution*—*Madhu Sudan* v *Kailash Chunder*, 2 C. W. N. 254

Where there is nothing to show a contrary *intention* of the parties every mortgage carries with it a personal liability to pay the money advanced, but a mortgagee must sue for his remedy against the property first. In so doing it is immaterial whether or not he prays *in his plaint* for relief against non-hypothecated property. Unless in exceptional cases he can obtain such relief only under *this rule, and if such relief is refused*, the refusal will not bar a subsequent application under this rule. *Observations* on the meaning and application of ss. 88, 89 and 90 of the T P Act (rr. 4, 5 and 6).—*Mushaheb Zaman Khan* v. *Inayatullah*, 14 A 513 (16 C. 423 *discussed*) Every mortgage carries with it a personal liability See 5 C L J. 287: 4 C. L. J. 246: 29 M. 191, noted under rule 5 and *Jangi Singh* v *Chandar Mal*, 30 A. 388: 5 A. L J 670 (11 B 475 *followed*; 21 M. 242 *referred to*).

If a person promises to pay a certain sum of money with interest and hypothecates property as security without any express covenant that he would be personally liable, or without stating any mode of payment, he is personally liable, and a decree under s. 90, T. P. Act, should be passed against the mortgagor, if the sale-proceeds of the mortgaged property prove to be insufficient and the remedy is not time-barred.—*Ram Kishore v. Surajdeo Pershad*, 13 C. W. N. 138. 9 C. L. J. 5 (4 C. L. J. 246 *approved ;* 10 C W. N. 740· 16 C 540 *referred to*)

The holder of a charge is like a mortgagee suing for sale, entitled to ask for and obtain a decree under s 90 of the T P. Act, 1882 (r. 6). An unpaid vendor has not only a charge on the property sold in execution of his decree, but he has also a personal remedy under this rule against the vendees. S. 13, C P Code, 1882 (s. 11), does not apply to an application under s. 90 of the T. P Act —*Uttam Ishlok* v *Phulman Rai*, 2 A. L. J. 379. (1905), A. W. N. 144 (21 A 454 22 B. 846· 14 A. 513 *referred to*).

Where the decree is in substance a mortgage decree, though not in the prescribed form, it is not open to the decree-holder to proceed against non hypothecated property before exhausting the mortgaged property and without obtaining an order under this rule —*Lal Behari* v. *Habibar Rahaman*, 26 C 166· 3 C W. N 8 (24 C 4753: 25 C 580, *referred to,* 22 C 813 *distinguished*) *See* also, *Karimulla* v *Mirza*, 3 Pat. L J. 649: 48 I C 608

A decree which is a combined decree under ss 88 and 90 of the T. P. Act (rr. 4 and 6), cannot be treated as money-decree to which the provisions of s 230 of the C P Code, 1882, are applicable —*Judunath* v *Jagmohan*, 25 A 541 (16 A 418 27 C 285 *referred to*). But see, *Chandi Charan* v. *Ambikacharan*, 31 C 792, *Damodar* v. *Vyanku*, 31 B. 244; *Sadho Singh* v *Maharaja of Benares*, 20 A 12

A mortgagee obtained a decree for sale of properties partly in India and partly in England In pursuance of the decree some of the mortgaged property was sold in India, and at the request of the mortgagor some of it was subsequently sold in England *Held*, that the sale which took place in England must be treated as a sale held in connection with the decree passed in this country and that the mortgagee was entitled to a decree under this rule —*Gajadhar* v. *The Alliance Bank of Simla*, 28 A. 660

Where a part of the mortgaged property was sold privately by consent of the parties, and consideration went towards payment of the mortgage decree, and the sale-proceeds of the remaining mortgaged properties were found insufficient to satisfy the decree *Held*, that the decree-holder is entitled to a personal decree under this section The sale of the mortgaged property by public auction is not essential —*Udit Narain* v *Baquar Sajjad*, 2 A L J 353· (1905), A. W. N. 124.

A puisne mortgagee of property upon which there existed several incumbrances, obtained a decree for sale after redemption of prior incumbrances The prior incumbrances were redeemed and the mortgaged property was sold, but the sale-proceeds were insufficient even to cover the amounts due upon the prior incumbrances, not to mention the amount

due upon his puisne mortgage.' *Held*, that the puisne mortgagee decree-holder is entitled to a decree under this rule in respect of the deficit due upon the prior incumbrances as well as in respect of the deficit upon his own mortgage —*Ali Jan* v *Narain Bibi*, 26 A 93.

A puisne mortgagee sued the prior mortgagees for redemption and a decree was passed for redemption or sale. He did not pay the decretal amount and the property was sold on the application of the prior mortgagees, but it failed to realize the full amount due to the prior mortgagees, who thereupon applied under s 90 of the T. P. Act, to recover the balance from the puisne mortgagee personally. *Held*, that this rule does not apply to such a case The word "*defendant*" which occurs in this rule does not include a puisne mortgagee —*Mafa Amber* v. *Sudhar*, 26 A. 507 *See* also, *Ram Lal* v *Sil Dhand*, 23 A 439, where it has been held that the word "*defendant*" in s 90 of the T P. Act, 1882, must mean the mortgagor defendant, and that the money recoverable, by reason of the proceeds of the mortgaged property proving insufficient to pay off the decree passed under s. 89, T P. Act (r. 5), from the person whose property had been mortgaged and sold, if legally recoverable from him

A purchaser of the equity of redemption is under no personal liability to the mortgagee though he agreed to pay off the mortgage —*Vanku Prasad* v *Kampta Prasad*, A I R. 1923 P C 54.

"If the balance is legally recoverable."—The words "balance is legally recoverable" mean that the balance must be a balance which the mortgagee is not precluded by the terms of the mortgage from realizing otherwise than out of the property sold, or a balance the recovery of which is not barred by limitation —*Musaheb Zamnai Khan* v *Inayatulla*, 14 A 513 *followed* in *Bageshri Dial* v. *Muhammad Naki*, 15 A 331 *See* also, *Parbati Charan* v *Govinda Chandra*, 4 C. L J 246 (28 B 639 *referred to*)

Where a mortgage decree gives the mortgagee a remedy against the mortgaged properties, the personal remedy on the money claim against the mortgagor being barred, the only way in which the mortgagee can recover the money is by sale of the mortgaged property.—*Hanmant Timaji Desai* v. *Ragavandra Rao*, 24 Bom. L. R. 410.

In making a supplemental decree under s. 90 of the T. P Act, 1882 (r 6), the Court has to consider whether the personal remedy was barred at the date of the institution of the suit and not whether it would be barred at the date of the application under this rule.—*Sheik Rahamat* v *Sheik Abdul* 34 C 672 11 C. W. N. 674: 6 C. L. J. 119 (22 C 921, 7 B. 213, 33 C 867 *approved*); *Biswambhar* v. *Ramsundar*, 42 C 294 30 I C 719; *Jangi Singh* v. *Chandar Mal*, 30 A. 388: 5 A. L. J. 670, *Hamiduddin* v *Kedarnath*, 20 A. 386

The balance is *not legally recoverable* if the personal remedy is barred by limitation, that is to say, if the suit is brought after the expiration of six years from the accrual of the cause of action —*Chattar Mal* v. *Thakuri* 20 A 512; *Miller* v. *Runga Nath*, 12 C. 389

Where a mortgage bond was payable by instalments, in default of which the creditor could enforce the whole bond and the instalments were

not paid but no suit was brought within six years of default of payment of instalments. *Held*, that the creditor was entitled to a decree under s. 90 of the T. P. Act, 1882.—*Basant Lal* v. *Gopal Parshad*, 3 A. L J. 463

Application for Supplementary Decree—Service of Notice and Production of Succession Certificate, If Necessary.—A personal decree for a large sum should not be passed *ex parte*. The person against whom the decree is sought to be obtained, has a right to be heard as to his personal liability, whether his property is liable for the debt and whether the amount claimed is correct.—*Abdul Sattar* v. *Sattya Bhusan*, 35 C. 767.

Where a mortgagee died after preliminary decree and his heirs were substituted and a decree absolute for sale was made in their favour, but the sale proceeds of the mortgaged property proving insufficient they applied for a personal decree under this rule for the recovery of the balance. *Held*, that no such decree could be made in their favour until they obtained certificate under the Succession Certificate Act, VII of 1889.—*Sahadev Sukul* v. *Sahamat Hossein*, 12 C W N. 145 7 C L J. 658 and *Abdul Sattar* v *Sattya Bhusan*, 35 C. 767

Limitation for an Application under this Rule.—The limitation governing an application for a personal decree under this rule is that prescribed by Art. 181 of the Limitation Act.—*Ram Sarup* v. *Ghauravi*, 21 A. 453 *See* also, *Sheo Charan* v. *Lalji Mal*, 18 A. 371, *Chunni Lal* v *Tikamdas*, 39 I. C. 854, but an application to execute the personal decree so passed under this rule is governed by Art 182.—25 M 244 F B ; 3 C L J 291; 32 I C. 744

Limitation for Execution of a Decree Passed under this Rule.—The limitation of three years for execution of a decree passed under this rule, will be counted from the date of the decree specifying the exact amount to be recovered, and not from the date of passing the order — *Madan Mohan* v *Nobin Kishore*, 3 C L. J 291

Preliminary decree in redemption suit

7. In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree—

(*a*) ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or

(*b*) declaring the amount so due at the date of such decree, and directing—

(*c*) that, if the plaintiff pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged

property, and shall, if so required, re-transfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff in possession of the property, but

(*d*) that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all right to redeem or (unless the mortgage is by conditional sale) that the mortgaged property be sold. [S. 92.]

COMMENTARY.

This rule corresponds to s. 92 of the T. P. Act, IV of 1882, with some additions and alterations The old section is reproduced here for the purpose of comparision:—

"*In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree ordering—*

"*that an account be taken of what will be due to the defendant for the mortgage-money and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree;*

"*that, upon the plaintiff paying to the defendant or into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property and shall re-transfer it to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, when the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff into possession of the mortgaged property, and*

"*that if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage be simple or usufructuary) be absolutely debarred of all right to redeem the property, or (unless the mortgage be by conditional sale) that the property be sold.*"

Excepting cl (d), the provisions of this rule corresponds with the provisions of r 2, which relates to a preliminary decree for foreclosure The Notes under r 2, apply *mutatis mutandis* to this rule.

Suit for Redemption—Procedure.—Under Or. XXXIV, r 7 of the C P. Code it is open to the Court either to order that an account be taken of what will be due to the defendant for principal and interest

due on the mortgage and for his costs of the suit, if any, or to declare the amount due at the date of such order; but in either case, the Court should proceed to ascertain the amount which would be found due on the date which is to be fixed for payment and specify what the consequence of the payment of that amount or the non-payment thereof would be.—*Mohkan Singh* v. *Thakur Chandra Pal*, 10 O. L J 374.

Scope of the Rule.—There is a certain amount of inconsistency between Or. XXXIV, r 7 and Or. XXXIV, r 8, C P. Code. A preliminary decree in a mortgage suit ought not to direct more than this, that if a plaintiff makes a default then the mortgagee should have a right to ask for a final decree either for foreclosure or sale as is provided by Or. XXXIV, r. 8—*Kushaba Ramji* v. *Budhaji Sakaram*, 23 Bom L R. 1176.

A redemption decree provided that on payment of a certain sum of money within a certain time, possession of the land was to be given *Held*, it was not a preliminary decree under Or XXXIV, r 7, *Mahabir* v. *Kartar Singh*, 76 I C. 144

Clause (d).—Or XXXIV, r. 7 (*d*) applies to the case of a mortgage only and has no application to the case of a co-mortgagor who had redeemed the entire mortgage. *Ali Akbar* v *Sultan-ul-Muluk*, 69 I C. 653 1923 Lah 129.

Final decree in redemption-suit.

8. (1) Where, on or before the day fixed, the plaintiff pays into Court the amount declared due as aforesaid, together which such subsequent costs as are mentioned in r. 10, the Court shall pass a decree—

(*a*) ordering the defendant to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required,

(*b*) ordering him to retransfer the mortgaged property as directed in the said decree,

and, also, if necessary,

(*c*) ordering him to put the plaintiff in possession of the property.

(2) Where such payment is not so made, and the mortgage is not simple or usufructuary, the Court shall, on application made in that behalf by the defendant, pass a decree that the plaintiff and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the plaintiff to put the defendant in possession of the property.

(3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged.

(4) Where such payment is not so made, and the mortgage is not by conditional sale, the Court shall, on application made in that behalf by the defendant, pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance (if any) be paid to the plaintiff or other persons entitled to receive the same:

Power to enlarge time.

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for payment. [S. 93]

COMMENTARY.

This rule corresponds to s. 93 of the T. P. Act, IV of 1882, with several additions and alterations as will appear on a comparison of this rule with the old section, which ran as follows:—

"If payment is made of such amount, and of such subsequent costs as are mentioned in s. 94, the plaintiff shall, if necessary, be put in possession of the mortgaged property.

"If such payment is not so made, the defendant may (unless the mortgage is simple or usufructuary) apply to the Court for an order that the plaintiff and all persons claiming through or under him be debarred absolutely of all right to redeem, or (unless the mortgage is by conditional sale) for an order that the mortgaged property be sold.

"If he applies for the former order, the Court shall pass an order that the plaintiff and all persons claiming through or under him be absolutely debarred of all right to redeem the mortgaged property, and must, if necessary, deliver possession of the property to the defendant.

"If he applies for the latter order, the Court shall pass an order that such property or a sufficient part thereof be sold, and that the proceeds of sale (after defraying thereout the expenses of the sale) be paid into Court, and applied in payment of what is found due to the defendant, and that the balance be paid to the plaintiff or other persons entitled to receive the same.

"On the passing of any order under this section, the plaintiff's right to redeem and the security shall as regards the property affected by the order, both be extinguished:

"Provided that the Court may, upon good cause shown, and upon such terms (if any) as it thinks fit from time to time, postpone the day fixed under section 93 for payment to the defendant."

Clauses (a) and (b) are new. There were no similar provisions in the old section. The word "*absolutely*" which stood after the word "debarred" in the old section has been omitted. Several other material alterations have been made in this rule, as will appear on comparison.

The Transfer of Property Act does not contain any provision for the passing of a final decree in cases where payment is made in accordance with the terms of the preliminary decree. This is in our opinion an omission and we have provided in rr. 3 (1), 5 (1) and 8 (1) for the passing of a final decree in such cases.—*See the Report of the Select Committee.*

It will be observed that under sub-rule (3), on the passing of a final decree in a redemption suit, the debt secured by the mortgage shall be deemed to be discharged But under the old section (93), the effect of passing a final decree was to extinguish the mortgage security as well as the plaintiff's right to redeem.

The proviso attached to this rule is almost similar to the proviso attached to the old section. The indulgence allowed by the proviso is seldom required to be granted in a suit for redemption by the mortgagor, who generally comes into Court with his money ready and offers to pay the amount that will be found due to the defendant.

In a suit for redemption it is necessary to take accounts in order to ascertain whether or not the mortgage has been paid off.

It is noticeable that the payments under these rules are to be made into Court and not to the defendant. The provisions as to payment to defendant which were contained in the old sections have been omitted from these rules, the reason being that the Special Committee thought it better that in every case the payment should be made into Court

Right of Redemption.—No such general rule of law exists in India as would preclude a mortgagor from redeeming a mortgage before the expiry of the term for which the mortgage was intended to be made unless the mortgagee succeeds in showing that by reason of the terms of the mortgage itself, the mortgagor is precluded from paying off the debt due by him to the mortgagee.—*Bhagwat Das* v. *Parshad Singh*, 10 A. 602. *See* also, *Rose Ammal* v. *Rajarathnam*, 23, M. 33 (5 B. 22, 16 M. 486 *considered*). *See*, however, *Raghubar Dayal* v *Budhu Lal*, 8 A. 95 ; *Setrucherla* v. *Vairi Cherla* 2 M 314.

Section 93 of the T P. Act (IV of 1882) (r 7) does not, in its literal terms, apply to a case where there is no prior mortgage still in existence, but the principles there laid down ought to be followed in dealing with such a case. The position of the defendant who is in possession of the property under an obligation to re-transfer it, if the redemption money is paid on a fixed date, is analogous to that of a mortgagee by conditional sale —*Bepin Behary* v. *Mukunda Lal*, 8 C L J 517· 36 C. 122

A mortgagor who has made default in the payment of the mortgage money within the time limited by the decree in a suit for redemption is not entitled to apply for execution of the decree after the time limited —*Vallabha Valiya* v *Vodapuratti* 19 M. 40.

A mortgagor, who institutes a redemption suit, is entitled to put an alternative claim. He may aver that the mortgage money has been repaid, and, in the alternative in the event of the Court finding any sum to be still due under the mortgage that he is prepared to pay such further sum.—*Butchanna* v. *Varahalu*, 24 M. 408.

Where the mortgaged property was sold for arrears of Government revenue.—*Held*, that if the sale took place owing to the mortgagee's default, it would not affect the mortgagor's right to redeem. The general rule that a sale for arrears of Government revenue gives a title against all the world, is subject to the exception that, if it is caused by the default of the mortgagee, it does not take away the mortgagor's right to redeem. —*Kalappa* v. *Shinaya*, 20 B. 492. *See* also, *Harshanka Prasad* v. *Sheo Gobind*, 26 C. 966: 4 C. W. N. 317; *Nazir Ali* v. *Ojoodhyaram*, 5 B. R. 83. P. C: 10 M. I. A. 540; *Bissesuar Prosad* v. *Lala Samam Singh*, 6 C. L. J. 134, 140.

A Decree for Redemption If Bars a Subsequent Suit for the Same Relief.—A mortgagor who has obtained a decree for redemption which does not contain a proviso as to payment within the date fixed by the Court, and who has not enforced that decree and has not paid in the decretal amount within the time, can subsequently bring a second suit for redemption of the mortgage in respect of which such first decree was obtained.—*Sitaram* v. *Madho Lal*, 24 A. 44 F. B. (19 A. 202 *overruled*, 21 A. 251, 6 M. 119, 7 M. 423, 8 M. 478, 21 M. 18, 11 A. 386, 20 A. 375 and 446 *referred to*; 7 B. 467, 17 M. 96, 4 A. 481, 13 B. 567 *not followed*). But the Madras High Court, in the Full Bench case of *Vedapuratti* v. *Vallabha Valiya Raja* 25 M. 300 F. B., have held that where a suit for redemption has been instituted and a decree for redemption has been passed therein, but not executed, a subsequent suit is not maintainable for the redemption of the same mortgage (6 M. 119, 7 M. 423, 8 M. 478, 15 M. 366, *overruled*, 19 M. 40, F. B., *explained*. 21 M. 19 *dissented from*). *See* also, *Lachman* v. *Madhusudan*, 29 A. 481: 4 A. L. J. 447, in which a similar view seems to have been taken. It would thus appear that all the cases on the point have been referred to, discussed and considered in the above two Full Bench rulings of the Allahabad and Madras High Courts.

When, under a compromise arrived at in a redemption suit, the parties did not agree that the plaintiff's right to redeem could be extinguished absolutely, he is not prevented from bringing a second suit for redemption. The mortgagee is still a mortgagee and does not become the absolute proprietor of the property.—*Mohamdi Begam* v. *Tufail Hasan*, A. I. R. 1927 All. 20 (A. I. R. 1922 All. 377 and A. I. R. 1925 Lah. 31 *refd. to*).

A person who does not deposit the redemption money within the time allowed can redeem afterwards, before final order is made under this rule.—*Bepin Behari* v. *Mukunda Lal*, 36 C. 122: 8 C. L. J. 547 (22 B. 771, 15 C. 246, 19 M. 40, 19 A. 180, 24 A. 479, 11 C. W. N. 679, and 25 M. 300 *referred to*). Referred to in *Krishna Chandra* v. *Jakeral Huq*, 10 C. L. J. 115.

Enlargement of Time.—Order XXXIV, r. 8 applies to redemption suits only and time for payment fixed by a decree cannot be extended under that rule when the decree is not one for redemption.—*Kur, Nardeo* v.

Sujan Singh, 18 A. L. J. 771; *Nand Kunwar* v. *Sujan Singh*, 43 A. 25.

In redemption suits the decree passed under r. 7 is only in the nature of a decree *nisi*, and the order passed under this rule is in the nature of a decree absolute. Under the proviso to this rule, an application to extend the time for redemption fixed by the preliminary decree may be made at any time before the decree absolute is made.—*Nanram* v. *Babaji*, 22 B. 771.

Where a decree for redemption omitted to state what would be the consequence of the non-payment of the mortgage money within the time specified, it was held that such omission could not operate to extend the period available to the plaintiff, for payment beyond the maximum term provided by r. 7.—*Wazir* v *Dhuman Khan*, 16 A. 165 (14 A. 529 *referred to*; 14 A. 350 *dissented from*).

The plaintiff who did not deposit the redemption money within the time allowed by the Court can redeem afterwards, before a final decree is made under r. 8, that is, before the decree is made absolute. If a deposit of the redemption money is accepted by the Court before the final decree, but after the date fixed for payment, it becomes an effectual deposit although no formal order extending the time was passed.—*Bepin Behary* v. *Mukanda Lal*, 8 C. L. J. 547. 36 C 122 (22 B 771 and 25 M. 300, pp. 306-7, *referred to*). Referred to in *Krishna Chandra v. Jakeal Huq*, 10 C. L. J. 115.

Where a decree gives a right of redemption within a certain specified period with a certain specified result to follow, if redemption is not made within such period, the mere fact of an appeal being preferred against it will not suspend the operation of such decree and unless the Appellate Court extends the period limited by the original decree, the right of redemption will be barred if not exercised within the period so limited —*Chiranji Lal* v. *Dharam Singh*, 18 A. 405 (18 A. 223 *applied*) *See* also, *Manavikraman* v. *Unniappan*, 15 M. 170.

In a suit on a usufructuary mortgage, a decree for redemption was passed directing the plaintiff to pay a certain sum within six months. Against this decree there was an appeal, which was dismissed more than six months after the date fixed in the decree. *Held*, that as the mortgagee had never obtained an order for sale under s 93 of the T. P. Act, and as the mortgagee's equity of redemption had not become extinct, he was entitled to redeem on tendering the amount mentioned in the decree —*Kanara* v *Govinda*, 16 M. 214

An application for enlarging the time granted by decree for redemption may be made after the prescribed time has expired An order refusing the time is appealable under s 244, C P. Code, 1882 (s 47) —*Rango* v. *Bhomshetti*, 26 B 121.

Failure to pay money on or before the date mentioned in the redemption decree does not absolutely bar the mortgagor's right to obtain possession of the mortgaged property; since the Court may, under s 93 of the T. P. Act, upon good cause shown, enlarge the time for payment upon such terms as it thinks fit The plaintiff within three years of the date of the decree produced in Court the decretal amount and prayed for possession

of the mortgaged property. *Held*, such an application could be treated as one for enlargement of time under s. 93 of the T. P. Act (IV of 1882)—*Iswar Lingo* v. *Gopal Jivaji*, 28 B. 102 (26 B 121 *followed*)

A mortgagor who has obtained a decree for redemption may pay in the decretal amount, and obtain redemption at any time up to the making of an order absolute.—*Saligram* v. *Muradan*, 25 A. 231 (20 A. 446 and 2 C 705 *followed*). *See* also, *Alimea* v. *Reshun Ali*, 3 C. L J 533 (27 C 705, 16 C. 246, 22 M. 133 *followed*). *See* also, *Maung Tun* v. *Ma* ... 54 I. C. 507.

Although the Court of first instance is the proper Court for dealing with applications under this rule, the Appellate Court has nevertheless jurisdiction to allow the enlargement of time in cases where there has been an appeal.—*Babu Parshad* v *Khiati Ram*, 3 A. L J. 828: (1906) A. W. N. 203. *See, however, Eheonarain* v. *Chuni Lal*, 23 A. 88, where it has been held that such an application must be made to the Court of first instance and not to the Appellate Court. *See* also, *Venkata* v. *Thiagarajan*, 23 M. 521; *Oudh Behari* v. *Nageshar Lal*, 13 A. 278; *Ramdhan* v. *L*... *Singh*, 31 A 328 (23 A 88 *followed*; (1906) A. W. N. 203 *dissented from*).

Appeal.—An order under r. 3 or r. 8 of Or. XXXIV, refusing to extend the time for the payment of the mortgage money, is appealable. *See* Or. XLIII, (o) But no appeal lies against an order extending the time so fixed.—*Dharmaraja* v. *Sreenivasa*, 29 M. L. J. 708: 18 M L ... *Dattatraya Vithal* v. *Vasudeo Anant*, 47 B. 956: 25 Bom L. 486; ... 990

See the cases noted under rule 3

Clog or Fetter on the Equity of Redemption.—A mortgage is a conveyance of land or an assignment of chattels as a security for the payment of the debts or the discharge of some other obligation for which it is given. That is the idea of a mortgage and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. Any provision inserted to prevent redemption on payment of the debt or performance of the obligation, for which the security was given is what is meant by a clog or fetter on the equity of redemption, and is therefore, void. It follows from this that once a mortgage always a mortgage; but this principle does not involve the proposition that the amount or nature of the further debt or the obligation the payment or performance of which is to be secured, is a clog or ... within the rule A lease which is to last as long as the pendency of the mortgage, is not bad as being for an indefinite period.—*Mahomed C...* v. *Joseph Ezekiel*, 7 Bom. L. R. 772.

Certain mortgagors, having taken a further advance on the security of a second mortgage of the same property, covenanted in the second mortgage that they should not be at liberty to redeem it, without, at the same time, redeeming the first. *Held*, that this was a valid covenant and did not amount to a clog or fetter on the right of redemption.—*Muhammad Abdul* v. *Jairaj Mal*, 3 A. L J. 768: (1906) A. W. N. 267 *See* ... *Bhartu* v. *Dalip*, 3 A. L. J 672: (1906) A. W. N. 278, and *Seth C...* *Mal* v. *Lala Baij Nath*, 28 A. 712: 3 A. L. J. 634 (26 A. 559 *distinguished*).

After the execution of a usufructuary mortgage, the mortgagor executed a bond, which in addition to the usual stipulation for repayment of the money secured thereby, contained a covenant to the effect that the mortgaged property should not be redeemed until principal money and interest due under the bond had been paid. *Held*, that such a provision was a clog or fetter on redemption placing in the way of the mortgagor a bar to the exercise of the right of redemption which the law gave him, and therefore a provision not to be enforced.—*Sheo Shankar* v. *Parma Mahton*, 26 A. 559 (4 A 85 *not followed*). *See* also, *Rajmal Maliram* v. *Shivaji*, 27 B. 154 (9 B 233, *doubted*), *Rugad Singh* v *Satnarain*, 27 A. 178 (26 A. 559 *followed*) In *Durga Pershad* v. *Dukhi Roy*, 9 C. W. N. 789, the meaning of the words clog or fetter on the equity of redemption " have been explained (9 B. 233 12 B. 231, 20 B. 346, 18 M. 368 *referred to*).

For the meaning of the expression " once a mortgage always a mortgage," *see* 9 C. W. N. 789 and 27 B. 154, noted above.

A covenant to renew perpetually a *kanam* mortgage is a clog on the mortgagor's right to redeem and is inoperative, if it is entered into simultaneously with the mortgage. According to the rules of equity, any agreement entered into at the time of the mortgage, having the effect of clogging the right of redemption is inoperative.—*Neelakandan* v. *Anantha Krishna* 30 M. 61: 16 M. L J. 462.

The right of redemption and the right of foreclosure are always co-extensive and from the postponement of the former, the Court will infer an intention to postpone the latter in the absence of express provision on the point; where there is express provision, giving the mortgagee power to foreclose at any time, any stipulation postponing the mortgagor's right to redeem is unilateral and void of consideration. A Court of equity will not enforce any agreement in restraint of the right of redemption which is oppressive and unreasonable. A mortgagor cannot by any contract entered into with the mortgagee at the time of the mortgage give up his right of redemption or fetter it in any manner by confining it to a particular time or a particular description of persons.—*Abdul Hak* v *Gulam Jilani*, 20 B 677. Followed in *Sari* v *Moliram*, 22 B 375. *See* also, *Kanaram* v *Kuttooly*, 21 M. 110; *Bimal Jati* v. *Biranja Kuar*, 22 A. 238 But see, *Krishnaji* v. *Mahesavar*, 20 B. 346.

Partial Redemption.—The mortgage-debt being indivisible and the mortgaged property being held in its entirety as security for the debt and every part of it, the property can only be redeemed in its entirety on payment of the whole debt The above principle has been enunciated in the last para of s. 60 of the T P. Act (IV of 1882)

Where the right of redemption is vested in several persons one of them may redeem the whole mortgage on payment of the entire mortgage-debt.—*Naro* v. *Vithalrat*, 10 B. 618; *Mora* v *Chandra*, 15 B 24; 21 B. 619; *Kuppusami* v *Popathi*, 21 M 369 *See*, however, 20 M. 295

Where the right of redemption is vested in several persons, one of them cannot, by offering to pay his share of the debt redeem a proportionate part of the property —*Nilkant* v *Suresh Chandra*, 12 C 414, P C · 20 A 23; *see* also, *Grish Chundra* v. *Kedarnath*, 33 C. 590 · 10 C W N. 592 (21 M. 61 *referred to*); 10 A 527, 28 A. 185 and 11 C. W. N. 403.

Where a mortgagee acquires a part of the mortgaged property, and thus a fusion takes place of the rights of the mortgagee and mortgagor in *the same person, the indivisible character of the mortgage is broken up* and one of several mortgagors, may in such case redeem his own share only on payment of a proportionate part of the mortgage money.—*Kalan Khan* v. *Mardan Khan*, 28 A. 155 (2 A. 565, 17 A. 63 *followed;* 15 B. [illegible] *distinguished*) *See* also, 3 C. L. J. 377, and *Brij Kishore* v. *Madho Singh*, 28 A. 279.

Where the equity of redemption in respect of a part of the mortgaged property becomes vested in the mortgagee whether by purchase or by inheritance or otherwise there is a merger of rights and the integrity of the mortgage is broken up.—*Hamida Bibi* v. *Ahmad Husain*, 31 A. 335 (17 A. 63 *followed*, 28 A. 155, 29 A. 362 *referred to*).

Where subsequent to the date of a mortgage, different persons had *become interested in different fragments of the equity* of redemption the owner of any portion of the equity of redemption is entitled to ask that not more than a relateable part of the mortgage-debt should be thrown upon the property in his hands. The mortgagees cannot claim to throw the entire burden upon a portion of the mortgaged premises, because by reason of their own laches they have lost their remedy against the remainder (31 C 755: 2 C. L. J 202, *referred to*). A mortgagee cannot release from his claim a portion of the mortgage security so as to prejudice the rights of others, who might have already acquired an interest in the released portion.—*Imam Ali* v. *Baij Nath*, 33 C. 613 · 10 C. W. N. 551 3 C L J 576 (2 C. L J. 202, 1 C L J. 337 *followed;* 18 W. R. 120, 25 A. [illegible] *dissented from*). *See* also, *Debendra Nath* v. *Abdul Samad*, 10 C. L. J. 150.

Where a mortgagee has gratuitously or otherwise released one of the joint mortgagors and his share of the property, the mortgage-debt is split up and redemption of a share is permissible, so that the other joint mortgagor is at liberty to redeem his share on paying a proportionate part of the mortgage money.—*Hakim Lal* v. *Ram Lal*, 6 C L. J. 46

Where a mortgagee has acquired in whole or in part, the share of a mortgagor, partial redemption may *be allowed.—Surji Ram Marwari* v. *Burhamdeo Pershad*, 2 C. L. J. 202 (4 C. W. N. 507, 5 C. W. N. 61, [illegible] C. 755 *followed*). *See* also, *Inu Khan* v. *Naimuddin Sircar*, 3 C. L. J. 377.

A purchaser of a part of the mortgaged property who was not made a party in a suit brought by the mortgagee for foreclosure is entitled to redeem that portion of the mortgaged property in which he has acquired an interest.—*Brij Kishore* v. *Madho Singh*, 28 A. 279: 3 A. L. J 27. See *Azimut Ali* v. *Jawahir Singh*, 14 W. R. 17, P. C.: 13 M. I. A 401; *Bedan Singh* v. *Deen Doyal*, 24 W. R. 47; *Hirdy Narain* v. *Attaoollah*, 4 C. [illegible] 2 C. L. R. 580, and *Debendra Nath* v. *Abdul Samad*, 10 C. L. J. 150.

Redemption of Whole Mortgage by a Part Owner of the Equity of Redemption.—By redeeming a mortgage of ordinary kind under which possession did not pass to the mortgagee, one of the several mortgagors becomes entitled to a charge on the interests of the other mortgagors for the amount payable by the latter.—*Malik Ahmad* v. *Shamsi Jahan Begam*

28 A. 482, P. C : 10 C. W. N. 626: 3 C. L. J. 481: 16 M. L. J. 269: 8 Bom. L. R. 397: 3 A. L. J. 360 *See also*, *Asansale* v. *Vamana Rau*, 2 M. 223; *Vithal Nilkanth* v. *Vishwasrav Bin*, 8 B. 497.

Decree where nothing is found due or where mortgagee as been overpaid.

9. Notwithstanding anything hereinbefore contained, if it appears, upon taking the account referred to in rule 7, that nothing is due to the defendant or that he has been overpaid, the Court shall pass a decree directing the defendant, if so required to re-transfer the property and to pay to the plaintiff the mount which may be found due to him ; and the plaintiff shall, f necessary, be put in possession of the mortgaged property.

[New]

COMMENTARY.

" This rule is new. It is a recognition of existing practice and remedies n obvious omission in the T. P. Act, 1882."—*See the Report of the Special Committee.*

It has been framed adopting the principles laid down in the following cases:—

In a suit for account and redemption, if the mortgagee on taking the accounts, is found to have been overpaid, the general practice is to order he payment by him, of the balance due to the mortgagor with interest rom the date of the institution of the suit.—*Janoji* v *Janoji*, 7 B. 185.

Where an usufructuary mortgagee has realised a sum of money in excess of the amount due to him, it is an equitable practice to allow to the mortgagor interest on such sum at the same rate at which interest has been allowed to the mortgagee on his mortgage debt.—*Bechoo Singh* v. *Roy Sheo Sahoy*, 1 N. W. 56: Ed. 1873, III.

If upon taking account between mortgagor and mortgagee it appears that the *mortgage has been fully satisfied, the mortgagor is not only* entitled to have the property back, but the Court is bound as a Court of equity and acting upon the principle that it is always the aim of a Court of equity to determine finally as far as possible all questions concerning the subject of the suit, to cause an account to be taken up to the time of the decree, the account so taken being considered binding, the parties not being at liberty, except under peculiar circumstances, to re-open it in any other suit.—*Kullyan Das* v. *Sheo Nundun*, 18 W R 65, *Roy Dinkar Dyal* v. *Sheo Golam*, 22 W. R. 172: *Lutafat Hossein* v *Chowdhury Mahomed*, 22 W. R. 269.

A mortgagee, who has obtained a decree for an account and sale, is not entitled to withdraw from the taking of accounts in his execution proceedings when those accounts appear to be going against him.—*Doolee Chand* v. *Omda Khanum*, 6 C. 377: 7 C. L. R. 373

Where it appears that there is nothing due to the mortgagee or that he has been overpaid, his suit will be dismissed with costs, and he should

be also ordered to pay over the balance with interest from the date of the institution of the suit.—*Ram Chandra* v. *Janardan*, 14 B 19 (7 B 1 referred to).

The essence of a foreclosure and redemption suit is, that in such suits each party is entitled to enforce his rights, a plaintiff claiming a foreclosure is bound, upon accounts being taken, if the balance is against him, to pay that balance; on the other hand, a plaintiff claiming a redemption, must submit to a decree for sale or foreclosure, if he makes default in payment; and to avoid a multiplicity of suits, it is necessary under a decree for foreclosure or redemption that the accounts between the parties should be settled and discharged, if the balance is against any party he must pay it (6 C. 377, 16 C. 682 *referred to*). In a redemption suit, the mortgagor is entitled as in a question with his mortgagee, to have a general account taken of what is due upon the mortgage, and the fact that the mortgagor then declared in his pleading his intention of bringing a separate action for recovery of the profits received by the mortgagee after refusal of his tender, does not entitle him to maintain an action for damages for wrongful detention of property after the tender, which would have been wholly unnecessary, if the claim urged in the latter action, had been put forward and given effect to in that litigation.—*Satyabadi Behera* v. *Hira Mati*, 5 C. L. J. 192. 34 C. 223 (20 C. 322 *referred to*)

As to the mode of taking accounts, see *Janjit Rai* v. *Gorind Tewari*, 6 A. 303 and 310 and *Madari* v. *Baldeo*, 27 A. 351, F. B.

10. In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure or sale or redemption, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure or sale or redemption up to the time of actual payment. [S. 94.]

Costs of mortgagee subsequent to decree.

COMMENTARY.

This rule corresponds to s. 94 of the T. P. Act, IV of 1882, with some additions and alterations, as will appear on a comparison of the rule with the old section which ran as follows:—

"*In finally adjusting the amount to be paid to a mortgagee in case of a redemption or a sale by the Court under this chapter, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure, redemption or sale, up to the time of actual payment.*"

In the first part of the old section there was no reference to a foreclosure; it was evidently an omission which has been supplied in the present rule by insertion of the words "*foreclosure*" before the words "sale or redemption."

This rule provides for the payment of costs incurred by the mortgagee subsequently to the decree. Under s. 35, C. P. Code, the Court has full discretion to award and apportion costs incurred in a suit before the decree and that section will still regulate such costs. But costs incurred after decree will be regulated by this rule. Such costs must be the costs of carrying out the directions of the decree, *e.g.*, costs of a reconveyance, etc.

" Unless the conduct of the mortgagee has been such as to disentitle him to costs."—The discretion given under s. 220, C. P Code, 1882 (s. 35), is one which is to be exercised with reference to general principles. Where a plaintiff comes to enforce a legal right and there has been no misconduct on his part, no omission or neglect which would induce the *Court to deprive him of his costs, the Court has no jurisdiction and cannot* take away the plaintiff's right to costs There may be misconduct of many sorts: for instance, there may be misconduct in commencing the proceedings or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs; but where there is nothing of the kind, the rule is plain and well-settled as stated above It is, for instance. no answer, where a plaintiff asserts a legal right, for a defendant to allege ignorance of such right and to say " if I had known of your right. I should not have infringed it."—*Kuppuswami Chetty* v *Zamindar of Kalahasti*, 27 M 341.

As a general rule, a mortgagee trying to enforce his rights upon the mortgage is entitled to costs in the absence of any misconduct or any other conduct which, in the opinion of the Court, disentitles him to the expenses.—*Damodar Das* v. *Budh Kuar*, 10 A. 179, and *Rutnessur Sein* v. *Jusoda*, 14 C 185.

A decree-holder in executing a mortgage-decree must, for the purpose of recovering costs awarded by the decree, proceed in the first instance against the property mortgaged; and in the event of the same being found insufficient, he can proceed against properties other than the mortgaged property. The order for costs is a part of the mortgage decree —*Raj-Kumar* v. *Sheo Narain*, 35 C 431 8 C. L J 152· 12 C. W N. 364 (20 A. 523 *followed*, 10 A. 179; 14 C 185 *distinguished*) *See* also, *Sadiq Hussain* v *Umma-tul Fatima*, 48 I C 329, *Damber Singh* v. *Kalyan Singh*, 40 A 109 15 A L J 914.

A decree for sale under s 88, T P Act, IV of 1882 (r. 4), can only be executed for the amount decreed or found on an account being taken to be due, and the order for sale cannot, except with regard to any additional costs which may be provided for by an order under s. 94 of the T. P. Act, extend in any way the liability of the judgment-debtor or his property under the decree —*Kashi Prasad* v *Sheo Sahai*, 19 A 186 (5 A 642 *distinguished*).

As to costs in mortgage suits generally see notes under s 35

" Such costs of suit as have been properly incurred."—The costs mentioned in this rule and costs which are properly incurred in the suit in carrying out the directions contained in the decree and are liable to be added to the mortgage-money. But costs incurred in subsequent ob-

jections to execution proceedings or in appeals from orders passed in execution are costs which are incurred in a proceeding separately numbered and treated as quite distinct and independent from the suit itself. These costs the decree-holder can realize separately by execution against the judgment-debtor personally and is not bound to add to the mortgage-money.—*Het Ram* v. *Dal Prasad*, A. I. R. 1926 All. 68.

Costs Awarded by the Decree—Mode of Realization.—The costs awarded by the decree directing the sale of the mortgaged property form part of the mortgage decree, the payment of which can be enforced personally against the mortgagor under this rule, if the sale-proceeds are insufficient to satisfy the mortgagee's claim.—*Rajkumar* v. *Sheo [illegible]*, 35 C. 431: 12 C. W. N. 364: 8 C. L. J. 152 (20 A. 523 *followed*; [illegible] 185: 10 A. 179 *distinguished*). *See* also, *Kamalamma* v. *[illegible]*, 30 M. 464: 17 M. L. J. 317, and *Maqbul Fatima* v. *Lalla Prasad*, [illegible] A. 523.

A mortgagee who has obtained an order absolute for foreclosure may proceed against the mortgagor personally for the costs of the suit.—*Shaffar Khan* v. *Satyanunda Das*, 13 C. W. N. 742 (14 C. 185; [illegible] 179 *followed*, 35 C. 431: 12 C. W. N. 364; 20 A. 523 *distinguished*).

11. Where property is mortgaged for successive debts to successive mortgagees, any mesne mortgagee may institute a suit to redeem the interest of the prior mortgagees and to foreclose the rights of those that are posterior to himself and of the mortgagor. [New.]

Right of mesne mortgagee to redeem and foreclose.

COMMENTARY.

This rule is new. The Committee have inserted this rule in compliance with the suggestion of the Privy Council in *Gopi Narain [illegible]* v. *Bansidhar*, 27 A. 325, P. C.: L. R. 32 I. A. 123: 2 C. L. J. 173: 9 C. W. N. 577: 15 M. L. J. 191: 7 Bom. L. R. 427: 2 A. L. J. 336.

This clause was in the Transfer of Property Act Bill, but was [illegible] by the Select Committee from that Bill on the ground that it [illegible] find a place in the Civil Procedure Code."—*See the Report of the [illegible] Committee*.

In the above Privy Council case the following rule has been laid down. A mortgage decree directed, that, in the event of the [illegible] amount not being paid within a certain time, the defendant should be absolutely debarred of all right to redeem the mortgaged property. [illegible] puisne mortgagee who was a party to a suit by first mortgagee for foreclosure, and who satisfies the decree made therein and thus prevents foreclosure, acquires under s. 74 of the T. P. Act, all the rights and the powers of the first mortgage. He is not entitled, however, to ask the Court to work out under s. 244, C. P. Code, 1882 (s. 47), his rights as owner of the first mortgage and as second mortgagee, as against other incumbrancers who were parties to the suit. As soon as the money due under the foreclosure decree has been paid by the puisne mortgagee and withdrawn by the decree-holder it was discharged and satisfied and [illegible]

is nothing to be done in the execution department. A new decree is required to work out the respective rights of the parties and s. 244, C. P. Code, 1882, (s. 47), is no bar to a separate suit, which is necessary to adjust the rights of the parties. Section 86 of the T. P. Act contemplates a suit between one mortgagee and the mortgagor only and should be treated as a common form not to be literally followed in every suit for foreclosure but to be adapted to the particular circumstances of each case. To regulate the rights of puisne mortgagees, in mortgage decree a form of order known in the Chancery Division of the High Court in England might be adopted in India.

See Forms Nos. 6, 7, 8 and 9, Sch. I, Appendix D.

Right of Mesne Mortgagee to Redeem and Foreclose.—A puisne mortgagee is entitled to redeem from the prior mortgagee who obtains a foreclosure decree in a suit to which a puisne mortgagee is not made a party or from the purchaser in the foreclosure suit; and it is immaterial whether the puisne mortgage is or is not registered, or whether the prior mortgagee at the date of the suit had or had not notice of the puisne mortgage.—*Sankana Kalana* v. *Virupakshapa*, 7 B 146.

A mortgagee created a sub-mortgage in favour of the plaintiff of land mortgaged to him The sub-mortgagor in express terms transferred his interest in the land to the sub-mortgagee The sub-mortgagor also left a portion of the consideration money in the hands of the sub-mortgagee for redemption of a prior mortgage The prior mortgagee refused to accept the sum due to him and deliver up possession. *Held*, that the sub-mortgagee is entitled to redeem the prior mortgage.—*Ramsubhag* v. *Narsingh*, 27 A. 473 2 A. L J 162

A perpetual lessee of the mortgaged premises from the mortgagor, holding under a lease granted upon a payment of the premium with a yearly fixed rental is entitled to redeem.—*Raghunandan* v. *Ambika Singh*, 29 A. 679. 4 A. L. J. 703.

Where the prior mortgagee purchased the property mortgaged to him in a suit in which the puisne mortgagee was not made a party, and the latter also purchased the same property subsequently in a suit in which the prior mortgagee was not made a party *Held*, that each party would be entitled to redeem the other; but the preferable right to redeem was with the puisne mortgagee —*Kedar Prosanna* v. *Girindra Prasad*, 8 C L. J. 173.

12. Where any property the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free form the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold [S 96.]

Sale of property subject to prior mortgage.

COMMENTARY.

This rule corresponds to s 96 of the T P Act, (IV of 1882), with some alterations of merely verbal character The word "where" has

been substituted for the word " if "; the words " *this Order* " have been substituted for the words " this chapter," and the word " direct " has been substituted for the word " order," which occurred in the old section. These are the only modifications made in this rule.

Compare this rule with clause (*b*) of s. 73 of this Code, which gives to the Court a similar power to that contained in this section. From the language of this rule and of s. 73, it is clear that property may be sold under a decree subject to a prior mortgage; but the Court may, with the consent of the prior mortgagee, direct the sale of the property free from his mortgage giving the prior mortgagee the same interest in the sale proceeds as he had in the property sold. Without the consent of the prior mortgagee the Court cannot direct such a sale.

This rule cannot be construed as implying that whenever a property is not to be sold free from a prior mortgage, the decree should reserve the prior mortgagee's right in express terms even when such rights have to be admitted and undisputed and his rights therefore will be left unaffected by the omission to make a special reservation of them in the decree itself.—*Srinivasa* v. *Vemunabhai*, 29 M. 84; 16 M. L. J. 50 (18 A 344 *referred to*).

The words " *subject to a prior mortgage* " in this rule, evidently refer to such mortgages under which the mortgaged property can be sold, they do not refer to usufructuary mortgages under which the mortgaged property cannot be sold. See, *Bhagwandas* v. *Bhawani*, 26 A. 14. But see *Rangasami* v. *Subbaraya*, 30 M. 408: 17 M. L. J. 403 (29 M 43 *followed*; 26 A 14 *dissented from*), noted under rule 13 below.

Application of proceeds.

13. (1) Such proceeds shall be brought into Court and applied as follows :—

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale ;

secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith ;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made ;

fourthly, in payment of the principal money due on account of that mortgage ; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons the

one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 57 of the Transfer of Property Act, 1882. [S 97.]

COMMENTARY.

This rule corresponds to section 97 of the T. P. Act (IV of 1882). Except the second clause, all the clauses of this rule are almost similar to the corresponding clauses of the old section. The second clause of the old section ran as follows: "*Secondly, if the property has been sold free from any prior mortgage, in payment of whatever is due on account of such mortgage.*" On comparison of the second clause of this rule with the second clause of the old section, the changes will be clearly understood.

The other changes are of a mere verbal character Compare this section with clause (c) of section 73 of this Code, in which there is a saving clause in favour of Government, but there is no such saving clause here. It will be observed that the provisions of rules 12 and 13 shall not be deemed to affect the powers conferred by section 57 of the T. P. Act, (IV of 1882), which under the terms of that section can be exercised by the High Court, District Court or by any other Court specially authorized by the Local Government

"*Persons interested in the property sold*" in the last clause of this rule would include the mortgagee or any subsequent mortgagees according to their respective priorities proved in the mortgage suit.

Sale of Property Subject to Prior Mortgage and Application of Proceeds.—From the language of rr. 12 and 13 it is clear that property may be sold under a decree subject to a prior mortgage But in the Full Bench case of *Matadin* v. *Kazim Husain*, 13 A. 432, it was held that the right of redemption left in the mortgagor after the execution of the first mortgage is not specific immoveable property and cannot be sold. The Court cannot direct the sale of any property subject to a prior mortgage at the instance of the puisne mortgagee. Similar view was also taken in 18 A. 113. But the Calcutta High Court have dissented from the Full Bench rulings of the Allahabad High Court in *Kantiram* v *Kutubuddin*, 22 C. 33 and also in *Jaggeswar Dutt* v *Bhuban Mohan*, 33 C. 425 3 C. L. J. 205. In *Ram Shankar* v *Gonesh Parshad*, 29 A. 385: 4 A L. J. 273, F B, the above Allahabad cases (13 A 432, F B, 18 A. 113) have been overruled.

In a suit on a mortgage by a second mortgagee to which the prior mortgagee was a party and in which the plaintiff prayed for sale of the mortgaged property, *held*, that the plaintiff was entitled to an order for sale of the mortgaged property subject to the lien of the prior incumbrancers. The words "immoveable property" in s 58 of the T P Act denote not only the property itself as distinguished from any equity of redemption which the mortgagor might possess but include the

right of the mortgagor in the property mortgaged at the time of the second mortgage, or in other words, his equity of redemption in such property. A second mortgage therefore is, as well as the first mortgage, a mortgage of specific immoveable property.—*Kantiram* v. *Kutubuddin*, 22 C. 33 (4 M. 213, 1 A. 240, 8 A. 105, 8 M 246, 18 C. 164, P. C, *approved as to the right of the second mortgagee to a sale subject to the lien of a prior mortgagee;* 13 A. 432 *dissented from*). *See* also, *Beni Madhub* v. *Sourendra Mohan*, 23 C 795.

A person holding two mortgages on the same property, the first usufructuary and the second simple, can bring the property to sale in suit on the second mortgage free of the first mortgage. Sections 96 and 97 of the T P. Act do not in terms exclude usufructuary mortgages and their provisions may be applied to such mortgages —*Rungasami* v *Subbarama* 30 M. 408: 17 M. L. J. 403 (20 M. 424 *followed;* 26 A. 14 *not followed*. In *Bhagwan Das* v. *Bhawani*, 26 A 14, it has been held that where a mortgagee held several simple mortgages over properties *A* and *B*, and also a usufructuary mortgage of prior date over property *B*, he was not entitled to bring to sale the property covered by his simple mortgage subject to the usufructuary mortgage held by him, nor could he bring to sale the whole property for the aggregate amount of his mortgages, simple and usufructuary (13 A. 432, 20 A. 322 *referred to*) *See* also, *Dorasami* v. *Venkataseshayyar*, 25 M. 108 (20 A. 322 *referred to*)

If a mortgagee receives any money out of the surplus sale proceeds of a share of the property mortgaged to him, sold in execution of a decree on a prior mortgage from some of the mortgagors to whom the share belonged, and against whom the decree was obtained, he is bound to apply the money to the satisfaction of his mortgage-debt only in case he receives it by virtue of his security, and not otherwise, although the payment might be made to him by the said mortgagors in satisfaction of other debts due to him from them.—*Gangaram* v. *Jaiballav Narain*, [illegible] C. 953.

There is nothing in the C. P. Code or in the T. P. Act to prevent the holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale on each of them in a separate suit.—*Sundar Singh* v. *Bholu*, 20 A. 322.

Where there exists a prior usufructuary mortgage, a subsequent mortgagee of the same property cannot bring the mortgaged property to sale in virtue of his incumbrance until such time as the usufructuary mortgage becomes capable of redemption —*Akhora* v. *Suba Lal*, 18 A 83 (13 A 432 *explained and followed*)

There is nothing in the T. P. Act, which requires that a decree in a mortgage suit should in terms reserve rights admitted by all the parties and order the sale to be subject to them and section 96 *of the T. P. Act* does not militate against this view.—*Srinivasa* v. *Yamunabhai*, 26 M 54: 16 M. L. J. 50

Where a mortgagee, with two mortgages on the same property, obtained a decree for sale of the mortgaged property in satisfaction of the first mortgage, he is debarred from bringing a subsequent suit for sale on

the second mortgage if no mention is made of it in the plaint in the former suit. But it may be open to him, when the decree in the first suit is executed, to enforce his claim on the second mortgage under s. 97 of the T. P. Act, by proceeding against any surplus that remains after satisfying the decree.—*Krishnamachariar* v. *Anangaracharlar*, 30 M. 353: 17 M. L. J. 301 (24 A. 429, P. C. *applied;* 25 M. 108 *referred to;* 20 A. 322 *dissented from*).

Section 96 of the T. P. Act, 1882, does not support the view that the puisne mortgagee is not required to redeem the prior mortgagee when the latter is a party to the suit The prior mortgagee may no doubt consent to a sale free of incumbrances, but it is not impossible that the section was intended to cover cases in which the prior mortgagee is not a party to the suit but intervenes after the decree. Where the prior mortgagee sues for and obtains a decree for sale without making a second mortgagee a party and himself purchases the property, a purchaser of the property from him cannot claim the value of improvements from the second mortgagee under s 51 of the T. P Act in a suit by the second mortgagee to enforce the rights under his mortgage. A mortgagee of property has the right to bring to sale all buildings on such property whether erected before or subsequent to the mortgage —*Cangayam* v. *Gomperts*, 31 M. 425: 18 M. L. J. 298 (20 M 120 *followed*)

See notes under s. 73.

Suit for sale necessary for bringing mortgaged property to sale.

14. (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2.

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882, has been extended

[S 99.]

COMMENTARY.

Scope and Object of the Rule.—This rule corresponds to s 99 of the T. P. Act (IV of 1882), with some additions, alterations and omissions, as will appear on a comparison of the present rule with the old section, which is reproduced here:—"*Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, to sale, otherwise than by instituting a suit under s 67, he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, s. 13*"

It would appear on comparison that the omission of the words "or not" which stood after the words 'under the mortgage,' in the old section is most significant, inasmuch as the present rule does not preclude the

mortgagee from bringing to sale the mortgaged property in execution of a money-decree unconnected with the mortgage-debt; in other words, a mortgagee who has obtained a money decree against the mortgagor in satisfaction of any claim not arising under the mortgage but quite unconnected with it, will be able to bring the mortgaged property to sale. But if he obtains a simple money decree upon his mortgage, he will not be entitled to sell the property comprised in the mortgage in execution of that decree, without instituting another suit under s. 67 of the T. P. Act, and r. 2 of Or. II, will not bar such a suit.

Under the old section the mortgagee was precluded from selling the mortgaged property in satisfaction of any claim, whether arising under the mortgage or unconnected with it, without instituting a suit under s. 67 of the T. P. Act.

The reasons for the amendment will appear from the following report of the Special Committee. "We approve of the proposal to repeal the provisions of s. 99 of the T. P. Act. We think that those provisions have worked considerable hardship and are not really needed." The first part of the section enacts that a *mortgagee* shall not bring the mortgaged property to sale otherwise than by instituting a suit under s. 67 of the Act. In so far as it precludes the mortgagee from selling the *mortgaged* property under a judgment unconnected with the mortgage-debt it is in our opinion inexpedient; it is beyond doubt competent to a mortgagee to purchase the equity of *redemption from the mortgagor* by an agreement subsequent to and distinct from the mortgage transaction, and we can see no reason why it should not be equally competent to him *to have it* sold in satisfaction of any claim which he may have against the mortgagor unconnected with the mortgage. (*Khairajmal* v. *Daim*, 32 C. 296, P. C., 1 C. L. J. 584. 9 C. W. N. 201: 7 Bom. L. R. 1: 2 A. L. J. 71, *Lal* v. *Reew*, 1902 A. C. 461).

"In so far as it precludes the mortgagee from selling the property under a judgment for the morgage-debt it serves no useful purpose. We understand that the provision was enacted to prevent *mortgagees* from suing their mortgagors on the debt as such and *in execution* selling the mortgagor's interest in the property; we, however, think that no such provision was needed, seeing that under the law as it stood prior to the Act, the Courts never allowed the sale of a bare equity of redemption under a judgment on the covenant. (*Syed Emam* v. *Raj Coomar*, 23 W. R. 187; *Khairajmal* v. *Daim*, 32 C. 296, P. C.)."

It would appear from the above report of the *Select Committee* that at first it was proposed to repeal s. 99 of the T. P. Act altogether, and not to insert any similar provision in the present Code, and s. 99 was, therefore, altogether omitted from the Bill. But subsequently r. 14 has been inserted in the present Code in an amended form, whereby a mortgagee has been empowered to bring the mortgaged property to sale in execution of any other money decree not arising on his mortgage and quite unconnected with and distinct from the same, without instituting a suit under s. 67 of the T. P. Act. He is, however, precluded under the present rule from bringing the mortgaged property to sale without instituting a suit under s. 67 of the T. P. Act, if he obtains a *simple money decree* upon his mortgage by relinquishing his mortgage security. But if the

same time, he is entitled to bring a second suit under s 67 of the T. P. Act, for that purpose, and his second suit will not be barred by Or. II, r. 2.

The re-insertion of s. 99 of the T .P. Act in the Code in the amended form, has rendered para. 2 of the Select Committee's Report as *obiter*.

The obvious intention of this rule is to prevent the mortgagee from executing a money decree against the mortgaged property so as to deprive the mortgagor of his right of redemption conferred by law.

Meaning of the term "Mortgagee" in this Rule.—"Mortgagee" in Or. XXXIV, r. 14, was intended to mean the holder of a subsisting and effective mortgage which could still be set up by the mortgagee against a purchaser or would be purchaser of the mortgaged property. A mortgage which has become in-operative or time-barred should not be deemed to be a mortgage which should bar the sale of the property —*Chedilal* v *Sadatunnissa*, 39 All. 36. 14 A L. J. 902

Sale of Mortgaged Property in Satisfaction of a Claim Not Arising under the Mortgage and Unconnected with and Distinct from it.—The words "where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage" in Or. XXXIV, r. 1, mean, that the decree should relate to the payment of money in satisfaction of a claim arising under the mortgage, *i e*, mortgage independent of the decree It can have no application where the charge of the mortgage is created by the decree and where the direction as to the payment of money is in no sense in respect of a claim arising under the charge of the mortgage —*Ambalal* v. *Narayan*, 43 B. 631 21 Bom. L R 698: 51 I. C. 929.

In order to escape the mischief aimed at by Or XXXIV, r. 14, the claim of the mortgage must be distinct from, that is to say, unconnected with the transaction The words "a claim arising under the mortgage" mean any claim under the mortgage.—*Mussammat Kadma Pasin* v. *Muhammad Ali*, 17 A. L J. 481 50 I C 134

Order XXXIV, r. 14 of the C P. Code, is confined to claims arising under the mortgage and does not apply to a case where the sale takes place in execution of a decree for money upon a claim not arising out of the mortgage —*Raja Jagadish Chandra Dhabal Deo* v. *Bhubaneshwar Mitra*, 27 C. W. N 38.

A mortgagee cannot sell the mortgaged property in execution of an ordinary money decree in satisfaction of a claim not arising under the mortgage. Section 99, T. P Act, limits the right of a decree-holder in such a case and provides that he shall not bring the mortgaged property to sale otherwise than by instituting a suit under s 67 of that Act —*Jadub Lall* v. *Madhub Lall*, 21 C 34 *See* also, *Hanmant Timaji* v *Raghavendra*, 22 Bom. L. R. 550.

Where the mortgagee being in possession gave the mortgaged property in lease to the mortgagor, it being stipulated that the rent payable under the lease would be taken in lieu of interest, and the equity of redemption having been sold in execution of a decree for arrears of rent obtained by the mortgagee on the basis of the lease and purchased by the mortgagee: *Held*, that the sale was not in execution of a decree for the satis-

faction of a claim arising under the mortgage.—*Uttam Chandra* v. [illegible] *Krishna*, 47 C. 377 F. B.: 24 C. W. N. 229: 31 C. L. J. 99: 55 I. C. 157 (Followed in *Ramnarayan* v. *Bishwanath*, 1920 Pat 250). See also *Kadma Pasin* v. *Mahomed Ali*, 17 A. L. J. 481: 50 I. C. 134

When a landlord has taken a mortgage of the holding of a [illegible] he is debarred by s. 99 of the T. P. Act, from bringing the tenure to [illegible] in execution of his rent decree otherwise than by instituting a suit [illegible] s. 67 of the T. P. Act.—*Rai Ramani Dasi* v. *Surendra Nath*, 1 C. W. N. 80.

A usufructuary mortgagee who had leased the mortgaged premises [illegible] his mortgagor could not in execution of simple money decree for [illegible] against the mortgagor attach and sell the mortgaged premises, but [illegible] bring a suit under s. 67 of the T. P. Act, IV of 1882.—*Azimulla* v. *[illegible] munnissa*, 16 A. 415. See also, *Mahabir* v. *Saira Bibi*, 17 A. 520; [illegible] *him Goolam Hussainbux* v. *Nihal Chand*, 22 Bom. L. R. 113: 55 I. C. 536. See however, *Parmanand* v. *Daulat Ram*, 4 A. 549

A usufructuary mortgagee obtained, against his mortgagor, a [illegible] money decree which had nothing to do with the mortgage or the [illegible] secured thereby. The mortgagee transferred his money decree to a [illegible] party. *Held*, that there is nothing to prevent the transferee from [illegible] ing to sale the mortgaged property.—*Banh Bal* v. *Mauni Lal*, 27 [illegible] (22 C. 813 *distinguished*). Dissented from in 31 M. 33: 17 M. L. J. [illegible]

The claim of the plaintiff, under a money decree which he [illegible] by this suit to enforce was one which arose independently of a usufructuary mortgage held by him and in respect of which he had attached the [illegible] of the mortgagor. *Held*, that the suit under s. 67, T. P. Act, was [illegible] course to be adopted while there was a subsisting attachment of the [illegible] gagor's interest entitling the plaintiff to sue thereunder, and having [illegible] to the object of s. 99 of the T. P. Act, the decree to be made in [illegible] suit should not be merely for the sale of equity of redemption, but [illegible] be for the sale of the property free from the mortgage claim of the [illegible] and the sale-proceeds should be applied first to discharge the mortgage [illegible] the property in order of their priority, and the surplus towards the [illegible] faction of the plaintiff's claim under the attachment, so far as [illegible] necessary.—*Govinda Bhatta* v. *Narain Bhatta*, 20 M. 421: 16 M. L. J. 285

A mortgagee brought a suit for sale on his mortgage, the suit [illegible] in a compromise and he took a money decree in which however the [illegible] perty originally hypothecated to him was set out as being charged [illegible] that the mortgagee decree-holder could not bring the mortgaged [illegible] to sale in execution of this decree, but if he wished to do so, he [illegible] have to institute a suit under s. 67, T. P. Act, on the decree.—[illegible] v. *Biharigir*, 28 A. 58: 2 A. L. J. 479 (22 C. 859 *followed*)

A landlord who holds a mortgage over his tenant's holding [illegible] execution of a decree obtained by him against the tenant for [illegible] the holding to sale, except by means of a suit under s. 67 of the T. P. Act.—*Basiruddi* v. *Kailas Kamini*, 33 C. 118 (26 C. 161 *followed* [illegible] also, *Sonu Singh* v. *Behari Singh*, 33 C. 283 (25 C. 161, 30 C. 453 [illegible] 347 *referred to*). See, however, *Parmanand* v. *Daulat Ram*, 21 A. [illegible]

Section 99 of the T. P. Act does not prevent a mortgagee from bring- the mortgaged property to sale in execution of a decree for interest ly obtained in accordance with the terms of the mortgage bond.—*Kasi rshad* v. *Jamuna*, 31 C. 922.

Sale of Mortgaged Property in Satisfaction of a Money Decree Obtained on the Mortgage.—A mortgaged property cannot be sold in execution a decree obtained not strictly in accordance with the provisions of the P. Act.—*Chandra Nath* v. *Barroda*, 22 C 813. But in *Lal Behari* v. *ibibur*, 26 C. 166; *Jogemaya* v. *Thakomoni*, 24 C. 473; *Fazil Hawladar Krishna Bandhoo*, 25 C. 580, it has been held that a decree which is not ictly in accordance with the provisions of the T. P. Act, but is a mort- ge decree, may be regarded as a mortgage decree under the T P. Act.

A mortgagee who has obtained a simple money decree in satisfaction a claim arising under his mortgage is competent to bring the mortgage operty to sale in execution of his decree if the mortgage has ceased to enforceable. Or. XXXIV, r. 14 applies only where the decree obtained the mortgagee is for the payment of money in satisfaction of the claim ising under the mortgage; but the mortgage must be a subsisting mort- ge and not one which by the reason of flow of time or any other like cumstance has ceased to be enforceable by law —*Tansukh Rai* v. *Sri opal*, 63 I. C. 445. *See* also, *Arumugam Pillai* v. *N. P R. M. Alagappa iettiar*, 41 M. L. J 160

A mortgagee holding a money bond from mortgagor—Transfer of oney bond—Transferee suing upon the money bond can bring the mort- ged property to sale and his suit is not barred by s 99 T. P. Act, and did not take the bond subject to any liability or equity, to which his ansferor, the mortgagee, was subject with regard to the mortgaged pro- erty.—*Narhar* v. *Shivram*, 7 Bom. L. R. 816 (32 C 296, P C , p 301 *ferred to*).

The transferee of a money decree obtained by a mortgagee is prohibited om selling the mortgaged property in execution of such decree, as by rtue of ss. 232 and 233, C. P Code, 1882 (s 49), he takes the decree bject to the conditions prescribed by s. 99 of the T P. Act. There is othing in that section to prohibit the attachment of the mortgaged pro- erty.—*Jeevarathanam* v *Srinivasa*, 31 M. 33 17 M. M. L J 503 (27 . 450 *dissented from;* 9 Bom. L R. 728 *approved;* 22 C. 813 *referred*). *See* also, *Chhagan Guman* v *Lakshman*, 31 B. 462. 9 Bom L R 28, and *Bank Bai* v *Mani Lal*, 27 A 450 2 A L. J 121.

Even though the mortgagee abandons his right under the mortgage nd asks for and obtains a simple money decree, he is precluded by s 99, . P. Act, 1882, form bringing the mortgaged property to sale in execution f the simple money decree —*Kishan Lal* v *Umarao Singh*, 30 A 146: A. L J 121 Relinquishment of the mortgage lien does not prevent he property from being mortgaged property and the mortgagor cannot e deprived of his right of redemption —*Madho Prasad* v. *Baijnath*, 2 A. . J. 356: (1905) A W N 152

A mortgagee is entitled to waive his right to proceed against the ortgaged property and to bring a suit only for a money decree, but e cannot bring to sale the mortgaged property in execution of such

decree without recourse to the provisions of s. 67 of the T. P. Act.—*Ram Keshab* v. *Sanatun Pal*, 2 C. W. N. 320.

Where a decree-holder holds both a decree for sale on a m as well as on a simple money decree against the same judgmen it was not unlawful for him to bring to sale the mortgaged prop the realization of the combined amounts of both the decrees.—*Bharthi* v. *Bhagwangir*, 31 A. 114 (29 A. 196 *referred to*)

A mortgagor obtained a simple money decree upon an ins mortgage bond and in execution brought to sale and purchased th gaged property. In a suit by the mortgagor to redeem, *held*, t mortgagor having been a party to the decree and to the order was not entitled to redeem.—*Dharanikanta* v. *Budharazu*, 30 M. 17 M. L. J. 325 (22 M. 372 *followed*; 22 B. 624: 5 B. L. R. *sented from*).

The equitable right of the mortgagor to redeem property bro sale in contravention of s. 99, T. P. Act, by the mortgagee can when the auction purchaser at such sale is not the mortgagee an party to the suit in which the property was sold.—*Mathu* v. *Ka* 30 M. 313. 17 M. L. J. 163 (22 M. 347 *distinguished*).

A maintenance decree declaring charge on the family property within s. 99 of the T. P. Act, and the decree-holder cannot bring t perties charged to sale without instituting a fresh suit.—*Venkat bamma* v. *Venkanna*, 17 M. L. J. 217.

Sale Held in Contravention of the Terms of this Rule, If Abs Void or Merely Voidable.—The provisions of Or. XXXIV, r. 14, Code, are not so wide as those of s. 99 of the T. P. Act and d with a matter of procedure not of substantive law.

A sale held in contravention of the terms of s. 99, T. P. A of 1882), is not a nullity, but an irregular sale and is liable to be av an application under s. 244, C. P. Code, 1882 (s. 47), before its confirmation on the ground that the provisions of s. 99 of the Act, have been contravened.—*Ashutosh Sikdar* v. *Behari Lal*, 35 F. B.: 6 C. L. J. 320; 11 C. W. N. 1011; *Lal Bahadur Singh* v. *Singh*, 37 A. 165: 13 A. L. J. 138 F. B. *See also*, *Bhai Chand* v. *chhoddas*, 22 Bom. L. R. 670. The Full Bench case is based up Privy Council case of *Khairaj Mal* v. *Diam*, 32 C. 296: 1 C. L. J. 9 C. W. N. 201: 7 Bom. L. R. 1: 2 A. L. J. 71, and in t Bench case the following cases have been referred to and discus

According to a long series of rulings, *viz.*, *Sathunayyan* v. *Muth* 12 M. 325; *Durgayya* v. *Anantha*, 14 M. 74; *Shib Das* v. *Kali K* 30 C. 403: 7 C. W. N. 592; *Vigneswara* v. *Bapayya*, 16 M. 436. *devi Tewari* v. *Ram Saran*, 26 C. 164: 3 C. W. N. 200; *Durg* *Kailash Kamini*, 33 C. 118; *Sonu Singh* v. *Behari Singh*, 23 C. sale, having taken place in contravention of the terms of s. 99 of T. P. Act, is a nullity. In other cases, *viz.*, *Chundra Nath* v. *Bis* 23 C. 813; *Aubhoyessury* v. *Gouri Sankar*, 22 C. 679, *Ma* *Chooneymoney*, 22 C. 903; *Lachmi Narain*, v. *Nand Kishore*, 543; *Tokhan Singh*, v. *Girwar Singh*, 32 C. 491; *Hemban* v. *Beh* 58, the principle has been laid down that a sale so held is null

In *Azimulla* v. *Nujmunnissa*, 16 A. 415; in *Mahabir Singh* v. *Saira Bibi*, 17 A. 520; in *Gobinda Bhatta* v. *Narain Bhatta*, 29 M. 424; *Matangini* v. *Chooneymoney*, 22 C. 903; and in *Lachmi Narain* v. *Nand Kishore*, 29 C. 537, it has been held that a suit under s. 67 of the T. P. Act is necessary to enforce the mortgage or charge before the holder thereof can sell the property and obtain satisfaction of a money decree held by him.

It has been uniformly held that if a mortgagee in execution of a money decree, seeks to sell the mortgaged property in contravention of the provisions of s. 99 of the T. P. Act, and if an objection is taken before the sale, by the holder of the equity of redemption, the objection must be allowed, and the sale prevented. To this effect are the decisions in *Chandra Nath* v. *Burroda*, 22 C. 813; *Aubhoyessury* v *Gouri Sankar*, 22 C. 859; *Rai Ramani* v. *Surendra*, 1 C. W. N. 80, *Tokhan Singh* v. *Girwar Singh*, 32 C. 494; *Hemban* v. *Behari*, 28 A. 58; *Madho Pershad* v. *Baij Nath*, 2 A. L J. 356; *Kaveri* v. *Ananthayya*, 10 M 129; *Kaji Inus* v. *Kaji Inus*, 8 Bom. L R 576.

In the following cases it has been held that a sale of the mortgaged property by a mortgagee in execution of a money decree in contravention of the provisions of s. 99 of the T. P Act, passes no title to the purchaser. In other words, the purchaser acquires no title under the sale. —12 M. 325: 14 M. 74: 26 C. 164. 30 C. 463 33 C. 113 and 23 B. 119.

Where a mortgagee in contravention of s 99 of the T P. Act has attached the mortgaged property and brought it up to sale and purchased it himself, the mortgagor or his transferee cannot successfully maintain a suit for redemption of the property without first getting the sale set aside.—*Uttam Chandra Daw* v. *Raj Krishna Dalal*, 47 C. 377 F. B.: 24 C. W. N. 229 31 C. L. J 98. 55 I C. 157.

In the following cases it has been held that sale in execution of a money decree in contravention of s. 99, T P. Act, is an illegal sale, which requires to be set aside in order that it may cease to be operative, *viz.*, 16 M. 436, 22 M 347, 22 M 372, 10 M. L. J. 110, 18 A 329, 27 A. 517, 33 C 283, and 17 M L. J. 217

In the following cases it has been held that a sale held contrary to provisions of s. 99, T P Act, is not a nullity and that though voidable, yet, if it is not formally annulled, it does not affect the right of redemption of the mortgagor, *viz*, 22 B 624, 23 M 377, 22 M. 347, 29 M. 421. But if such a sale does in fact take place and is confirmed and a certificate granted to the purchaser, it cannot afterwards be impeached.—*Kishan Lal* v. *Umraj Singh*, 30 A 146· 5 A L J 121 (12 C. W. N. I. 10 M. L. J. 110, 26 C 727, 29 A 612, 33 C 283 *referred to*)

On a reference to the Full Bench case of the Calcutta High Court (Ashutosh Sikdar v *Biharilal*, 35 C 61 F B) *all the cases on the point, decided by any of the High Courts are to be found, and each case has been fully discussed and explained in the judgment of Mookerjee, J*

The principle laid down in the above Full Bench case of the Calcutta High Court has also been adopted by the Madras High Court in the following case, *viz.*, in *Muthu* v *Karuppan*, 30 M 313· 17 M L J 163, where it has been held that a sale in violation of s 99 of the T P Act is voidable only and not void (22 M 347, 22 B 624, 23 M 377 *referred to*) See,

Venkayya v. *Surayya*, 30 M. 362: 17 M. L. J. 325, and the cases there referred to, and also *Muhammad Abdul* v. *Dilsukh Rai*, 27 A. 517, 21 L. J. 210. In these cases it has been held that a sale held in contravention of s. 99 of the T. P. Act is voidable only and not void. See also *Bhaichand* v. *Ranchhoddas*, 22 Bom. L. R. 670.

Order II, Rule 2, C. P. Code, is No Bar to a Subsequent Suit.—The effect of this rule is that if the mortgagee obtains a simple money decree upon his mortgage he cannot sell property comprised therein without instituting another suit under s. 67 of the T. P. Act and such suit is not barred by s. 43, C. P. Code, 1882 (Or. II, r. 2).—*Bhola Nath* v. *Muhammad Sadiq*, 26 A. 223 (16 A. 415 and 25 B. 161 *referred to*). See also *Surajnarain* v. *Jagbali*, 18 A. L. J. 677.

Section 43 of the C. P. Code, 1882 (Or. II, r. 2), is directed against two evils: the splitting of claims and the splitting of remedies. If a man omits from his suit a portion of his claim, he shall not afterwards sue in respect of it: if he omits one of his remedies, he cannot afterwards pursue it, so that if a mortgagee sues on his personal security alone, he cannot afterwards sue on his real security. Section 99 of the T. P. Act is aimed at another distinct evil: the hardship inflicted on mortgagors by mortgagees proceeding to realize their claim by execution of money decrees passed in respect of the mortgagor's personal liability. Consequently, that section provides, that mortgaged property shall not be sold in execution of a decree otherwise than by an ordinary mortgagee's suit. It will be seen, therefore, that the primary purpose of s. 99 is not to protect but to curtail a mortgagee's powers; and to secure that end, and for that purpose alone, the bar imposed by s. 43, C. P. Code, 1882, has been relaxed.—*Govind* v. *Prashram*, 25 B. 161 (167).

Suit by mortgagee for personal decree in one Court—Subsequent suit against mortgaged property in another Court—Latter suit not within jurisdiction of former Court. *Held*, that the latter suit was not barred by reason of the former suit either under s. 13 or under s. 43 of the C. P. Code, 1882.—*Narasinga* v. *Venkata Narayana*, 16 M. 481.

This Rule If Applies to the Enforcement of Security Bond Given for Performance of a Decree.—Section 99, T. P. Act, has no application to the enforcement, by a process of the Court, of a security bond given to the Court, for the performance of its decree.—*Janki Kuar* v. *Sarup Rani*, 17 A. 99 (101).

A security bond given during the pendency of an appeal, creating a charge on the sureties' property, can be enforced by summary procedure, and this rule does not apply when no person is named as mortgagee, for the Court is not a juridical person.—*Raghubar Singh* v. *Jai Indra*, 47 I. A. 228: 42 A. 158. 55 I. C. 550; *Official Receiver* v. *Nagiretnam*, 49 L. J. 643. 92 I. C. 497: A. I. R. 1926 Mad. 194.

Consent-decree.—This rule does not apply to consent-decrees. The mortgagee can waive the benefit of this rule.—*Indramani* v. *Surendra*, 35 C. L. J. 61. 64 I. C. 852: A. I. R. 1922 Cal. 35; *Kashi* v. *Priyanath*, 28 C. W. N. 550. 83 I. C. 424: A. I. R. 1924 Cal. 645.

The relationship between a decree-holder, and a judgment-debtor who has executed a security bond mortgaging certain properties, for the p-

formance of the decree, is not that of mortgagee and mortgagor; the decree-holder is therefore entitled to realize his decretal money by sale of the properties given in security, without instituting a suit under s. 67 of that Act.—*Shyam Sundar* v. *Bajpai*, 30 C. 1060: 7 C. W. N. 914. *Indramani* v. *Surendra Nath*, 35 C. L J. 61: 64 I. C. 852. But in *Tokhan Singh* v. *Girwar Singh*, 32 C. 494: 9 C. W. N. 372:1 C. L. J. 118, a contrary view has been taken. In this case it has been held that a security bond amounts to a mortgage and the properties comprised in the bond cannot be sold in execution without bringing a suit under s. 67 of the T. P. Act (26 C. 246 *relied on*; 27 A. 99 and 30 C 1060: 7 C. W. N. 914, *dissented from*)

Miscellaneous Cases.—Part of mortgaged property was sold in execution of a decree for costs, otherwise than in accordance with the provisions of s. 99 of the T. P Act, and was purchased by the assignee of the mortgagee decree-holder, and sale was confirmed *Held*, that the mortgagor could not obtain redemption of the property so sold, although the integrity of the mortgage having been broken up it was possible for him to redeem the unsold portion —*Madan Makund* v *Jamna*, 1908, A. W. N 48· 2 A L J. 123

Section 99 of the T. P. Act contemplates attachment of property by a judgment-creditor (even if he be a mortgagee) and he is entitled to attach the property by an application in execution of the decree. The proper time to consider the applicability of s. 99, T. P. Act, is when an application for sale is made in execution —*Nathubhai* v *Bai Ujam*, 32 B. 205: 10 Bom. L. R 274.

Section 99 of the T P Act forbids the sale of the mortgaged property in execution of a decree at the instance of the mortgagee, but it is no bar to an attachment of the property.—*Kaji Inus* v *Kaji Inus*, 8 Bom. L. R 576.

Section 99 of the T P Act cannot be given retrospective effect so as to affect purchase by mortgagees in judicial sales perfected before the Act came into force —*Nanuvien* v *Muthusami*, 20 M 421· 15 M L J. 415. *See* also, *Naranappa* v. *Samacharlu*, 19 M. 382.

Where property was mortgaged to Government under the Agriculturists Loan Act (XII of 1884), but the Government, instead of proceeding under s. 67 of the T. P. Act, caused the property to be sold under the Public Demands Recovery Act. *Held*, that the Government as mortgagee could not sell the hypothecated property except under a decree passed under the T P Act —*Lachmi Narain* v. *Nand Kishore*, 29 C 537.

Where a mortgagee, instead of enforcing his mortgage and bringing the property to sale free of incumbrances (where such course is open) brings to sale the equity of redemption in part of the mortgaged property, and buys it himself, an equity arises which entitles the mortgagor to require satisfaction first out of the property bought by the mortgagee. Otherwise the action of the mortgagee in causing the sale subject to the mortgage might almost necessarily secure to him an undue profit at the expense of the mortgagor —*Fakiraya* v *Gadigaya*, 26 B 88.

The purchase by a mortgagee of portion of the mortgaged property at a Court sale in execution of a money decree of a third party involves

a taking advantage by the mortgagee of his fiduciary position as gagee. *Held*, that the principle of the impossibility of a mortgage ing himself from his liability to be redeemed, as affirmed in *M* v. *Dhondo*, 22 B. 624 and *Mayan Pathuli* v. *Pakuram*, 22 M 34 applicable, even in the absence of fraud or collusion between the gagee and the third party in execution of whose decree the purch the equity and redemption had been made, and that such a pu contravened the principle underlying s. 99, T. P. Act.—*Erusappa liar* v. *Commercial and Mortgage Bank*, 23 M. 377.

The conditions under which a sale of mortgaged property is p sible under s 99 of the T P. Act are not satisfied unless there is a for sale, and in the absence of such decree, the sale is prohibited although a sale in contravention of the section is not absolutel for all purposes, it is at least void against all persons who are n t to the suit in which the decree of money was obtained —*Muthurar Ettappasami*, 22 M. 372

A third person purchasing mortgaged property *bona fide* at a s execution of a money decree obtained by the mortgagee against the gagor obtains a good title free from the mortgage lien, unless th is made subject to it.—*Husain* v. *Shankargiri*, 23 B 119 (22 B *distinguished*).

Section 99, T. P. Act, 1882 is as binding on a revenue Court is on a Civil Court —*Tara Chand* v. *Imdad Husain*, 18 A. 325

15. All the provisions contained in this Order as to th or redemption of mortgaged property sha far as may be, apply to property subject charge within the meaning of section 100 of the Transf Property Act, 1882. [Part of s.

Charges

COMMENTARY.

This rule has been framed by taking a portion of s. 100 of the Act. The following words of s. 100 of the T. P. Act, *viz.*, "*And a provisions hereinbefore contained as to a mortgagee instituting a su the sale of the mortgaged property.*" have been repealed by the Schedule of the C P. Code, of 1908, Section 100 of the T. P. A which the word "*charge*" has been defined, is reproduced below:—

"*Where immoveable property of one person is by act of parti operation of law made security for the payment of money to a and the transaction does not amount to a mortgage, the latter pers said to have a charge on the property, and all the provisions h before contained as to a mortgagor shall, so far as may be, apply t owner of such property, and the provisions of ss. 81 and 82 * * * shall, so far as may be, apply to the person having charge.*"

Distinction between Mortgage and Charge.—The main distinctio tween a charge and a simple mortgage is, that by a charge the cr becomes entitled to have his claim satisfied out of a particular pro

out that property is not transferred to him. By mortgage the interest of the mortgagor in specific immoveable property is transferred to the mortgagee. (*See* s. 58 of the T P. Act). But a charge does not involve a transfer of an interest in specific immoveable property. (*See* s. 100 of the T. P. Act).

By sale, all the rights of the vendor in the property are transferred to the purchaser By mortgage an interest of the mortgagor in the mortgaged property is only transferred, whereby he is entitled to bring the mortgaged property to sale. By charge neither any right nor any interest in the property is transferred but the creditor is entitled to have his claim satisfied out of the particular property, but that property nor any interest in it is transferred to him

A simple mortgage is in the nature of equitable lien, it does not vest any estate in the mortgagee, but only creates a lien as incident to the debt. —*Nadir Hossein* v *Pearoo Thovildarim*, 19 W R 255 14 B L R 425-*note*. The mortgagor remains the owner of the property and may deal with it in any manner he pleases subject only to the conditions of the mortgage. For the distinction between simple mortgage and charge, see *Rangasami* v. *Muttukumorappa*, 10 M. 509 In *Rayzuddi Sheik* v. *Kritarthanath*, 33 C. 985 4 C L J. 219, the distinction between a charge and mortgage has been clearly pointed out by *Mookerjee, J* " There is a considerable difficulty, as is well known, in drawing a sharp line of demarcation between a mortgage and a charge, but there is this well-marked distinction between the two, that a mortgage does, whereas a charge does not, involve a transfer of an interest in immoveable property (*Narayana* v. *Venkataramana*, 25 M. 220, p. 237). A charge differs altogether from a mortgage by a charge the title is not transferred, but the person creating the charge merely says that out of the particular fund he will discharge particular debt. A mortgagee can follow the mortgaged property in the hands of a transferee from the mortgagor, whereas a charge can be enforced against a transferee only, if it is shown that he has taken with notice of the charge. (*Kishan Lal* v *Ganga Ram*, 13 A 28, p 44) A charge-holder cannot follow the property in the hand of an innocent purchaser for value without notice of the charge If a charge is created by operation of law, and the charge does not amount to a mortgage, any subsequent mortgage or sale of the property to a *bona fide* purchaser or mortgagor for value without notice will not be affected by the prior charge A charge-holder can, of course, follow the property if it remains in the hands of the person creating the charge (12 M 69)

A charge under this rule is created as soon as the document is executed. A document which is not creating any charge at the time of its execution but is to operate only as a charge upon the land on the non-payment of the principal money at a future date does not create any charge within the meaning of this rule —*Madho Misser* v *Sidh Binail*, 14 C 687 *See* also, *Harjas Rai* v *Naurang*, 3 A L J 220 (1906) A W N 82 Execution of an unregistered agreement stating that as a security for the loan, a mortgage deed will be executed whenever required by the plaintiff and also depositing some title-deeds, does not create any charge —*Konchadi* v *Shira Rao*, 28 M 51.

Creation of Charge by Act of Parties.—A Hindu executed a document attested by witnesses, whereby he agreed to pay to his sister and after

her death to her daughter Rs. 10 per annum. from the produce of estate inherited by him from his maternal grand-mother. *Held*, the corrody or charge on the profits of the estate was created, which [illegible] the estate in the hands of the widow of the grantor.—*Chatti* v. *Pen[illegible]*; 7 M 23. *See* also, *Ramnad Zemindar* v. *Dorasami*, 7 M 311, [illegible] *Collector of Thana* v. *Krishnanath*, 5 B. 331.

A man by his will may charge his debts on his property either [illegible] express words to that effect or by giving to his executors, being [illegible] devisees of his estate, a direction to pay his debts. As against a purchaser from the executor such a charge cannot be made good unless it is shown that he had notice of the debts and of the intention to defeat them.—*Greender Chunder* v *Mackintosh*, 4 C. 807: 4 C. L. R. 193; *Kher[illegible] Money* v *Doorgamoney*, 4 C. 455; *Anundmoye* v. *Girish Chunder*, [illegible] C. 772; *Hemangini* v. *Nabin Chand*, 8 C. 788: 11 C. L. R. 370.

A charge may be created for religious purposes, and in such cases notwithstanding the religious declaration, the property descends beneficially to heirs subject to a trust or charge for the purposes of [illegible] —*Ashutosh Dutt* v. *Doorga Churn*, 5 C. 438, P. C. Approved in *Jyotindra Nath* v. *Hemanto Kumari*, 32 C. 129 P. C.: 8 C. W. N. [illegible]; [illegible] Bom. L. R. 765. *See* also, *Sonatun Bysack* v. *Juggat Soondree*, 8 M. I. A. 66.

Where having regard to all the circumstances of a transaction, there remains no doubt that a document shows an intention to make the [illegible] security for the payment of the money mentioned *therein*, the document does create a charge.—*Janardana* v. *Anant*, 32 B. 380. 10 Bom L. R. 575.

In a suit for declaration of right, for partition and account a decree was made which provided that a certain sum of money should be paid by the defendant to the plaintiff within a specified time, that the same should form a charge on certain property mentioned, and that in case of default the property should be sold for the realization of the [illegible] *Held*, that the decree was similar to a mortgage decree *nisi* directing property to be sold on non-payment of amount due within a specified time, that such a decree was not a final one, that the plaintiff [illegible] apply in the same suit for a sale order, and that the suit was a [illegible] one.—*Kissory Lal* v. *Sewbux Bogola*, 13 C. W. N. 787 (22 C. [illegible] C. W. N. 17 *referred to*).

Creation of Charge by Operation of Law.—Under s. 95 of the T. P. Act, 1882, a redeeming co-mortgagor has a charge on the share of each of the other co-mortgagors.—*Vasudev* v. *Balagi*, 26 B. 500, p. 503.

By redeeming a mortgage of the ordinary kind under which possession did not pass to the mortgagee, one of the several mortgagors became entitled to a charge on the interest of the other mortgagors for the [illegible] payable by the latter.—*Malik Ahmad Wab Khan* v. *Shams Jehan Begam*, 28 A. 482, P. C.: 10 C. W. N. 626. 3 C. L. J. 481: 3 A. L. J. 860: 16 M. L. J. 269: 8 Bom. L. R. 397.

Where one of two or more co-sharers owning an estate subject to the payment of revenue to Government pays the whole revenue, in [illegible]

save and so does save, the estate from liability to be sold by Government for realizing the arrear of revenue, he is by operation of law entitled to a charge upon the share of each of the co-sharers for the realization of the latter's share of the revenue, as between the co-sharers.—*Rajah Vizianagram* v. *Rajah Setrucherlu*, 26 M 686, F. B. But this case is opposed to the Full Bench case of the Calcutta High Court (*Kinu Ram* v. *Mozaffer Hosain*, 14 C. 809), and of the Allahabad High Court (*Sethchitor Mal* v. *Shiv Lal*, 14 A. 273), and also of the Bombay High Court (*Achut Ram Chandra* v. *Hari Kamti*, 11 B 318). In the Madras Full Bench case all the rulings on the point have been referred to and discussed. *See* also, *Ibn Hosain* v *Brijbhukan*, 26 A 407, F. B., and the cases therein referred to.

On this point, see the cases noted under s 9

A mortgagor who discharges the whole mortgage-debt obtains thereby a charge on his co-mortgagor's share of the mortgaged property in respect of the amount paid by him in excess of the share of the mortgage-debt for which he is proportionately liable and that such charge takes priority over a subsequent mortgage on the same property created by one of the other co-mortgagors.—*Har Prasad* v *Raghunandan*, 31 A 166 (4 A. 58) *See* also, *Bhagwan Das* v *Har Dei*, 26 A 227 (11 M 416 *referred to*).

A person who is entitled to contribution also acquires, in the case of a mortgage, a charge upon the property of his co-mortgagors.—*Ibn Hasain* v. *Brijbhukan*, 26 A 407, F. B , where all the cases of the several High Courts have been referred to and discussed *See* also, *Raushan Ali* v. *Kali Mohon*, 4 C. L J. 79.

A mortgagee having obtained a decree on his mortgage the decretal amount was paid off by one of several representatives of the deceased mortgagor. *Held*, that the latter did not thereby acquire a charge on the mortgaged property within the meaning of s. 100 of the T P. Act, (IV of 1882) —*Jahan Ali Begam* v. *Mirza Shujauddin*, 9 C W. N 865 (26 A. 227 *disapproved* ; 26 B. 379 *distinguished* , 25 C. 565 *referred to*).

Charge under the Rent Act.—The charge referred to in s 65 of the B. T. Act, VIII of 1885, is not such a charge as that defined in s. 100 of the T. P. Act, 1882, and does not require to be enforced in the same manner ; the only consequence which follows from the provisions that rent is a first charge upon an undertenure, is, that a sale held in execution of a decree for arrears of rent, produces the effect described in Ch. XVI of the Bengal Tenancy Act —*Royzuddi Sheik* v. *Kalinath*,, 33 C. 985: 4 C L J 219 *See* also, *Fatick Chundra* v. *Foley*, 15 C 492, where it has been held that the charge under the B T Act is not a charge within the meaning of this Act Neither is a charge for rent created by s 5 of the Madras Estates Land Act (I of 1908) a charge within the meaning of s 100 of the T P Act —*Suramma* v *Suryanarayana*, 42 M. 114: 48 I C 791

Where the plaintiffs and the defendants are co-tenants of certain jotes which were sold in execution of a rent decree and the plaintiffs by paying the decretal amount under s 174 of the B T Act, had the sale set aside, they did not by such payment acquire any charge on the shares of their defaulting co-tenants —*Gopi Nath* v *Ishur Chundra*, 22 C. 800;

Kinuram v. *Mozaffur Hessein*, 14 C. 809, F. B.; *Upendra Lal* v *dra Nath*, 25 C. 565: 2 C. W. N. 425. But see, *Manindra Cha Jamabir Kumari*, 32 C 463 (1 C. W. N. 458, 6 C W. N 794 *fo* The principle laid down in this latter case is not reconcilable w principles laid down in the former cases

Rent Decree and Mortgage Decree—Priority.—A purchaser in tion of a rent decree has priority over the purchaser in executio mortgage decree —*Gopinath* v. *Kashinath*, 9 C. L. J. 234: 13 C. 412; *Meherunnessa* v. *Sham Sundar*, 6 C. W N. 834

A vendor has a charge on the property sold for his unpaid p money *See* s. 55 (4) (*b*) of the T. P. Act, 1882.

The charge which a vendor obtains under s. 55 of the T P different in its origin and nature from the vendor's lien given by th lish Courts of Equity to an unpaid vendor. The English cases a vendor's lien for unpaid purchase money though useful for the p of illustration are not authoritative in the interpretation of law on th ject as laid down in s 55 of the T. P. Act.—*Webb* v. *Macpherson*, 37, P. C.: 8 C. W N 41, P. C. Followed in *Ram Krishna* v. *mania*, 29 M 305 In this case it has been also held (overruling 141: 24 M 233 and 27 M. 28) that Art 132 of the Limitati 1877, is applicable to a suit to enforce such a charge and not art 11

The lien of the unpaid vendor, under s. 55 (4) (*b*) of the T P is non-possessory He has only a right to retain the title-deeds a a charge for the unpaid purchase money, but he cannot retain pos of the property sold against the vendee.—*Velayutha Chetty* v. *Go swami*, 30 M 524

Mortgage being Invalid, Whether it Creates any Charge.—An ment which cannot operate as a mortgage by reason of its not ful the requirements of s 59 of T. P. Act, 1882, does not operate to a charge under s 100 of T. P. Act, IV of 1882.—*Tofaluddi* v. *Mah* 26 C. 78: Approved in *Prannath* v. *Jadunath*, 32 C. 729· 9 C W 637. See also, *Ram Kumari* v. *Srinath*, 1 C. W. N. 81; *Royziddi* v. *Kali Nath*, 33 C. 985; 4 C. L. J. 216 (26 C. 78 and 210, 7 L. R 934, *followed*· 10 M 509, 24 M. 397 *disapproved*); *Samco* v *Abdul Sammad*, 31 M. 337 (33 C. 985: 7 Bom. L. R. 934 *follo* 17 M. L J 39 and 24 M. 397 *disapproved*) and *Nabin Chand* v. *Raj Co* 9 C. W. N 1001

Hindu Widow's Right of Maintenance Whether Creates A Ch upon her Husband's Property.—*See*, notes under s. 9, and also *Gs* v *Kaunsilla*, 31 A. 161, and *Promothonath*, v. *Nagendrabala*, 8 C 489· 12 C. W. N 808, in which it has been held (by Cox, J) th Hindu widow's right of maintenance is a charge on her husband's e in the hands of heirs and of the purchasers colluding with heirs to d the widow's rights, although it may not be so in the hands of persons have purchased it honestly, without notice and without any attemp defraud the widow of her rights. *See* also, s. 39 of the T. P. Act

Mahomedan Widow's Claim for Dower, If Charge upon her Husba Property.—A widow's claim for dower under Mahomedan law is c

lien on her husband's property, such as is obtained by a mortgage, but ranks on a par with ordinary debts —*Ameer Ammal* v. *Sankaranarayanan*, 25 M. 658. *See* also, *Wahidunnissa* v *Shubrattun*, 6 B. L R 54. In *Bholanath* v. *Maqbulunnissa*, 26 A. 28, it has been held that a widow's claim for dower though not a charge upon her husband's property, but her decree for dower is entitled to priority over the decree against the heir for the heir's personal debt.

The Provisions of this Order Apply to a Charge as well as to a Mortgage.—All the provisions contained in this order, as to sale or redemption shall apply to a charge within the meaning of s 100 of the T P. Act. See, *Durgayya* v. *Anantha*, 14 M 74, *Vigneswara* v *Bepayya*, 16 M. 436 and *Girwar Singh* v *Thakur Narain*, 14 C. 730

Charge on the Surplus Proceeds of Sale for Arrears of Revenue or Rent.—The proceeds of a sale for arrears of revenue or rent, being substituted for the mortgaged property, become subject to the lien to which that property was subject This principles is recognized in s 73 of the T. P. Act, (IV of 1882).

The surplus sale-proceeds whether in the hands of the Collector or of creditors of the mortgagor are available to satisfy the mortgagee's claim. *See*, *Heera Lal* v *Janokeenath*, 16 W R 222, *Kristodas* v *Ram Kant*, 6 C. 142, *Gosto Behary* v. *Shib Nath*, 20 C 241, *Raja Gopal* v. *Subbaraya*; 7 M. 31 (5 M 371 *overruled*); *Subramanya* v. *Rajaram*, 8 M. 573; *Prem Chand* v *Purnima*, 15 C 546 24 C 746; explained in 24 C. 642. *See* also, *Jogeshur* v *Ghanasham*, 5 C. W. N 356; *Berhamdeo Prasad* v. *Tara Chand*, 33 C. 92 9 C W N 989; *Umatara* v *Uma Charan*, 3 C L J 52; in these cases it has been held that mortgagee is entitled to a charge on the surplus sale-proceeds after the payment of the arrears of revenue, and that the limitation for a suit to enforce the charge is 12 years under Act 132 of the Limitation Act, and the period of limitation begins to run from the due date of mortgage bond and not from date of sale. *See* also 17 C 143 and 27 C. 180.

On sale of mortgaged property for arrears of rent, the mortgagee has a charge on the surplus sale-proceeds and can enforce his charge —*Gobind Sahai* v. *Sibdut Ram*, 33 C. 878 *See*, *Hem Chandra* v *Tafazzel Hossein*, 8 C. W N 332 But where the sale is occasioned by the mortgagee's own default, he is debarred from recovering the surplus sale-proceeds.—*Chitkan Koer* v. *Mathura Lal*, 3 C L J 220

Sale of mortgaged property for arrears of revenue —Purchase of the same by the mortgagor *Benami*—Realization of the surplus sale-proceeds by the mortgagee —*Held*, that the mortgagee is entitled to have the property sold again in the hands of the tranferee from the mortgagor's successors in title for realization of the balance —*Ganga Sahai* v *Tulsiram* 25 A. 371 (23 C 397 *followed*)

ORDER XXXV.

INTERPLEADER.

1. In every suit of interpleader the plaint shall, in add to the other statements necessary for pl state—

Plaint in interpleader suit.

(a) that the plaintiff claims no interest in the sul matter in dispute other than for charges or co

(b) the claims made by the defendants severally; and

(c) that there is no collusion between the plaintiff and of the defendants. [S 4

COMMENTARY.

This rule corresponds to section 471 of the C. P. Code, 1882, some modifications

In para 1, the word "*shall*" has been substituted for the " must," which occurred in the old section.

The language of clause (a) has been materially changed. Clause of the old section ran as follows: "*That the plaintiff has no intere the thing claimed otherwise than as a mere stake-holder.*"

Clauses (b) and (c) are exactly similar to the corresponding cla of the old section.

See s 88 and notes thereto, where all the cases relating to i pleader suits are collected.

2. Where the thing claimed is capable of being paid i Court or placed in the custody of the Co the plaintiff may be required to so pay place it before he can be entitled to any or in the suit. [S 47

Payment of thing claimed into Court

COMMENTARY.

This rule corresponds to s 472, C. P. Code, 1882, with the m fication that the word "*where*" has been substituted for the " when "; and the words "*the plaintiff may be required to so pay*" the words " the plaintiff must so pay," which occurred in the old

See notes under s. 88.

3. Where any of the defendants in an interpleader-suit is actually suing the plaintiff in respect of the subject-matter of such suit, the Court in which the suit against the plaintiff is pending, shall, on being informed by the Court in which the interpleader-suit has been instituted, stay the proceedings as against him; and his costs in the suit so stayed may be provided for in such suit; but if, and in so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader-suit. [S. 476.]

Procedure where defendant is suing plaintiff.

COMMENTARY.

This rule corresponds to section 476, C. P. Code, 1882, with some additions and alterations.

Alterations in the Rule.—The word "*where*" has been substituted for the word "if" in the beginning; the word "*plaintiff*" has been substituted for the word "stake-holder" which occurred in the old section. The words "*on being informed by the Court in which the interpleader-suit has been instituted,*" have been substituted for the words "on being duly informed by the Court which passed the decree in the interpleader-suit in favour of the stake-holder that such decree has been passed," which occurred in the old section The above change is material, because under the old section the proceedings in other Court could be stayed only after the passing of decree in the interpleader-suit; but under the present rule, the proceedings in another Court can be stayed after the institution of the interpleader-suit The object of the change is clearly explained in the following report of the Special Committee:—

"The Committee think that the institution of the interpleader-suit affords a sufficient reason for the stay of other litigation in reference to the same subject-matter and they have modified section 476 so as to give effect to this view."—*See the Report of the Special Committee.*

Appeal.—Under Or XLIII, r 1, cl. (*p*), an appeal lies from an order under this rule.

4. (1) At the first hearing the Court may—

Procedure at first hearing.

(*a*) declare that the plaintiff is discharged, from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit; or

(*b*) if it thinks that justice or convenience so require retain all parties until the final disposal of the suit.

(2) Where the Court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed.

(3) Where the admissions of the parties do not enable the Court so to adjudicate, it may direct—

(a) that an issue or issues between the parties be framed and tried, and

(b) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff,

and shall proceed to try the suit in the ordinary manner. [S. 473.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s 473, C P Code 1882, with several additions and alterations. The old section is reproduced below to observe the changes introduced in the present rule—

"*At the first hearing, the Court may—*

"*(a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award his costs, and dismiss him from the suit,*

"*or, if it thinks that justice or convenience so require,*

"*(b) retain all parties until the final disposal of the suit; and, if it finds that the admissions of the parties or other evidence enable it,*

"*(c) adjudicate the title to the thing claimed; or else it may*

"*(d) direct the defendants to interplead one another by filing statements and entering into evidence for the purpose of bringing their respective claims before the Court, and shall adjudicate on such claims.*"

Procedure where Defendant does Not Appear.—The plaintiffs who were in possession of a sum of money, filed an interpleader-suit against the two rival claimant-defendants who did not appear at the trial—*Held* that the proper order would be to discharge the plaintiffs from all liability to the defendants in respect of the money and dismiss them from the suit and to direct them to pay the balance into the Court to the credit of the suit after getting their taxed rates —*Khemchand Issardas* v. *Khimchand Ranglahi*, 21 B L R. 948 53 I. C. 365.

Appeal.—Under Or. XLIII, r. 1, cl. (p), an appeal lies from an order under this rule

The adjudication upon the claims of the defendants in an interpleader suit is a decree and stands on the same footing as an adjudication of any other claims, and is appealable under the provisions of s. 540, C P. Code, 1882 (s. 96) The direction as to interpleading is an order appealable under s 588 (Or XLIII) —*Maharaj Singh* v. *Chittar Singh*, 30 A 22 : 4 A L J. 683

5. Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords. [S 474.]

Agents and tenants may not institute interpleader-suits.

Illustrations.

(*a*) *A* deposits a box of jewels with *B* as his agent *C* alleges that the jewels were wrongfully obtained from him by *A*, and claims them from *B*. *B* cannot institute an interpleader-suit against *A*, and *C*

(*b*) *A* deposits a box of jewels with *B* as his agent. He then writes to *C* for the purpose of making the jewels a security for a debt due from himself to *C*. *A* afterwards alleges that *C's* debt is satisfied, and *C* alleges the contrary. Both claim the jewels from *B*. *B* may institute an interpleader-suit against *A* and *C*.

COMMENTARY.

This rule corresponds to section 474, C P Code, 1882, with some modifications The words "*nothing in this order shall be deemed*" have been substituted for the words "nothing in this chapter shall be taken," which occurred in the old section No other change has been made

Interpleader-suit by Tenants.—Plaintiff giving *kabuliyats* to two sets of landlords cannot bring an interpleader-suit against the latter to settle the nature and extent of their right in the land.—*Shelly Bonnerjee* v *Raj Chandra*, 37 C 552· 11 C L J 577 14 C W N 784

A tenant can maintain an interpleader-suit against a landlord and another person when the latter alleges that the landlord only acted as trustee in granting such lease—*Orr* v *Chidambaram*, 33 M 22

A tenant has a right to bring a suit to have it determined which of the two defendants, both of whom obtained rent decrees against him, is his landlord—*Gopal Dac* v *Hari Charan*, 5 C L J 34-N *See* also, *Kasim Saib* v. *Louis*, 17 M. 82 (s. 85) But see, *Koylash Chundra* v. *Goluk Chunder*, 2 C. W. N 61, noted under s 88

Interpleader-suit by a Railway Company.—A Railway Company can file an interpleader suit against the consignor and a third party claiming adversely to the consignor, as the company is not an agent of the consignor within the meaning of Or XXXV, r 5—*Chhaganlal* v *B B C I. Railway*

6. Where the suit is properly instituted the Court may provide for the costs of the original plaintiff by giving him a charge on the thing claimed or in some other effectual way. [S. 475.]

Charge for plaintiff's costs.

COMMENTARY.

This section corresponds to s. 475, C. P. Code, 1881, with some changes of a verbal character.

Appeal.—An appeal lies from an order under this rule. *See* Or. XLIII, r. 1, cl. (p).

ORDER XXXVI.

SPECIAL CASE.

Power to state case for Court's opinion.

1. (1) Parties claiming to be interested in the decision of any question of fact or law may enter into an agreement in writing stating such question in the form of a case for the opinion of the Court, and providing that, upon the finding of the Court with respect to such question,—

(*a*) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them; or

(*b*) some property moveable or immoveable, specified in the agreement, shall be delivered by one of the parties to the other of them; or

(*c*) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement.

(2) Every case stated under this rule shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and specify such documents as may be necessary to enable the Court to decide the question raised thereby. [S. 527.]

COMMENTARY.

This rule corresponds to s. 527, C. P. Code, 1882, with a verbal change, *viz.*, the words "*specify such*" have been added before the word "documents" in sub-rule (2). No other change has been made.

The parties to a suit for possession came to an agreement that they should ask the Court to decide the question of title on the basis of the *thak-bust* map only and the plaintiff agreed to abide by that decision. The Court decided accordingly. *Held*, that in deciding the question on the basis of the *thak-bust* map, in accordance with the agreement of the parties, the Court acted as arbitrator and hence no appeal lay from that decision.—*Kumar Saradindu Roy* v. *Bhagobati Debya*, 10 C. W. N. 835.

2. Where the agreement is for the delivery of any property or for the doing or the refraining from doing any particular act, the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement [S 528.]

Where value of subject-matter must be stated.

COMMENTARY.

This rule corresponds to s. 528, C. P. Code, with this modification that the word "*where*" has been substituted for the word "*when*" in the beginning

3. (1) The agreement, if framed in accordance with the rules hereinbefore contained, may be filed in the Court which would have jurisdiction to entertain a suit, the amount or value of the subject-matter of which is the same as the amount or value of the subject-matter of agreement.

Agreement to be filed and registered as suit.

(2) The agreement, when so filed, shall be numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff, or plaintiffs, and the other or the others of them as defendant or defendants; and notice shall be given to all the parties to the agreement, other than the party or parties by whom it was presented. [S. 529.]

COMMENTARY.

This rule exactly corresponds to s. 529, C. P. Code, 1882

4. Where the agreement has been filed, the parties to it shall be subject to the jurisdiction of the Court and shall be bound by the statements contained therein. [S. 530.]

Parties to be subject to court's jurisdiction.

COMMENTARY.

This rule corresponds to s. 530, C. P. Code, 1882, with the modification that the word "*where*" has been substituted for the word "when" in the beginning.

5. (1) The case shall be set down for hearing as a suit instituted in the ordinary manner, and the provisions of this Code shall apply to such extent as far as the same are applicable.

Hearing and disposal of case.

(2) Where the Court is satisfied, after examination of the parties, or after taking such evidence as it thinks fit,—

(a) that the agreement was duly executed by them,

(b) that they have a *bona fide* interest in the question stated therein, and

(c) that the same is fit to be decided,

it shall proceed to pronounce judgment thereon, in the same way as in an ordinary suit, and upon the judgment so pronounced a decree shall follow. [S. 531.]

COMMENTARY.

This rule corresponds to section 531, C P Code, 1882, with some alterations and omissions.

In para 1, the words "*in the ordinary manner*" have been substituted for the words "under Chapter V" which occured in the old Code

The sentence, "*and shall be enforced in the manner provided in this Code for the execution of decrees*," which stood after the words, "a decree shall follow," in the last para of the old section, has been omitted, probably, as unnecessary The other changes are merely verbal

Appeal.—Where both the parties to a suit referred the matters in dispute between them to the Court, and agreed to abide by the decision, and the Court passed a decree awarding a certain sum to the plaintiff; *Held*, that no appeal lay from the decree, the decision of the Court being in the nature of an arbitration award —*Sayad Zaian* v. *Kalabhai*, 23 B. 752.

Court-fee.—The written agreement must be on a Court-fee of Rs 10 [Sch II, Art. 19, Court Fees Act (VII of 1870)].

ORDER XXXVII.

SUMMARY PROCEDURE ON NEGOTIABLE INSTRUMENTS

Application of Order. **1.** This order shall apply only to—

(*a*) the High Courts of Judicature at Fort William, Madras and Bombay;

(*b*) the Chief Court of Lower Burma;

(*c*) the Court of the Judicial Commissioner of Sind; and

(*d*) any other Court to which sections 532 to 537 of the Code of Civil Procedure, 1882, have been already applied. [S. 538.]

COMMENTARY.

This rule corresponds to section 538, C. P. Code, 1882, with a few alterations and omissions.

Clause (*c*) and the last three paras. of the old section, relating to the power of Local Government to extend these rules to any other Court, have been omitted, and several alterations have been made in the wording and language of clauses (*a*), (*b*), (c) and (*d*), as will appear on comparison.

Small Cause Courts.—"As Chapter XXXIX of the Code is transferred into rules, the Committee have not reproduced paragraph (*c*) of s. 538, as its appropriate place will be in rules under the Presidency Small Cause Courts Act, 1882."—*See the Report of the Special Committee.*

Para (*c*) of the old section ran as follows "*(c) the Courts of Small Causes in Calcutta, Madras and Bombay.*"

The sections have been applied to the following other Courts in—

(1) Burma—

(*a*) Court of the Judge of Maulmain, and

(*b*) Court of the Deputy Commissioner of Akyab;

see Burma Rules Manual, Ed. 1897, p. 110.

(2) the Madras Presidency—

(*a*) District and Subordinate Judges' Courts, and

(*b*) District Munsifs' Courts;

see Madras List of Local Rules and Orders, Ed. 1898, Vol. I, p. 123.

2. All suits upon bills of exchange, hundis or promissory notes may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed; but the summons shall be in Form No. 4 in Appendix B or in such other form as may be from time to time prescribed.

Institution of summary suits upon bills of exchange, etc.

(2) In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit *unless he obtains leave from a Judge as hereinafter provided* so to appear and defend; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree :—

(a) *for the principal sum due on the instrument and for interest calculated in accordance with the provisions of section 79 or section 80, as the case may be, of the Negotiable Instruments Act, 1881, up to the date of the institution of the suit, or for the sum mentioned in the summons, whichever is less, and for interest up to the date of the decree at the same rate or at such other rate as the Court thinks fit; and*

(b) *for such subsequent interest, if any, as the Court may order under section 34 of this Code; and*

(c) *for such sum for costs as may be prescribed:*

Provided that, if the plaintiff claims more than such fixed sum for costs, the costs shall be ascertained in the ordinary way.

(3) *A decree passed under this rule may be executed forthwith.* [S. 532.]

COMMENTARY.

Changes in the Rule.—This rule corresponds with s. 532 of the old Code except in the following particulars:—

(1) The Explanation to s. 532 has been omitted and in lieu thereof the words "*the allegations in the plaint shall be deemed to be admitted*" have been added to sub-rule (2).

(2) The fourth paragraph of s. 532 has been omitted.

(3) The italicized words in clauses (a), (b) and (c) of sub-rule (2) and in sub-rule (3) have been substituted by Amendment Act XXX of 1926 for

the words beginning with the words " for any sum not exceeding " and ending with the words " executed forthwith " of the old rule

Object and Scope of the Rule.—" The explanation to s. [illegible] was inserted to negative the effect of the decision in 1 C. 130, but its meaning, as it stands, is obscure. The committee have therefore deleted the explanation, and added words in the body of the rule which will remove the doubts at which the explanation was aimed "—*See the Report of the Special Committee*. *See* also, 30 C. 446.

By the addition of the words " *the allegations in the plaint shall be deemed to be admitted*," it has now been made clear that in default of defendants obtaining leave to appear and defend, the allegations in the plaint shall be deemed to be admitted. The provisions of this rule are therefore, not limited to those simple cases in which the bill itself together with mere lapse of time is sufficient to establish for the plaintiff a *prima facie* case to recover, as pointed in 1 C. 130; but they are applicable to suits on promissory notes in which there is no express stipulation to pay interest or there is provision for payment by instalments, as the allegations of those facts in the plaint will be deemed to be admission of the defendant, and no further evidence would be required to prove them.

Negotiable Instrument, Bill of Exchange, Promissory Note.—The term " Negotiable Instrument " has been defined in s. 13 and the terms " Promissory Note " and " Bill of Exchange " in ss. 4 and 5, respectively of the Negotiable Instruments Act (XXVI of 1881). *See* also, s. 2, clauses (2), (3) and (22) of the Indian Stamp Act, (II of 1899)

As to " negotiable instrument," *see* also *Jetha Parkha* v. *Ram Chandra*, 16 B. 689; and *Bharata Pisharodi* v. *Vasudevan*, 27 M. 1, F. B. (16 M. 283 *overruled;* 23 M. 156-*n.*, and 13 B. 669 *approved*)

An instrument signed bearing one anna stamp, was in the following terms, *viz.* " On deposit of title-deeds named therein below for safe custody received by me, I promise to pay three months after date, Rs. 100 to A. B. or order ", then followed the details of the title-deeds. *Held*, that the instrument was a negotiable instrument.—*Rama* v. *Sesha*, 17 M. 5[illegible]

Practice and Procedure in Suits under this Order.—A summary suit under this chapter differs from a suit instituted in the ordinary manner on negotiable instruments in the following respects: (1) A *summary suit* can only be instituted in the Courts mentioned in r. 1; (2) It must be brought within 6 months from the date on which the debt becomes due and payable, (3) The defendants in a summary suit is not, as in a suit brought in the ordinary manner, entitled as of right to put in a defence. He must in a summary suit apply for leave to defend and such application under Sch. I, Art. 159 of the Limitation Act must be made within 10 days from the service of summons on him. *If no leave is granted* the plaintiff is entitled to get a decree.

Interest.—In a suit instituted under this Chapter, the plaintiff is not entitled to recover, any interest unless such interest is specified in the note itself, or to give evidence regarding any agreement to *interest.*—*Ela-pati* v. *Sourendra Mohan*, 30 C. 446: 7 C. W. N. 412 (1 C. 130 [illegible]-to).

In a suit on a promissory note instituted under Chapter 37 of the C. P. Code, where no leave had been obtained to defend the suit, the plaintiff is not entitled to a decree for interest at 18 per cent. on the strength of an oral agreement alleged in the plaint. The plaintiff can only get interest at 6 per cent.—*Kader Buksh Hazir Buksh* v. *Shaikh Sirajuddin*, 49 C. 716.

"The allegations in the plaint shall be deemed to be admitted."—The effect of these words which have been substituted for the *Explanation* to s. 532 of the Old Code is to enable the plaintiff to succeed on his own allegations, though the allegations may be of such a nature that if the defendant appeared and denied them, they would have to be proved by the plaintiff. The fundamental principle of law is that the plaintiff, when he comes to Court, must prove his case and he must prove it to the satisfaction of the Court Under the C. P. Code such proof can be dispensed with and the allegations in the plaint considered as admitted only in undefended cases of Bills of Exchange, Promissory Notes and Hundis as contemplated in Or. XXXVII, r. 2 of the Code.—*J. B Ross & Co* v *C R Scriven*, 43 C 1001 · 20 C W. N 1192.

Decree.—A plaintiff suing on a bill of exchange, the drawer, acceptor and endorser, where the endorsement has been made before maturity and without *restriction, is entitled to a decree against all the defendants*; a decree containing a condition exempting the endorser from liability until the plaintiff has exhausted his remedies against the drawer or acceptor is therefore illegal —*Bank of Bengal* v *Kartick Chunder*, 16 C 804. After the usual return of service and the expiration of the period mentioned in the summons, an order of Court for a decree should be obtained —*Schiller* v. *Marker*, 1 Ind. Jur N S. 283

Summons.—In a suit under this Chapter, the Court has no power, after the time fixed by the summons for obtaining leave to appear and defend has expired, to extend the time.—*Quazie Mahmudar Rahman* v *Sarat Chandra*, 5 C W. N 259 (3 B. L. R. 83, and 3 C. 539 *distinguished*)

In a suit under the Chapter, the defendant is bound to make his application for leave to defend the suit within 10 days, from the date of service of summons as shown in the Sheriff's return He cannot be allowed extension of time on the ground of his absence from the dwelling house when the service is alleged to have been effected.—*Madhub Lall* v. *Woopendra Narain*, 23 C 573

The plaintiff is entitled to claim by his summons whatever sum, principal, or interest is, on the legal construction of the instrument, demandable, though as to interest beyond the scope of the instrument, the question is a different one and out of the scope of the Act.—*De Souza* v. *Rangaian*, 6 M. H. C. R. 257.

One who takes a promissory note in his own name *benami* for another is the only party entitled to sue thereon and that the true owner is precluded from maintaining an action in his own name for the amount thereof.—*Ramanuja* v. *Sadagopa*, 28 M. 205; *Subba Narayana* v. *Ramaswami*, 28 M. 244, where it has been further held that the defendant is precluded from pleading that the plaintiff is not the true owner of the note. See also, *Subba Narayana* v *Ramaswami*, 30 M. 88 (21 M. 391 *overruled*). An assignee

of a negotiable instrument otherwise than by endorsement may sue.—*Kuthar Sahib* v. *Kader Sahib*, 28 A. 544.

No person can claim a title to a negotiable instrument through a forged endorsement. Such an endorsement is a nullity and must be taken as if no endorsement was on the instrument (32 C. 799, 815 *not followed*, 21 A. 65, 67 *followed*). Where a plaintiff establishes the fact that a negotiable instrument was obtained from its lawful owner by means of fraud, the onus of proving that a third party was a holder in due course lies on the defendant.—*Bunku Behari* v. *Secretary of State*, 36 C. 239

"Leave to defend."—*See* notes to next rule.

Limitation.—It is optional with the plaintiff to bring a suit under this order, or in the ordinary way. If he sues under this order then the period of limitation is 6 months from the date when the money becomes payable. *See* Art. 5 of the Limitation Act, IX of 1908. But when the plaintiff sues in the ordinary way then the limitation is 3 years. *See Arts*. 69 to 81 of the Limitation Act, (IX of 1908).

Defendant showing defence on merits to have leave to appear.

3. (1) The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit. [S. 533.]

COMMENTARY.

This rule corresponds to s. 533, C. P. Code, with some additions, alterations and omissions.

The words "*upon the defendant paying into Court the sum mentioned in the summons*," which occurred in the old section after the words "Leave to defend the suit" have been omitted, and in sub-rule (2), the words "*Leave to defend may be given unconditionally or subject to such terms as to payment into Court*" have been added. Under sub-rule (2) discretion has been given to Courts to allow the defendant to defend the suit unconditionally or subject to such terms as to payment into Court, as the Court thinks fit. Under the old section it was obligatory upon the Court to grant leave

"Upon affidavits."—An affidavit in support of an application for leave to defend as required by Or. XXXVII, r. 3 (1) of the C. P. Code, must disclose facts sufficient to support the application.—*Firm of Kewalram Sukhanand* v. *Firm of Madandas Siroomal*, 19 I. C. 100; 12 S. L. R. 71

"Leave to defend."—The Court will give leave to a defendant to appear and defend a suit, where he shows a defence apparently real, to

re there is a doubt as to the *bona fides* of the defence, payment of ey into Court will be ordered or security directed to be given.—*lintagy* v. *Narayan Sing*, 6 B L. R. App. 61.

As a rule, leave to defend should be given unconditionally if the *defen-* shows *a prima facie* case or raises a triable issue. Leave should be e conditional if the Court doubts the *bona fides* of the defendant or ks the defence is only put in to gain time.—*Periya Miyana* v. *Subra-ia*, 46 M L J 255 78 I. C 505: A. I. R. 1924 Mad. 612.

In a suit under Act V of 1866 the summons should be returned in usual way; and after the expiration of the required time, an order of Court or a decree should be obtained.—*Schiller* v. *Marker*, 1 Ind. Jur. 5. 283.

The High Court has power to extend the time within which a defendant a suit brought under this Chapter, can come in and obtain leave to end: therefore, in a suit in which it appeared that a defendant resided Peshawar, the time for the defendant to obtain leave from the Court to ear and defend was extended to 28 days.—*Groom* v. *Wilson*, 3 C. 539. *tinguished* in *Quazie Mahmudar Rahaman* v *Saral Chandra*, 5 C. W. 259, where it has been held that the Court has no power to extend the e).

In a summary suit, if a defendant has been arrested before judgment claims compensation for such arrest under s. 491, C. P. Code, 1882, he entitled on the ground to apply for leave to defend the suit, and if a *ma facie* case is made out, leave to defend should be given.—*Roulet* v *Merle*. 18 B 717

"Subject to such terms as to payment into Court."—Where a decree a suit under the summary procedure described by Or. XXXVII is set de on the defendant depositing into court the amount sued for, the ount deposited becomes charged with the decretal amount and is avail-e for the satisfaction of any other decree passed. It is not com-ent to the Court passing the decree to enquire into the question whether amount deposited was or was not the defendants' own money.—*Gopal r* v. *Tiruvengadam Pillai*, 32 M. L. J. 503: 5 L. W. 407.

Where in a suit on a promissory note filed under Or. XXXVII, the fendant by his affidavits shows that he has a real defence to the suit, but sincerity of which may be open to doubt the proper course is to give defendant leave to defend on his bringing the suit money into Court.—*Chakrapany Chettiar* v. *Kamalvalli Ammal*, 12 L. W. 712.

Limitation.—Application for leave to appear and defend must under t. 159 of the Limitation Act be made within 10 days from the date of rvice of summons on the defendant. In determining any question as to nitation arising on an application under this rule, the date shown in the eriff's return as the date of service should only be referred to.—*Madhub ll* v. *Woopendra Narain*, 23 C. 573.

Appeal.—An order under this rule is not appealable. *See*, *Sukhlal Eastern Bank Ld.*, 42 C. 735.

4. After decree the Court may, under special circumstances set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit. [S. 534.]

Power to set aside decree.

COMMENTARY.

This rule corresponds to s. 534, C. P. Code, 1882, with the addition of the words "*to the defendant*" after the words "may give leave". No other changes have been made.

Special Circumstances.—This rule gives the defendant a right in special circumstances to set aside the decree, and, if necessary, to stay or set aside execution, and where a defendant fails to obtain leave to defend on the ground of the expiration of 10 days from the date of service of summons his remedy is under this rule.—*Quazi Mahmudar Rahman v. S... Chandra*, 5 C. W. N. 259.

A defendant who has obtained no leave to defend a summary suit cannot be allowed to appear while the hearing is proceeding. Or. XXXVII contemplates that a decree should be passed in such a cases in accordance with the plaint. Thereafter the defendant can apply under Or. XX, r. 11 (2), for payment of the decretal amount by instalments or to grant him any of the reliefs in Or. XXXVII, r. 4.—*Pestonji v. Jamshedji*, 51 B. 2... 94 I. C. 9. A. I. R. 1926 Bom. 250.

An appeal lies from an order made under this rule, refusing to set aside an *ex parte* decree.—*Luckmidas v. Ebrahim*, 2 B. 644.

5. In any proceeding under this Order the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof. [S. 535.]

Power to order bill, etc., to be deposited with officer of Court.

COMMENTARY.

This rule corresponds to section 535, C. P. Code, 1882, with a few verbal alterations.

6. The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this Order for the recovery of the amount of such bill or note. [S. 537.]

Recovery of cost of noting non-acceptance of dishonoured bill or note.

COMMENTARY.

This rule corresponds to section 536, C. P. Code, 1882, with some verbal changes only.

Procedure in suits.

7. Save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner.

[S. 537.]

COMMENTARY.

This rule corresponds to s 537, C P Code 1882, with some verbal changes only.

ORDER XXXVIII.

ARREST AND ATTACHMENT BEFORE JUDGEMENT.

Arrest before Judgment.

Where defendant may be called upon to furnish security for appearance.

1. When at any stage of a suit, other than a suit of the nature referred to in *section* 16, clauses (*a*) to (*d*), the Court is satisfied, by affidavit or otherwise—

(*a*) that the defendant, with intent to delay the plaintiff, or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against him—

(*i*) has absconded or left the local limits of the jurisdiction of the Court, or

(*ii*) is about to abscond or leave the local limits of the jurisdiction of the Court, or

(*iii*) has disposed of or removed from the local limits of the jurisdiction of the Court his property or any part thereof, or

(*b*) that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, [S. 477.]

the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance : [S. 478.]

Provided that the *defendant* shall *not* be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim ; and such sum shall be held in deposit by the Court until the suit is disposed of or *until the order of the Court.* [New.]

COMMENTARY.

This rule corresponds to ss. 477 and 478, C. P. Code 1882 with several alterations and omissions.

The provisions of ss 477 and 478 have been amalgamated in this rule. Some of the words and phrases of s 477 have been changed and replaced by more appropriate words and phrases; and the last para. of s 477, which ran as follows: *"The plaintiff may apply to the Court that security be taken for the appearance of the defendant to answer any decree that may be passed against him in the suit,"* has been omitted probably as unnecessary.

The last para only of s 478 has been embodied in this rule, and the other portions of the section, which contained provisions almost similar to s. 477, have been omitted, probably as redundant. Section 478, C. P. Code, is reproduced below for the purpose of comparison and to observe the changes introduced by the present rule —

"If the Court after examining the applicant, and making such further investigation as it thinks fit, is satisfied—

"that the defendants, with any such intent as aforesaid—

"(a) has absconded or left the jurisdiction of the Court, or

"(b) is about to abscond or to leave the jurisdiction of the Court, or

"(c) has disposed of, or removed from the jurisdiction of the Court, his property or any part thereof, or

"that the defendant is about to leave British India under the circumstances last aforesaid,

"the Court may issue a warrant to arrest the defendant, and bring him before the Court to show cause why he should not give security for his appearance"

On comparison it would appear that the first para. of s 478, which contained provisions for the examination of the applicant and for making further investigation before issuing warrant for arrest has been omitted, the last para. of the section has been retained and embodied in this rule, and the other portions of the section, the provisions of which were almost similar to s 477, have been omitted as redundant.

Clauses (*a*) to (*d*) of s 16 refer to the following classes of suits (*a*) for the recovery of immoveable property, (*b*) for partition of immoveable property, (c) suits for foreclosure, sale or redemption in the case of a mortgage of or charge upon immoveable property, (*d*) for the determination of any other right to or interest in immoveable property All these suits are excluded from the operation of this rule

The proviso is new, and it is similar to rule 38 of Or XXI

Under the present rule no further examination of the applicant or investigation, except the affidavit, is needed to take action under this rule But under the old s 478 it was necessary to examine the applicant and to make further enquiry before taking action under ss 477 and 478. The present rule has simplified the procedure to a certain extent

"The Court is satisfied by Affidavit or otherwise."—A creditor, is not entitled, merely because he has a just demand against his debtor, to move the Court to put in force the extraordinary processes of arrest or

attachment ; he must also have good reason to believe that his de... is about to leave the jurisdiction of the Court, or to deal with his prop... in such a manner that it will be unavailable for satisfaction of the c... against him.—*Goutiere* v. *Charnol*, 2 N. W. P. (1870) 353.

It is not necessary for the plaintiff to show that the defendant ... to obstruct or delay the plaintiff in execution of his decree in ord... justify an application to the Court for his arrest before judgment, ... enough if his going away will have that effect.—*Agra and Masterman Bank* v. *Minto*, I Ind. Jur. N. S. 265

A defendant failing to show good cause will be ordered to find se... for the amount of the claim and the costs of the suit. And "good ca... must be either (1) that he is not going to leave India, or not for su... time as will obstruct, or be likely to obstruct, the plaintiff, ... succeed ; or (2) that the suit is not a *bona fide* one ; or (3) that ... it is, the institution of it has been vexatiously delayed till the defe... is about to depart from India, in order to embarrass or coerce h... *Spencer's Hotel Company* v. *Anderson*, I Ind. Jur. N. S. 294 *note*

Where an officer proceeding from Burma to England on leave, ... ed a few days in Madras on the way ; *held*, that such residence was ... cient for the purposes of s. 648, C. P. Code, 1882, to render him li... arrest before judgment —*Everet* v. *Frere*, 8 M. 205

Where a person has to leave his place of residence for attendance ... criminal court, his departure is not with a view to delay the pl... avoid the process of Court or to obstruct or delay execution and ... under Or XXXVIII, r 1, is not justifiable —*Daulat Ram* v. *Kanja* ... 4 Lah L J 423

The mere fact that an appeal is pending against a decree is n... for not enforcing execution by arrest when the execution has ... stayed.—*Mehr Chand* v. *Ram Lal*, 73 I. C. 766

A suit was instituted against the master of a vessel for repairs d... to his vessel and for hire of a dock in which the vessel had been. T... master being about to leave the jurisdiction of the Court, the pl... applied under s 477, C P. Code, 1882 (Or. XXXVII), for an ord... the defendant should give security for his appearance *Held*, that ... case fell within s. 477, C. P. Code, 1882 (Or XXXVII), and that the de... fendant should furnish security for his appearance.—*Probode Chund...* *Dowey*, 14 C 695.

Warrant.—For Form of warrant of arrest under this rule, *See* Appen... dix F , No. 1

Consequence of Obtaining Arrest on Insufficient Grounds.—*See* ...

2. (1) Where the defendant fails to show such cause ... Court shall order him either to deposit ... Court money or other property suffici... answer the claim against him, or to furnish security for his ap... pearance at any time when called upon while the suit is pend... and until satisfaction of any decree that may be passed ag...

Security.

him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to the last proceeding rule. [S. 479.]

(2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

COMMENTARY.

This rule corresponds to s. 479, C P Code, 1882, with some alterations and additions

In sub-rule (1), the words "*or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to the last preceding rule,*" have been added The addition has been made on account of the addition of proviso to r 1

Sub-rule (2) corresponds to para. 2 of the section with change of some words only; no change has been made in the meaning

Deposit in Court.—Where after deposit in Court, other decree-holders of the defendant attach the money so deposited, or the defendant becomes an insolvent, the plaintiff on obtaining his decree is entitled to priority over the claims of the other attaching decree-holders and the Official Receiver —*Ramiah* v *Gopalier*, 41 M 1053

Security.—The object of a security bond executed under Or XXXVIII is merely to secure the rights of judgment-creditor. The Court has no power to declare forfeiture of the bond in favour of Government. The bond should be enforced only on the application of the judgment-creditor and only to the extent of the sums found payable under the decree —*Hussain Ali* v. *Secretary of State*, 28 I C. 92

Payment by Surety.—Money paid by a surety after decree, is liable to rateable distribution.—*Ghisu Lal* v *Todarmull*, 26 C W N 169 · 70 I. C. 539, A I R. 1922 Cal 19

Extent of Liability of Surety.—Where a person stands surety under Or. XXXVIII, r. 2, C P Code for another arrested before judgment, the surety is not discharged from liability unless at the time when the judgment-debtor is produced, he can be called upon to pay up the decretal amount or suffer imprisonment in default The mere production of the debtor with a production order does not absolve the surety —*Subrahmania Iyer* v. *Abdul Rahman*, 1 Bur. L J 196

Appeal.—An order under this rule is appealable, *see* Or XLIII, r. 1 (*q*)

3. (1) A surety for the appearance of a defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation.

Procedure on application by surety to be discharged.

(2) On such application being made, the Court shall summon the defendant to appear or, if it thinks fit, may issue a warrant for his arrest in the first instance.

(3) On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security. [S. 480.]

COMMENTARY.

This rule corresponds to s. 480, C. P. Code, 1882, with some [illegible] changes only.

Section 253, C. P. Code, 1882 (s. 145), applies to cases such as [illegible] of parties who become sureties under this rule but not to parties who become sureties after the decree is passed.—*Ram Kissen* v. *Hurkhoo Singh*, 7 W. R. 329 (rejecting a review in *Hurkoo Singh* v. *Ram Kuber*, 6 W. R. Mis. 44).

Surety still remains liable although remedy against the principal is barred.—*Kristo Kishori* v. *Radha Mohun*, 12 C. 330 (5 B. 647 [illegible]).

"Voluntary surrender."—A defendant who appears in Court to defend his suit is exempt from personal arrest under s. 135 of the C. P. Code. A surety for the appearance of the defendant cannot therefore claim to initiate proceedings under this rule with a view to obtain his discharge when the defendant appears in Court to defend his suit. Nor does the appearance of the defendant on that occasion amount to a voluntary surrender within the meaning of Or. XXXVIII, r. 3.—[illegible] *Mangalath* v. *Isack Mackadam*, 37 M. L. J. 435: 63 I. C. 367.

Appeal.—An order under this rule is appealable, *see* Or. XLIII, r. 1 (*q*).

Form.—For form of summons to defendant, *see* App. F, Form No. 3.

Procedure where defendant fails to furnish security or find fresh security.

4. Where the defendant fails to comply with any order under rule 2 or rule 3, the Court may commit him to the civil prison until the decision of the suit, or where a decree is passed against the defendant, until the decree has been satisfied:

Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees:

Provided also that no person shall be detained in prison under this rule after he has complied with such order. [S. 4[illegible]]

COMMENTARY.

This rule corresponds to section 481, C P. Code, with some alterations and additions.

In the concluding part of para. 1, the words, "*or where a decree is passed against the defendant, until the decree has been satisfied,*" have been substituted for the words "or if judgment be given against the defendant," until the execution of the decree," which occurred in the old section. The other changes are of a verbal character only

Section 482, C. P. Code, 1882, which contained provisions for payment of subsistence allowance, to defendants arrested under this Order, has been omitted, on account of insertion of the new section 134, in the body of the Code, which is applicable to all persons arrested under this Code.

Failure to Furnish Security.—A Judge of Small Cause Court in the Muffasil could direct the jailor to bring up before the Court, at the hearing of the suit, a defendant committed to custody under this rule, without having recourse to the procedure under Act XV of 1869 —*Kilaram Maji* v *Narayan*, 5 B. L R. 215 13 W R 278

Held, that imprisonment under this rule becomes, after decree, imprisonment in execution of the decree, and the imprisonment suffered after that date must consequently be taken into consideration in calculating the period of 6 months, which by section 58 of the Code is the limit allowed for an imprisonment in execution of a decree —*Ghanasham Das* v. *Joharimull*, 7 B. 431

Appeal.—An order under this rule for the arrest of the defendant is appealable under s. 104 (*h*) —*Syed Hoossein* v *Chettiar*, 2 R 362 84 I. C. 270 A I. R 1924 Rang 361.

ATTACHMENT BEFORE JUDGMENT.

Where defendant may be called upon to furnish security for production of property.

5. (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—

(*a*) is about to dispose of the whole or any part of his property, or

(*b*) is about to remove the whole or any part of his property from the local limits of the jurisdiction of Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such por-

tion thereof as may be sufficient to satisfy the decree, or to app[ear] and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise direc[ts,] specify the property required to be attached and the estimated va[lue] thereof.

(3) The Court may also in the order direct the condit[ional] attachment of the whole or any portion of the property so spec[i]fied. [Ss. 483 and 484.]

COMMENTARY.

Alterations in the Rule.—The provisions of ss. 483 and 484, C. P. Code, 1882, have been amalgamated in this rule with several [...] alterations and omissions.

The reason for amalgamation seems to be that it has been [...] unnecessary to retain two separate sections containing almost [...] visions.—Hence the provisions of the two sections have bee[n] [...] in one rule.

The provisions contained in clause (a) of s. 483, and similar pro[visions] contained in s. 484, have been inserted in this rule by making two [...] clauses (a) and (b); and the provisions contained in clause (b) [...] and similar provisions contained in s. 484, which ran as follows, [...] *quitted the jurisdiction of the Court, leaving therein, property be[longing] to him*;" and the first part of s. 484, C. P. Code, 1882, which ra[n as] follows," *if the Court after examining the applicant and making su[ch fur]ther investigation which it thinks fit*," have been altogether omitte[d in] the present rule.

Under the present rule it is neither necessary to examine the ap[plicant] nor to make any further investigation before taking any action [under the] provisions of Or. XXXVIII, r. 5 but under s. 484 of the old Code [it was] necessary to examine the applicant and to make further investigat[ion be]fore proceeding under those sections.

The other changes introduced in this rule do not seem to be [...] Those changes are merely verbal.

Scope and Object of the Rule.—The main object of an attach[ment] before judgment is to enable the plaintiff to realize the amount [of the] decree, supposing a decree is eventually passed, from the defendant's [pro]perty.—*Ganu Singh* v. *Jangilal*, 26 C. 531. An attachment before [judg]ment is not an attachment for the enforcement of the decree [...] step taken merely for the purpose of preventing the defendant fr[om ob]structing or delaying such enforcement when the decree subsequ[ently pass]ed against him in the suit is sought to be executed.—*Sai Kimar* [...] *Tincouri Rai*, 4 B. L. R. 63, 67, 68, F. B.; *Basiram* v. *Kattyay[ani]*, [...] C. 448. 15 C. W. N. 705. The scope and object of this and th[e follow]ing rules are merely to safeguard the plaintiff against any loss w[hich may] arise if the defendant disposes of or removes his property pen[ding the dis]posal of the suit. 4 B. L. R. 63, 68 and 74 F. B.

"The Court is satisfied by affidavit or otherwise."—In an applica- under this rule the Court must be satisfied that a removal of goods is g made or about to be made, with a view to evade the execution of cree in a specific suit, though it is not necessary that the suit should ictually commenced at the time of their removal.—*Ram Narain* v. *l*, 2 Hyde 183.

Before proceeding under this rule to attach property, the Court should horoughly satisfied that the defendant is really disposing of his pro- y with intent to obstruct or delay the execution of any decree that be passed against him.—*Soshee Sekoreswar* v. *Harogobind*, 13 C. L. 356; *Chandrika Prasad* v. *Hera Lal*, 73 I. C. 721; *Khoka Marwari Ramachander*, 44 I. C. 40. Merely vague allegations that the defend- is about to remove the whole or any part of his property from the local ts of the jurisdiction of the Court are not sufficient.—*Senaji Kapur nd* v. *Pannaji Devi Chand*, 29 Bom. L. R. 1228; 46 B. 431: 64 580: A. I. R. 1922 Bom. 276.

"Is about to dispose of the whole or any part of his property."—The rt is not restricted to attempts at alienation made after the com- icement of the action. It is open to the Court to look to the conduct he parties immediately before the suit and to examine also surrounding umstances.—*J. D. Mac Gregor* v. *Cawnpore Sugar Works, Ltd.*, 9 C. J. 86-n.

An order directing the issue of a notice upon the defendant to show se why attachment should not issue before judgment and at the same e directing the defendant not to part with the property in any way is an order in accordance with this rule.—*Mahendra* v. *Gurudas*, 23 C. J. 392.

The term "property" as used in this rule is wide enough to include perty of every description, moveable or immoveable, whether in the ual possession of the defendant or some other person on his behalf.— *'di Lal* v. *Kuarji Dichit*, 17 A. 82.—*Bishambar Sahi* v. *Sukhdevi*, 16 186.

It does not apply to the joint property of a partnership, of which the gment-debtor is a member. In cases of this kind the proper order to ke is the appointment of a receiver.—*Damodar* v. *Panna Lal*, 9 Bom. R. 540.

Where a plaintiff has applied for leave to sue *in forma pauperis* an ler under this rule cannot be passed before the leave is granted.—*Purna Tara*, 21 C. W. N. 780: 25 C. L. J. 159.

The plaintiff in a mortgage suit who applies for attachment of certain ier properties of the defendant on the ground of insufficiency of the rtgaged security has a right to get an attachment before judgment der Or. XXXVIII, r. 5 of the C. P. Code.—*Jogemaya* v. *Baidynath*, C. 215.

"With intent to obstruct or delay, the execution of any decree that y be passed against him."—Pending a suit against him for a money im, the defendant agreed to sell a small portion of his considerable perty. The trial judge thereupon ordered, under Or. XXXVIII, r. 5

attachment before judgment of the defendant's property. Held... aside the order, that merely because the defendant attempted to s... of his immoveable property whilst proceedings against him were p... it did not follow that he was disposing of the property with intent... struct or delay the execution of any decree that might be passed... suit; *Nourojee Pudumjee v. The Deccan Bank Ld.*, 23 Bom... 550 63 I. C. 958: 45 B., 1256.

The fact that the defendant is running into debts or attempt... secure debts already incurred by executing a mortgage in respect of... does not necessarily indicate an intention to obstruct or delay the... tion of a decree to be passed when the value of the properties far e... the amount of such debts as well as the claim in the suit.—*S...nath v Tarubala*, 31 C W. N. 432: A. I. R. 1927 Cal. 354: 101 I...

Where groceries are being sold in the ordinary course of busi... not with a view to obstruct or delay the execution of any decree... may be passed, there should not be attachment before judg... *Chaudhari Kanhayaram v. Dina Nath*, 27 P.L. R. 141: 93 I. C... A. I. R. 1926 Lah. 330

To justify an order of attachment before judgment, the Court... be satisfied that the defendant has a present intention of dispo... property with intent to delay or obstruct execution. The mere fact... in the past he mortgaged his property or otherwise disposed of it, ... not be a sufficient ground for passing an order under r. 6.—*M...* v. *Nagendra*, 94 I. C. 880: A. I. R. 1926 Cal. 855

Divorce Proceedings.—An order for attachment before judgment... not be made in divorce proceedings under the Indian Divorce Act (... 1869).—*Philips* v. *Philips*, 37 C. 613.

Effect of Attachment Before Judgment.—*See*, Notes to Rul...

"Court may direct to furnish security."—The defendants... called upon under this rule to furnish security or to show cause... security should not be furnished. The Court also directed pr... attachment of the property. The defendants, in order to avoid a... ment, gave security and then showed cause; but the Sub-Judge th... that the matter was at an end, and that he could not cancel the s... bond. *Held*, that the Sub-Judge was wrong, the security so given... not the security expressly provided for under this rule and did not... clude the defendants from showing cause why no security should be... nished.—*Lotlikar* v. *Lotlikar*, 5 B. 643

Section 145 applies to sureties under this rule.—*Baboo...ram* v. *H...* *Sing*, 7 W. R. 329.

The words "produce and place at the disposal of the Court" ... only to such property as is capable of being produced in Court.—... *Lal* v. *Kuarji*, 17 A. 82.

Whether Court can Extend Time for the Furnishing of the Security.—Under its general powers the Court may, if necessary, extend the... for the furnishing of the security.—*Haji Mahamuddin & Co.* v. *The ...ern Japan Trading Co.*, 50 C. 215

Death of Defendant does Not Operate as a Discharge of the Surety.—Where the defendant dies, pending the suit, and the cause of action survives against his legal representatives, and they are brought on the record, the death of the defendant does not operate as a discharge of the surety.—*Chandulal* v. *Jeshangbhai*, 41 B. 402: 39 I. C. 88.

Power of Small Causes Court to Attach Before Judgment.—*See*, r. 13 below.

Attachment Before Judgment in Mortgage Suit.—An attachment before judgment may be granted in a suit on a mortgage.—*Jogemaya* v. *Baidyanath*, 46 C. 245: 50 I. C 924; *Rani Jotirmoyee* v *Raghunath*, 3 Pat. 966. 85 I C 9· A I. R. 1925 Pat 291.

Attachment Before Judgment during Pendency of Application for Leave to Sue in Forma Pauperis.—Where a plaintiff has applied for leave to sue *in forma pauperis*, a Court has no jurisdiction to pass an order of attachment before judgment under Or. XXXVIII, r. 5, C P. Code, without determining whether the leave of the Court should be granted to the plaintiff to sue *in forma pauperis* —*Purna Chandra* v. *Taraprasad*, 21 C. W. N 870: 25 C. L. J. 159.

Clause (3).—It is not competent to a Court to make an *ad interim* order for attachment under cl. (3) of r 5 of Or. XXXVIII, C. P Code, of a debt payable to the defendant outside its jurisdiction by a person not resident within its jurisdiction —*Surendra Nath* v *Bangsi Badan*, 22 C W. N. 160 24 C L J 533.

Forms.—For form of attachment before judgment with order to call for surety, *see* App F, Form No 5 For form of surety for production of property, *see* App F, Form No 6.

Attachment where cause not shown or security not furnished.

6. (1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit. [S. 485.]

COMMENTARY.

This rule corresponds to s 485, C P Code, with some additions and alterations.

In sub-rule (2) the words "*or make such other order as it thinks fit*" have been added after the word "withdrawn" The other changes are merely verbal

"Property specified."—This means the property specified by plaintiff or required by r. 5 (2) Such property may be within or beyond the local limits of the jurisdiction of the Court. The words "property within the jurisdiction of the Court" which occurred in the penultimate para. of s 483 of the old Code, have been omitted. The reason for the omission has been clearly explained in the following report of the Special Committee. "The Committee have omitted the words "property within the jurisdiction of the Court," as they have caused a conflict of decisions and they think, as a matter of policy, there should not be the restriction these words suggest." The conflicting rulings referred to are—*Kristnasami* v. *Engel*, 8 M 20; *Kedar Nath* v. *Deva Veyana*, 1 C. L. R.; *Balaram* v *Solana*, 8 B. L. R. 335; *Nur Muhammad* v. *Abbakar*, 8 Bom. H. C. 29; in all these cases it was held that the property of the defendant which is not within the jurisdiction of the Court could not be attached before judgment *Contra* in *Amaraveerayya* v. *Annamala Chetty*, 11 M. 502; *Ram Protap* v *Madho Rai*, 7 C. W. N 216 and *In re Abraham*, 8 Bom H. C 170, where it has been held that the property of the defendant which is not within the jurisdiction of the Court can be attached before judgment The Legislature adopting the views expressed in the latter cases has omitted the words above referred to, and has removed the restriction which existed under the old Code, in attaching property situated beyond the jurisdiction of the Court in which the suit is instituted. *See* also, notes under rule 48 of Or. XXI.

Conditional Order of Attachment Before Judgment.—A conditional order of attachment before judgment under Or. XXXVIII, r 6 of the C. P Code can not be passed until after the defendant has either failed to show cause why he should not furnish security or has failed to furnish security A conditional order of attachment *before* judgment under Or. XXXVIII, r 5 (3) cannot be made without an accompanying order under cl. (1) directing the defendant to furnish security or to show cause. *Abdul Karim Dhali* v. *Nur Mahomed*, 57 I. C. 907. Or XXXVIII, r 6, cl 6 (1) contemplates an order of attachment. Or. *XXXVIII, r* 5, cl contemplates a conditional attachment made in terms of r 5, cl Where the Court issued notices upon the defendants to show cause why attachment before judgment should not be made and at the same time directed the defendants not to part with the properties in any way. *Held* that the order was not in accordance with Or. XXXVIII, r. 5, *Makhan Narain* v *Gurudas*, 23 C. L. J. 392.

An attachment before judgment under this rule issued by a Court at the instance of a third party, prohibited the creditor from recovering and the debtor from paying, the debt. *Held*, that an order in these terms was not an order staying the institution of a suit within the meaning of s. 15 of the Limitation Act.—*Beti Maharani* v. *Collector of Etawah*, 17 A. 198, P. C. (affirming 14 A. 162).

"The Court may order......be attached."—Where an order is passed to furnish security or to show cause why security should not be furnished within a date fixed, and no security is furnished, the Court would have first to determine judicially that there had been a failure before drawing up a writ of attachment —*Sourendra* v. *Tarubala*, 31 C. W N 432, A I R. 1927 Cal 354.

Appeal.—Under Or XLIII, r. 1 (*q*), an appeal lies from an order under this rule.—*Janday Lal* v. *Sarman Lal*, 21 A 291. *See* also, *Mir Ali* v. *Behari Lal*, 21 B. 273; *Haji Mohamuddin & Co.* v *The Eastern Japan Trading Co.*, 50 C. 215: A. I. R. 1923 C. 639.

Form.—For form of attachment before judgment, *see*, App F, Form No. 7.

7. Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree. [S. 486.]

Mode of making attachment.

COMMENTARY.

This rule corresponds to s. 486, C. P. Code, 1882, with the addition of the words "*save as otherwise expressly provided*" in the beginning.

If the property of the defendant sought to be attached is outside the local limits of the jurisdiction of a High Court, the proper course for the Court to follow is to transmit the order for attachment before judgment to the Court in whose jurisdiction the property is situated, with a request that that Court should levy the attachment. It should not appoint the plaintiff's solicitor's clerk a special bailiff for the purpose of levying attachment.—*Gajanan* v. *Bhaskar*, 28 Bom L. R 380 : 94 I. C. 116 : A. I. R. 1926 Bom. 278

8. Where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money. [S. 487.]

Investigation of claim to property attached before judgment.

COMMENTARY.

This rule corresponds to section 487, C P. Code, 1882, with the change of the word "*where*" for "if," and the addition of the words "*payment of*" before the word "money"

Section 281, C P Code, 1882 (Or XXI, r 61), has not been applied to claims to property attached before judgment for this rule which prescribes the manner of investigation is silent as to the result.—*Turner* v *Pestonji*, 20 B 403, *Mir Ali* v *Behari Lal*, 21 B 273

Claim to Property Attached Before Judgment.—An assignee of a decree which is attached before judgment in another Court may prefer a claim to the latter for withdrawal of the attachment and the Court ought to withdraw it.—*Sadagopachariar* v. *Raghunath*, 33 M 62

Order XXI, r 63, C P Code, applies to orders on claims preferred to property attached before judgment.—*Mallikarjuna* v *Mallapalli*, 11 M. 849; 35 M L J 231 F B (11 M 23 *overruled*) 6 L W 518.

Order XXXVIII, r. 8 simply provides for the manner of investigation into claims to properties sought to be attached before judgment. An order passed is not final subject to a suit as provided in Or XXI, r 63 and a party against whom an order under this rule is passed in a claim case is not precluded from asserting his right to the property in any other proceedings.—*Ramanamma* v. *Bathula*, 5 L. W. 704: 39 I. C. 863 (37 A. 5 *dissented from*).

Removal of attachment when security furnished or suit dismissed.

9. Where an order is made for attachment before judgment the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed. [S. 488.]

COMMENTARY.

This rule corresponds to s. 488, C. P. Code, 1882, with some verbal alterations only. The words "*is made*" have been substituted for the words "is passed"; and the words "*to be withdrawn*" for the words "shall remove."

Removal of Attachment.—It is obligatory upon the Court to withdraw the attachment when the suit is dismissed, and it does not revive on the suit being decreed on appeal.—*Sasirama* v. *Meherban*, 13 C. L. J. 243; *Abdur Rahaman* v. *Amir Sharif*, 45 C. 780: 22 C. W. N. 827.

When the suit is dismissed, the attachment before judgment terminates with the dismissal of the suit, and the attachment shall be withdrawn. A fresh attachment is necessary if the suit is decreed on appeal.—*Ram Chand* v. *Pitam Mal*, 10 A. 506.

Attachment before judgment not to affect rights of strangers, nor bar decree-holder from applying for sale.

10. Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree. [S. 489.]

COMMENTARY.

This rule exactly corresponds to s. 489, C. P. Code.

Effect of Attachment.—The effect of an attachment of a property under the C. P. Code, whether made before or after decree is the same and any alienation of property attached before judgment, is ... void.—*Raj Chunder* v. *Isser Chunder*, Bourke, O. C. 130. See also *Ganu Singh* v. *Jangi Lal*, 26 C. 531, and *Serdul Roy* v. *See ...* C. 630: 10 C. W. N. 634, where it has been held that the object and effect of attachment before judgment is simply to safeguard the property

attached so as to enable the plaintiff to realize the amount of his decree if he should get one. A plaintiff decree-holder who has attached before judgment has not by reason of such attachment or process identical thereto, any right to be treated preferentially to other judgment-creditors. There must be a realization in execution to give rights of priority.

An attachment before judgment does not by itself create any interest in the property attached.—*Madhusudan* v. *Rash Mohan*, 21 C. L. J. 654; *Jogendra* v. *Monmotha*, 16 C. L. J. 565; nor does it operate as an injunction —*Munsoor* v. *Abhoy*, 21 C. W. N. 1147

Where a defendant furnished security by paying money into Court in obedience to an order under Or. XXXVIII, r. 5, such payment will not create a charge in favour of the plaintiff.—*Errikulapa* v *Official Assignee of Madras*, 39 M 903. But see, *Janaki* v. *Ramaswami*, 41 L W. 5.

An attachment before judgment has no effect against the Official Assignee, who holds the property of the judgment-debtor under a vesting order of Court made before the order for attachment was passed —*Millar* v. *Mon Mohan*, 7 C 213 8 C L R 213. *See* also, *Bank of Bengal* v. *Newton*, 12 B L R App 1, *Java Ramji* v. *Jadavji Nathu*, 1 Bom. H. C. 224, and 2 Bom H C 150

When a vesting order has been made, after attachment and before decree, the title of Official Assignee takes effect, and prevents the attaching creditor from obtaining satisfaction of his decree by sale—*Sadayappa* v. *Ponnama*, 8 M. 454; *Shib Kristo* v *Miller*, 10 C 150. 13 C L. R. 433; *Turner* v *Pestonji*, 20 B. 403; *Kristnaswamy* v. *Official Assignee of Madras*, 26 M. 673, where all the cases on the point have been referred to, discussed and explained *See also, notes under s* 64

In attachment before judgment, the Court does not interfere with the legal disposal of the property attached, beyond declaring that possession shall not be taken without its previous sanction, undertaking only that, if no subsequent order to the contrary be made, the property shall be forthcoming at the time of pronouncing of the decree to abide whatever order it shall make about it —*Java Ramji* v *Jadhavji Nathu*, 1 Bom. H. C. 224; *Sava Ramji* v *Jadhabji Nathu*, 2 Bom H C 150

Where in a suit against one member of an undivided Hindu family, not as representing the family, there is an attachment before judgment of family property, and the defendant dies before decree is passed, the right of survivorship takes effect before the attachment becomes effectual for the purpose of execution.—*Ramanayya* v *Rangappayya*, 17 M 144

Attachment Before Judgment Not to Affect Rights of Persons Not Parties to the Suit.—*Where a judgment-debtor's interest in the joint family property is attached before judgment ,and after such attachment and decree he dies, his co-parcenary interest in the property passes by survivorship to the other members of the family, the decree-holder is not entitled to have his share sold in execution of the decree.* —*Subrao* v *Mahadvi*, 38 B 105 21 I C 330, *Sunderlal* v *Raghunandan*, 3 Pat 250 A I R 1924 Pat 165 83 I C 113 But a contrary view was taken by the Madras High Court in *Sankaralinga* v *Official Receiver*, 49 M L J 616 A I R 1926 Mad 72 92 I C 504, where it was

held (following 5 C. 148, P. C. and 26 M. L. J. 517) that an attachment before judgment has the effect of preventing the interest of the deceased judgment-debtor from passing by survivorship in a case where the judgment-debtor dies after decree.

Attachment Before Judgment Not to Bar Rights of Other Decree-holders.—Attachment before judgment does not prevent the property being attached and sold in execution of any other decree against the judgment-debtor.—*Bishesar Das* v. *Ambika*, 37 A. 575; *Sewdut* v. *S... canto*, 33 C. 639, 643; *Madhusudan* v. *Rash Mohan*, 21 C. L. J. ...; *Harnandan* v. *Pran Nath*, (1921) Pat. 205: 61 I. C. 922; *Vishnu ...der* v. *Rampratap*, 45 B. 360: 22 Bom. L. R. 1407; *Cassim* v. *A... Kader*, 91 I. C. 93 A. I. R. 1926 Rang. 85.

Property attached before judgment not to be re-attached in execution of decree.

11. Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property. [S. 490.]

COMMENTARY.

Scope of the Rule.—This rule corresponds to s. 490, C. P. Code, 1882, with some additions and alterations. The words "*a decree is subsequently passed*" have been substituted for the words "a decree is given", and the words "*upon an application for execution of such decree to apply for a re-attachment of the property,*" have been substituted for the words, "to re-attach the property in execution of such decree," which occurred in the old section. By the addition of the words "upon application" it has now been made clear, that after obtaining a decree the plaintiff must apply for execution like any other creditor under s. ... C. P. Code, 1882 [Or. XXI, r. 11 (2)]. The above amendment has been made adopting the law as laid down in 12 B. 400 and 33 C. 639: 10 W. N. 634, noted below.

Re-attachment.—It is only when decree is subsequently given in favour of the plaintiff that re-attachment in execution of that decree becomes unnecessary. But when the suit is dismissed, attachment before judgment terminates with the dismissal of the suit; and if the suit is subsequently decreed on appeal, a fresh attachment is necessary for the validity of the sale in execution of that decree.—*Ram Chand* v. *L... Mal*, 13 A. 506.

When property is attached before judgment, the fact that a decree is made in the plaintiff's favour does not determine the attachment which continues in force.—*Heramba Nath* v. *Surendra Nath*, (1919) Pat. ...: 53 I. C. 20.

Under s. 490 (r. 11), read with s. 273 (Or. XXI, r. 53), the property of a judgment-debtor attached before judgment is brought into Court by stress of the attachment; and, where a decree follows the judgment, the creditor will be entitled, without fresh attachment to ...

tion out of the sale-proceeds of such property under s 295, C P. Code, 1882, (s. 73).—*Amara Veerayya* v *Annamala Chetty*, 31 M. 502: 4 M. L. T. 348.

A decree-holder who has attached before judgment is not entitled under s. 295, C. P. Code, 1882 (s. 73), to a rateable distribution of the assets unless, subsequently to his decree, he has applied for execution under s. 235, C. P. Code, 1882, Or. XXI, r. 11 (2). Section 490, C. P. Code, 1882 (r. 11), does not by implication confer upon a decree-holder who has attached before judgment, the right to come in under s. 295 (s. 73) and share in the distribution of the sale-proceeds of the property which he has attached.—*Pallanji Sharpurji* v. *Jordan*, 12 B 400 (Referred to in *Sewdat Roy* v *Sree Canto*, 33 C 639: 10 C W N 634). *See* also, *Arunachellam* v. *Hajee Sheik Meera*, 34 M 25

An attachment before judgment, though it gives a security, does not create any charge on the property attached, which remains that of the defendant. Nor does a decree following such attachment place *ipso facto* in a better position the creditor, who must apply for execution from which he is not exempted by s. 490, C. P. Code, 1882 (r. 11) On such application for execution, the attachment before judgment enures and becomes an attachment in execution. But neither attachment before judgment nor process incidental thereto, such as sale of goods attached prior to decree under s 269, C P Code, (Or. XXI, r 43), gives a decree-holder applying for execution any right to preferential treatment over another judgment-creditor who has also before the date of such application himself taken execution of his decree —*Sewdut Roy* v *Sree Canto*, 33 C. 639: 10 C. W. N. 634.

The effect of this rule is to put a person attaching before judgment in the same position as if he had attached, after decree, if a decree is passed in his favour after attachment before judgment —*Ramaswamy* v *Chakrapany*, 17 M L. J. 488, *Ram Piari Lall* v *Nathu Ram*, 2 Pat L T. 719: 6 Pat. L J. 332

An attachment applied for before judgment but actually effected after decree has still the force of an attachment before judgment under Or. XXXVIII and the provisions of Or XXXVIII do not lay down imperatively that the attachment should be actually effected before judgment.—*Rudravarain* v *Perla Lutchauna*, 42 M 1 35 M. L. J. 387.

Objection by Defendant that Property Attached Before Judgment is Not Saleable.—The act that a defendant did not raise any objection under s. 60 on the ground that the property is not saleable when it was attached before judgment does not preclude him from raising that objection when application for execution of the decree is made after a decree is subsequently passed in the suit —*Basiram* v *Kattyayani*, 38 C 448.

Agricultural produce not attachable before judgment.

12. Nothing in this Order shall be deemed to authorize the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce. [New.]

COMMENTARY.

"This rule represents the views of the Government of India, as expressed in the former Bill."—See, *the Report of the Special Committee*

Compensation for Improper Arrests or Attachments.—Section 491, C. P. Code, 1882, which contained provisions for compensation for improper arrests and attachments has been relegated to the body of the Code as s 95, and all the cases bearing on the point have been noted under that section Besides the cases noted under s. 95, *see also*, the following cases.

An order under s. 483, C. P. Code, 1882 (Or. XXXVIII, r 5), where the application has been made on insufficient grounds must necessarily cause damages to the credit and reputation of the party against whom the order is made, and general and special damages are recoverable. *Quaere*—Whether it is necessary to prove that the defendant acted maliciously in the above case —*Palani Kumarasami* v. *Udayar Nadan*, 32 M. 170: 18 M. L. J. 490.

Pending a civil suit against him, the defendant was arrested before judgment, but was afterwards released. He then made a claim of Rs. 25,000 against the plaintiff as damages for his wrongful arrest and applied to include in the suit his counterclaim of Rs 25,000 *Held*, that the question which the defendant desired to be tried was not one which ought to be tried by counterclaim —*Magoomal Jethanand* v. *Hamid Fez Ali*, 10 Bom L R 1002

No appeal will lie from an order under s. 491, C. P Code, 1882 (s. 95), granting compensation to a person against whom an attachment has been obtained upon insufficient grounds —*Loknath* v. *Amir Singh*, 28 A. 81: 2 A. L J 602 (24 M. 62 *followed*)

Section 104 (*g*) of the present Code has given an appeal from an order under s 95. The cases (28 A. 81, and 24 M. 62) have been overruled by s 104 (*g*).

Small Cause Court not to attach immoveable property.

13. Nothing in this Order shall be deemed to empower any Court of Small Causes to make an order for the attachment of immoveable property.

COMMENTARY.

This is a new rule and was added by the Amending Act I of 1926 *See*, notes to r. 7, above.

ORDER XXXIX.

TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS.

Temporary Injunctions.

Cases in which temporary injunction may be granted.

1. Where in any suit it is proved by affidavit or otherwise—

(*a*) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(*b*) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors,

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders. [S. 492.]

COMMENTARY.

This rule corresponds to s. 492, C P. Code, 1882, with some additions and alterations

The word "*where*" has been substituted for the word "when" in the beginning.

In clause (*b*), the word "*intends*" has been substituted for the words "is about," and the words "*with a view*" have been substituted for the words "with intent" which occurred in cl (*b*) of the old section.

In the last para. the words "*or make such other order,*" have been substituted for the words "or give such other order" which occurred in the old section; and the words "*until the disposal of the suit or until further orders,*" have been added, after the words "as the Court thinks fit."

Injunctions.—An injunction is an order or command preventing a party from doing that which he is under a legal obligation not to do Injunctions are of two kinds, *temporary* and *perpetual* Temporary injunctions are such as are to continue until a specified time, or until further order of the Court. They may be granted at any period of a suit and are regulated by the Code of Civil Procedure (s. 94 and Or. XXXIX, rr. 1 and 2 The object of the temporary injunction is to prevent mis-

chievous malicious waste, unlawful alienation, fraudulent removal, disposal or wrongful seizure in execution of the property in dispute pending the trial of the suit, to preserve the property in dispute in statu quo until the further hearing of the case or until further order; it is provisional in its nautre and does not conclude a right; and it may be dissolved at any time under s. 95 and Or. XXXIX, r. 4 of the C. P. Code on defendant's showing sufficient cause to the satisfaction of the Court against the order granting the injunction. Before granting a temporary injunction it must be proved to the satisfaction of the Court that unless the defendant is immediately restrained by an injunction, irreparable loss or damage will be caused to the plaintiff, during the pending of the suit. A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit: the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff. It is regulated by ss. 55-57 of the Specific Relief Act (I of 1877).

Principles Governing Temporary Injunctions.—The granting of temporary injunction under the powers conferred by this rule is a matter of discretion. True, it is a matter of judicial discretion. But if the Court which grants the injunction rightly appreciates the facts and applies to those facts the true principles, then that is a sound exercise of judicial discretion.—*Per* White, C. J., in *Subba Naidu* v. *Haji Badsha*, 26 M. 1?

An interlocutory injunction should not be lightly granted because it would be a serious thing if the persons in possession were restrained from making use of the property merely because a suit has been instituted with reference to the property. It is only in cases where property which it is essential should be kept in its existing condition during the pendency of the suit is in danger of being wasted, alienated or damaged that the Court ought to interfere so as to restrain persons who may turn out at the final event of the litigation to be the actual owners of the property from proper enjoyment and possession of it.—*Begg Dunlop & Co.* v. *S. Chandra*, 46 C 1001: 23 C. W. N. 677: 29 C. L. J. 581.

The general principles applicable to cases of *interim* injunction is that where a permanent injunction cannot be given, no prayer for a temporary injunction will be allowed.—*Bishnu Prasad* v. *Sashi Bhusan*, (1923) P. 133: 2 Pt. L. R. 17.

The Court, in granting an *ad interim* injunction, will first see that there is a *bona fide* contention between the parties, and then consider which side, in the event of obtaining a successful result to the suit, will be the balance of inconvenience if the injunction do not issue, bearing in mind the principle of retaining immoveable property *in status quo*.—*Gomes* v. *Chandra*, 16 C. ...; 1 Ind. Jur., N. S. 411; *Begg Dunlop & Co.* v. *Satish Chandra*, 46 C. 1001: 23 C. W. N. 677, *Krishna Chandra* v. *Hem Chandra*, 21 C. L. J. ...; I. C. 855; *Doherty* v. *Allman*, 3 App. Cas. 709; *Subba* v. *Haji Badsha*, 26 M. 168, 175; *Allah Din* v. *Shankar Das*, 66 I. C. 500; *Kasel...* v. *Sharf Din*, (1922) Lah. 356: 66 I. C. 161; *Kenneth Arthur* ... v. ... *Ranjan Basdhar*, 75 I. C. 859.

This rule applies to a case where it is shewn to the satisfaction of the Court that the defendant in possession is likely to endanger or make away with any property in dispute in the suit, and empowers the Court

in such a case to issue an injunction to the defendant to refrain from the the particular act complained of, and, in case of necessity, to appoint a receiver or manager of so much of the property only as is in dispute.—*Joy Narain* v. *Ship Pershad*, 6 W. R. Mis. 1. *See* also, *Mun Mohine* v. *Ichamoyee*, 13 W. R. 60.

The power of a Court to attach property and to appoint a receiver extends only to the better management or custody of any property which is in dispute and ceases when the suit comes to an end. An injunction in respect of property cannot be maintained after a claim is dismissed or pending an appeal.—*Moheooddeen* v. *Ahmed Hossein*, 14 W. R. 384.

A Civil Court has no right to issue an injunction which would have the effect of staying proceedings in a Criminal Court.—*Nawab* v. *Seth Dooli Chand*, 2 I. C. 266.

The distinction between a case in which a temporary injunction may be granted and a case in which a receiver may be appointed, is that, while in either case, it must be shown that property should be preserved from waste or alienation, in the former case it would be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged; while, in the latter case a good *prima facie* case has to be made out.—*Chandidat Jha* v. *Padmanand Singh*, 22 C. 459; *Guru Sami* v. *Chinna*, 10 L. W 551 53 I. C 760. *See* also, *Nasarvanji Cowasji Argani* v. *Shahjadi Begam*, 24 Bom L. R. 378

No Court would grant an injunction against persons residing outside its jurisdiction and not subject to its jurisdiction in cases where they would have no means of enforcing the order. But where the acts complained of are acts taking place within the Court's jurisdiction and the party although a resident outside the Court's jurisdiction appears in the suit and submits personally to the jurisdiction of the Court (not under protest or to question the Court's jurisdiction) the Court has power to grant an injunction against him Before granting a temporary injunction the Court must be satisfied in the first instance that the plaintiff applicant has a fair question to raise as to the existence of the right alleged and further that the defendants have infringed or are threatening an infringement of these rights —*Maharajah Bahadur Singh* v *Seth Hukum Chand*, 4 Pat. L. T. 48 71 I C. 11

A obtained a decree against *B* and others (Hindus), on a title of purchase from them, for possession of an undivided moiety of a dwelling-house, to the remaining moiety of which *C* (a Hindu) was jointly entitled On *A*'s proceeding to execute his decree, *C* brought a suit alleging that *A* had obtained no title under his purchase, and praying for partition of the property and for an *interim* injunction to restrain *A* from executing his decree pending the partition suit The Court granted the prayer —*Anant Nath* v *Mackintosh*, 6 B. L R. 571.

The plaintiffs being in possession of a dock used for docking and repairing vessels, and being threatened by the defendant with an ejectment suit, sued the defendant for specific performance of contract and for an injunction to restrain him from ejecting them until the completion of the repairs of their two vessels Both parties filed contradictory affidavits. *Held*, that, looking into the inconvenience of allowing the same matter to be litigated simultaneously in different Courts between the same parties,

an *interim* injunction may issue although there is a contradiction of facts.—*Mohan* v. *River Steam Navigation Company*, 14 B L R 5.

The plaintiffs who were in possession of certain premises, brought a suit to restrain the defendant from selling a share in them which he had attached in execution of a decree upon a mortgage to him of the share, and to set aside the deed of mortgage, on the ground that the mortgagors to the defendant had no interest in the property at the time of their mortgage to him (defendant). The plaintiffs applied for an *interim* injunction and the Court granted the application.—*Rup Lal* v. *Mahima Chunder*, 5 B. L. R. 254; *Sree Narain* v. *Miller*, 5 B L R 254-*note*

In a suit to restrain the defendant from using plaintiff's alleged trade mark, the plaintiff applied for an *ad interim* injunction. *Held*, that the plaintiff's right to an *ad interim* injunction depended on his making a strong if not an overwhelming *prima facie* case.—*Reddaway & Co* v. *Schroder Smidt & Co.*, 8 C. W. N. 151.

The Court has to be satisfied that the applicant has a *prima facie* case, and further that the protection of his interest requires the issue of a temporary injunction.—*Vathiar Ramanuja* v. *Aiyanachariar*, 23 M. L. J. 316; *Kalidas* v. *Probat Chandra*, 18 I. C. 394. See also, *Sant Lal* v. *Ishar Das*, 46 P. L. R. 1919: 51 I. C. 108; *Begg Dunlop & Co* v. *Sarat Chandra*, 46 C. 1001: 23 C. W. N. 677: 29 C. L J. 584; *Sundar S...* v. *Ramsarandas*, 5 Lah. L. J. 262; *Upendra Nath* v. *Union Drug Co. Ltd.*, 43 C. L J 405: 95 I. C. 667: A. I R. 1926 Cal. 837.

In a suit for a permanent injunction, a temporary injunction ought not to be refused where the refusal would defeat the object of the suit and amount to denial of justice to the applicant.—*Gunabala* v. *Hem...*, 43 I. C. 24.

The defendant company acting under a *bona fide* claim of right commenced mining operations in a certain land and already finished constructing a railway siding, when the plaintiff sued for a declaration of their under ground rights in the said land and for permanent injunction restraining the defendant company from interfering with the same. It also applied for issue of temporary injunction. The first Court granted the temporary injunction. The High Court set aside the order granting the temporary injunction on the ground that the balance of the convenience was in favour of the defendant company being allowed to continue the mining operations, the plaintiff having stood by and allowed the defendant to spend a considerable sum of money. *Principles on which temporary injunction should be granted pointed out.*—*Singaran Coal Syndicate* v. *Indra Nath*, 10 C. W. N. 173

An application for a temporary injunction by the defendants that the plaintiffs should, pending the disposal of the suit, be restrained by injunction from interfering with the defendant's right to worship in and free access to, the temple does not fall either within cl. (a) or cl. (b) of Or. XXXIX, r 1, C. P. Code.—*Karori Chand* v. *Maharaj Bal...*, 1 P. L. J. 560.

An injunction cannot be issued on a mere allegation that the defendant wished to realize debts by bringing actions in Court, without ...

of an intention of waste, damage or alienation.—*Prosunnomoyee* v. *Woomamoyee*, 14 W. R. 409. There must be some evidence that the property in dispute in the suit is in danger of being wasted, damaged or alienated by any party to the suit.—*Dhundiram* v. *Chander*, 2 Bom. H. C. 103.

In a suit for the specific performance of an agreement to grant a lease, the Court should grant a temporary injunction to restrain the defendant from granting a lease to any other person for the disposal of the suit.—*Pramathanath* v. *Jagannath*, 17 C. L. J. 427: 16 I. C. 357.

A Court cannot be asked to give the relief which forms the cause of action in the suit, under colour of temporary injunction.—*Brajendra Kishore* v. *Nawab Abdus Sobhan*, 21 C. L. J. 464.

An injunction although subsequently discharged when the plaintiff's case failed, must be obeyed while it lasts.—*Eastern Trust Co.* v. *McKenzie Man & Co.*, 20 C. W. N. 457, P. C.: 35 I. C. 378.

During the pendency of an application to restore to file a suit which had been dismissed for default, a Court has no jurisdiction to pass an injunction order, as there is no suit pending then.—*Ram Sarup* v. *Emperor*, 77 I. C. 238.

Temporary Injunction in Suit for Declaration Only.—Although a hard and fast rule cannot be laid down that an *ad interim* injunction can never be granted in a suit for declaration, it should not be granted when in that suit there is no prayer for consequential relief or for a perpetual injunction and where the plaintiff, if successful in his suit for declaration, must bring another action for enforcing the right which he seeks to keep undisturbed by such injunction.—*Shiroman* v. *Banta*, 8 Lah. L. J. 289.

Against Whom Injunction can be Issued.—An injunction under this rule cannot be issued to a Court but only to a party, and an injunction to a party contemplates that some property, the subject-matter of the suit, is in danger of being wasted.—*Raja Ram* v. *Dharam Das*, 2 A. L. J. 601; *Sant Lal* v. *Ishar Das*, 46 P. L. R. 1919: 51 I. C. 108, *Mahiuddin* v. *Ather Hossain*, 44 I. C. 496.

During the pendency of an application by the mother for the guardianship of her minor girl, the Court on the application of the mother, granted an injunction restraining the bridegroom's brother and some other persons who were residing out of the jurisdiction of the Court, and who were not parties to the proceeding, from marrying or allowing the marriage of the minor. *Held*, that s. 12 of the Guardian and Wards Act (VIII of 1890) authorizes the Court to make such order for the protection of the person of the minor; and that the mere fact that a person resides outside the jurisdiction of the Court is not *per se* sufficient to prevent the Court from granting an injunction.—*Harendra Nath* v. *Brinda Rani*, 2 C. W. N. 521.

Injunction Against a Person Not a Party to the Suit.—No injunction can be granted under this rule against a person who is not a party to the suit.—*Ram Sunder* v. *Ram Dheyan*, 3 Pat. L. J. 456: 46 I. C. 224; *Ram Saran* v. *Maulu*, 27 P. L. R. 11: 96 I. C. 540: A. I. R. 1926 Lah. 284.

"Property in dispute in a suit.—The property in respect of which an injunction may be granted under cl. (*a*) of this rule must be property in dispute in the suit and no other.—*Joy Narain* v. *Shib Pershad*, 6 R. Mis 1. No injunction can, therefore, be granted to restrain a person who is alleged to be a debtor from parting with his property.—*S... Singh* v. *Ram Saran*, 5 Lah. L. J. 262: 81 I. C. 322: A. I. R. 1923 Lah. 227.

Power of Court to Issue Injunction where Defendant Resides Outside Jurisdiction but has Property within Jurisdiction.—On an application for a temporary injunction to restrain a sale in execution of a decree pending a suit, the applicant must show a *prima facie* case. A Court has jurisdiction to issue an injunction upon a person residing outside its territorial limits if he has property within the jurisdiction against which the Court could proceed in the event of any contempt of the Court's authority.—*Maharajadhiraj Sir Rameshwar Singh* v. *Kumar G... Singh*, 1 Pat. L. R. 462: 75 I. C. 381.

"Wrongfully sold in execution of a decree."—By these words the legislature intended that an injunction might be granted when property which the claimant claimed to be his was in danger of being sold in execution of a decree against another person or even against himself.—*Abdul... lah* v. *Banke*, 33 A. 79 (F. B.).

A prohibitory order by way of injunction can be issued so long as the property in dispute is in danger of being *wrongfully sold in execution of a decree*, but once it is sold no such order can be passed.—*D... Chand* v. *Mitsui Bussan Kaisha & Co.*, 54 I. C. 928.

"With a view to defraud his creditors."—The threat or intention to remove or dispose of property with a view to defraud creditors must be proved by definite evidence.—*Kalian Singh* v. *Musst. Shanno*, 6 Lah. L. J. 298: 85 I. C. 88: A. I. R. 1924 Lah. 718

Temporary Injunction to Restrain Execution of Decree Lawfully Obtained can Not be Granted.—A Court has no power to issue a temporary injunction to restrain the defendant from executing a decree lawfully obtained by him.—*Varada Charyulu* v. *Narasimha Charyulu*, 23 L. W. 85. 92 I. C. 615: A. I. R. 1926 Mad. 258.

Temporary Injunction to Stay Execution and Sale.—*After rejection* of a claim, the unsuccessful party may institute a suit under Or. XXI r. 63 of the C. P. Code and ask for a temporary injunction to stay sale, and a temporary injunction may be granted when the property which the claimant claimed to be his is in danger of being sold in execution of a decree against another person or even against himself.—*Abdullah* v. *Banke Lal*, 33 A. 79 F. B.: 7 A. L. J. 932 (10 A. 80 *followed*; ... 311 *overruled*); *see also*, *Brojendra* v. *Rup Lal*, 12 C. 576 ... *Narendra* v. *Haji Abdul*, 25 I. C. 9). *As to principles which should ... disposal of application for temporary injunction to stay execution ... decree.*—See, *Bhabhikan Sing* v. *Chakradar Prasad*, 9 I. C. ...

In execution of a money-decree certain property ... the judgment-debtor was attached, to which a claim under Or. XXI r. ... C. P. Code, was successfully preferred, and thereupon the decree-holder ... brought a suit under r. 63 for a declaration of the judgment-debtor's ...

to the property and the suit was decreed and against that decree the defendant preferred an appeal to the Court; pending the appeal, he applied for an injunction against the decree-holder. *Held*, that such an injunction could not be granted, inasmuch as it was impossible to say that the attached property was in danger of being "wrongfully" sold in execution of a decree within the meaning of this rule.—*Chando Bibi* v. *Rai Kishen Chand*, 26 A. 311 (10 A 80, *overruled*)

In a suit under Or. XXI, r. 63 after rejection of a claim to establish right to the property attached, and advertised for sale, an injunction to stay execution proceedings should not issue. The proper course is to apply by petition for a postponement of the sale, the attachment continuing.—*Luchmiput Singh* v. *Secretary of State*, 11 B. L R. App. 28. 20 W. R. 11; *Doorga Churn* v. *Ashutosh*, 24 W. R. 70.

After rejection of a claim, when the unsuccessful claimant brings a suit under Or. XXI, r. 63 to establish his title to the property, his proper course is to apply to the Court in which the suit is brought for an injunction to stay the sale; the Court executing the decree cannot stay the sale on his application.—*Brojendra Kumar* v. *Rup Lall*, 12 C. 515. Referred to in *Amir Dulhin* v. *Administrator-General of Bengal*, 23 C. 351, where it has been further held that a subordinate Court may issue an injunction restraining proceedings in execution pending before a superior Court.

After the dismissal of a suit brought by an unsuccessful claimant under Or. XXI, r. 63 for a declaration of his right to the property in dispute, the Court cannot grant a further injunction restraining the decree-holder from executing his decree, merely on the possibility of the Appellate Court reversing its decision.—*Gossain Mony Puree* v *Guru Pershad*, 11 C. 146.

The rule that a stay order issued by an Appellate Court suspends the power and jurisdiction of the executing Court to conduct further proceedings from the moment the order of the superior Court is passed, cannot be extended to the case of an injunction passed under Or. XXXIX, r. 1.—*Dharam Chand* v. *Mitsui Bussan Kaisha & Co.*, 54 I. C. 928.

Where an ancestral property was attached in execution of a decree, and a son of the judgment-debtor instituted a suit to establish his right to the property, and made an application for a temporary injunction directing stay of sale pending the decision of the suit: *Held*, that what was advertised for sale was the rights and interests of the judgment-debtor in the property, and it could not be said that the property being "wrongfully sold in execution of a decree," the injunction prayed for could not be granted. Order granting an injunction without notice to the opposite party is irregular —*Amolak Ram* v. *Sahib Singh*, 7 A. 550.

In a case in which the defendants have submitted to the jurisdiction of a Court by entering appearance, the Court has jurisdiction to grant an injunction restraining the defendants from executing in another Court, a decree which they had obtained against plaintiff; *Kumar Ganga Singh* v. *Pirthi Chand*, 1 Pat. 350 *See* also, *Maharajah Bahadur Singh* v. *Seth Hukum Chand*, 4 Pat. L. T. 48.

Stay of Sale in Execution of a Decree of Revenue Court.—The term "decree" as used in the Code of Civil Procedure does not include the

decree of a Court of Revenue. *Held*, therefore, that an application under s. 492, C. P. Code, 1882, for stay of a sale in execution of a decree of a Revenue Court under s. 93 of Act XII of 1881, cannot be entertained by a Civil Court.—*Onkar Singh* v. *Bhup Singh*, 16 A. 496

The Revenue Courts are Courts of Civil jurisdiction within the meaning of the C P. Code, in that their decrees, when transferred in the regular course, are to be treated in all respects ,as if they were passed by a Court of the Civil jurisdiction. *Held*, therefore, that an application under this section for stay of a sale in execution of a decree of a Revenue Court can be entertained by a Civil Court.—*Ram Lochan* v. *Beni Pr*... 36 C. 252: 9 C. L. J. 125: 13 C. W. N. 791 (16 A. 496 *dissented from*, 9 C. 295, P. C : 5 A. 406 *referred to*); followed in *Jit Lal* v. *Raja Kum... wari*, 16 C. L. J. 555.

Injunction to Restrain Marriage.—An application for temporary injunction to restrain the marriage of a Mahomedan woman who is ... and who is alleged to have been married cannot be entertained ... against her relations or herself.—*Mahammad Yamin* v. *Rezia Begam*, A. L. J. 1818.

This rule is not applicable to a suit for specific performance of a contract to give in marriage, and the Court will not grant an *interim* injunction to restrain the defendant from making another marriage with a third person.—*Gunput Narain* v. *Rajun Kooer*, 1 C. 74; 24 W. R. 2... See, however, *Nanabhai Ganpatrao* v. *Janardhan*, 12 B. 110; *Venkata Ch...ulu* v. *Ranga Charyulu*, 14 M. 316; *Harendra Nath* v. *Brinda B...* C. W. N. 521; and *Kanahi Ram* v. *Biddya Ram*, 1 A. 549

Power of High Court to Restrain a Party from Proceeding with a Suit Pending in Another Court.—It has been held by the High Court of Calcutta that the powers of High Courts to grant a temporary injunction are not confined to the terms of rr. 1 and 2 of this Order, and that the Courts have inherent power, under their general equity jurisdiction, to grant such an injunction independently of the provisions of the Code, and further, that such power can be exercised by a single Judge sitting on the Original Side of the High Court.—*Mungle Chand* v. *Gopal Ram*, 34 C. 101; *Rash Behary* v. *Bhowani*, 34 C. 97; *Mul Chand* v. *Gill & Co.*, ... 283: 53 I. C. 518 It has been held by the Bombay High Court that it has inherent power to restrain by injunction a defendant in a suit filed in the High Court from proceeding, in the Small Cause Court at Bombay, with a suit filed by the defendant referring to the same matter to which the High Court suit relates; *Udcram* v. *Hyderally*, 33 B. 460 (*Jamnadas* v. *Zamonlal*, 27 B 357 *distinguished*). As to the question whether the power of a Chartered High Court to restrain a party from proceeding with a suit pending in another Court is confined to suits pending in a Court subordinate thereto, or whether it extends to suits pending in any Court in British India, it has been held by the Bombay High Court (per Macleod, J.) that though Court has power to restrain a party from proceeding with a suit pending in a Court subordinate to it, it has no such power in respect of a suit pending in a Court not subordinate to it.— *Narayan* v. *Jankibai*, 39 B. 604.

The plaintiff, in a suit instituted in the High Court ... on a balance of account, sought for an injunction to restrain the d...

ants from proceeding with a suit previously instituted in the Court of the Sub-Judge at Bareilly, in which the present defendants sought to recover from the present plaintiff a sum of money as balance due to themselves on the same account. *Held*, that the High Court was competent to grant the injunction. The powers of the High Court to grant temporary injunctions are not confined to the terms of ss. 492 and 493, C. P. Code, 1882.—*Mungle Chand* v. *Gopal Ram*, 34 C. 101. But see, *Vulcan Iron Works* v. *Bishumbhur Prasad*, 36 C. 233: 13 C. W. N. 346, where it has been held (dissenting from 34 C. 101) that the High Court can only restrain a person from proceeding with a suit in a foreign Court if the person sought to be restrained is within the jurisdiction of the Court.

Effect of a Temporary Injunction.—The effect of a temporary injunction granted under Or. XXXIX, r 1 is not to make a subsequent alienation of the property in question illegal and void Hence if a party, against whom a temporary injunction is granted restraining him from alienating the property, sells or mortgages the property pending the injunction, the sale or mortgage is not void. The only penalty that he incurs by alienating the property inspite of the injunction is that prescribed by r. 2 (3), namely, that his other property may be attached and sold for awarding, out of the sale proceeds, compensation to the party on whose application the injunction was granted, and he may also be detained in the civil prison. But alienation after attachment has a different effect When a property is attached, any private alienation of the property contrary to the atachment is void under s 64—*Delhi and London Bank* v. *Ram Narain*, 9 A. 497, *Manohar* v *Ram Autor*, 25 A 431; *Beli Ram* v. *Ram Lal*, 6 L. 380: 90 I C. 937. A. I R 1925 Lah. 644.

Disobedience to Injunction.—In case of breach or disobedience of a temporary injunction, the Court which actually granted the injunction may punish the contempt under Or. XXXIX, r. 2 (3), C. P. Code There is nothing in s 24, C. P. Code or in cl. IV of the Bengal Civil Courts Act authorizing a Court to which the suit may be transferred, but which did not grant the injunction, to exercise the special jurisdiction under Or. XXXIX, r 2 (3).—*Sheikh Jaharudi* v *Hari Charan*, 18 C. W. N. 470: 22 I. C. 499

Appeal.—An order refusing or granting an injunction is appealable under Or. XLIII, r. 1 (r), C P. Code—*Lachmi Narain* v. *Ram Charan*, 35 A. 425: 11 A. L. J. 613: *Ottapurakkal* v. *Alabi Mashur*, 27 I C. 131. An order refusing temporary injunction is appealable.—*Harilal* v *Prayag Ram*, 17 C. W. N. 996: 18 C L. J. 39.

Revision.—No appeal lies to the High Court from an order made by the lower appellate Court under this rule; *see* s. 104 (2). But where a temporary injunction was refused by the lower appellate Court, the Calcutta High Court made an order granting an injunction in the exercise of powers conferred upon High Courts by s. 15 of the Charter Act.—*Israil* v. *Shamser*, 41 C. 436; *Hemanta* v. *Baranagore*, 19 C. W. N. 412: 21 I. C. 318.

This Rule does Not Apply to Probate Proceedings.—An application by a caveator in probate proceedings, for temporary injunction, cannot be granted, as a probate proceeding is not a suit in which any property is in dispute.—*Nirod* v. *Chamatkarini*, 19 C. W. N. 205: 27 I. C. 617.

Valuation and Court-fee in Suits for Injunction.—In a suit for injunction the Court has no power to increase the valuation of the suit. Section 7, cl. (iv) (d) of the Court Fees Act requires that, in a suit for injunction, the plaintiff shall state the amount at which he values the relief sought, the Court has, therefore, no power to increase the valuation and to return the plaint for want of jurisdiction.—*Guruvajamma v. Venkata Krishna*, 24 M. 34.

In a suit for injunction and damages on the allegation of [illegible] the Court has no power to ascertain the value of the property for the purpose of jurisdiction but it should accept the value of the relief stated in the plaint, both for the purposes of Court-fee and jurisdiction.—*Hara Sundari v. Kali Kumar*, 32 C. 734: 9 C. W. N. 690 (17 B. 56, 18 B. [illegible], [illegible] 320, 15 A. 378, and 20 M. 289 *referred to*; 8 C. 757 and 17 C. 680 *distinguished*). *Followed in Vachhani v. Vachhani*, 33 B. 307.

As to Court-fee, *see also*, *Manmatha Nath v. Rohilli Moni*, 27 A. [illegible]

GENERAL PRINCIPLES GOVERNING GRANT OF INJUNCTIONS (TEMPORARY OR PERPETUAL)—SPECIAL CASES.

(a) **Alienation by Hindu Widow—Prevention of Waste.**—A [illegible] of a Hindu widow obtained a decree against her, whereupon the [illegible] reversioner brought a suit to set aside the decree on the ground of [illegible] and collusion. This suit was compromised on the reversioner's [illegible] up his reversionary interest to the widow for a consideration. Subsequently the more remote reversioners sued to set aside the decree [illegible] compromise as fraudulent and collusive, and prayed for an ad [illegible] injunction, which was granted.—*Gopee Nath v. Kally Dass*, 10 C. [illegible]

If there is any reasonable apprehension of waste by a Hindu [illegible] sufficient provision should be made in the final decree for partition [illegible] prevention of such waste, to safeguard the interests of the reversioners [illegible] a separate suit for injunction is unnecessary.—*Durganath v. Chintamani*, 31 C. 214: 8 C. W. N. 11 (6 M. I. A. 433, 2 C. 262, and 3 C. [illegible] *referred to*).

A suit by a heir presumptive against life-tenant to restrain waste [illegible] the life-tenant and for an injunction and appointment of receiver is [illegible] tainable upon a stamp of Rs. 10.—*Manmatha Nath v. Rohilli Moni*, [illegible] A. 406 (6 C. 764, P. C., *followed*; 10 M. 90 *referred to*; and 8 C. [illegible] *dissented from*).

(b) **Breach of Agreement.**—Where more than 20 artisans [illegible] agreement, whereby they constituted themselves an association for the purpose of enhancing the price of their work by bringing all the [illegible] of the trade into one shop, and dividing the prices amongst the [illegible] according to their skill, but which association was not registered [illegible] company under Act X of 1866. *Held*, that the Court could [illegible] injunction to restrain the breach of such agreement.—*Bhikaji [illegible] v. Bapu Saju*, 1 B. 550.

A Hindu widow in order to settle disputes with the relatives of [illegible] husband entered into an agreement with them that she would [illegible] a son. Subsequently her husband's relatives brought a suit [illegible] alleging that the widow, in violation of the agreement was about to [illegible]

a son, and praying for an *interim* injunction to restrain the adoption, but the Court refused to grant the *interim* injunction.— *Assur Purshotam* v. *Ratanbai*, 13 B. 56.

The granting of an injunction under this rule, for breach of contract, is a matter of judicial discretion. *Quære*—Whether the principles which govern the grant of a temporary injunction under the C. P. Code are the same as those which are laid down in the Specific Relief Act to the grant of a perpetual injunction —*Subba Naidu* v *Haji Badsha*, 26 M. 168.

The defendant signed an agreement in England with a Railway Company contracting to serve the company for 4 years in India under a penalty of £ 100. The defendant having accordingly served it for two years, left its service for that of another employer, alleging ill-treatment. *Held*, that the plaintiff company was entitled to an injunction restraining the defendant from serving others on the terms that the plaintiff company should consent to retain him in its employ.—*Madras Railway Company* v. *Rust*, 14 M. 18.

Agreement not to work for a rival tradesman—Agreement made when under criminal charge—Suit for injunction to restrain the defendant from working for a rival tradesman *Held*, that in the exercise of the discretion given to the Court by section 22 of the Specific Relief Act (I of 1877), the injunction should be refused, but the Court should award pecuniary compensation to plaintiff as his proper remedy.—*Callianji Harjivan* v *Narsi Tricum*, 19 B 764.

Injunction granted to restrain a partner from excluding his co-partner from the partnership business, and from doing any act to prevent its being carried on according to the articles —*Virdachella* v. *Ramaswami*, 1 M. 341.

Where a charter-party has been actually completed, the Court will, by injunction, prevent an employment of the ship inconsistent with the terms of the charter-party; but where there is only an agreement for a charter-party, no such injunction will be granted —*Abdul Allarakhi* v. *Abdul Bacha*, 6 B. 5.

(c) **Collection of Rents.**—Injunction to restrain the defendant from collecting without any title, from the ryots of the plaintiff's estate two annas rent over and above the full sixteen annas in the rupee, may be granted without proof of any actual damage.—*Nadir Jumma* v. *Ram Chunder*, W. R. (1864) 362

(d) **Digging Well.**—The digging of a well by a talukdar intermediate between the zemindar and the ryots, is not an act of waste to restrain which the Court will issue an injunction —*Magneeram* v. *Gunesh Dutt*, W. R. (1864) 275.

(e) **Digging Close to a Neighbour's Land.**—Where an act threatening danger to a person's land is such that injury will inevitably follow, a Court may grant perpetual injunction restraining the continuance of the Act.—*Bindu Bashini* v. *Janhabi Chowdhrain*, 24 C. 260. *See*, however, *Moho Lal* v. *Bai Jivkore*, 28 B. 472, where it has been held that a person has a right to build on his land and for the purpose of building to make ditches for foundations.

(f) **Stay of Execution of Decree.**—An injunction restraining a decree-holder from executing a decree against the person applying for the injunction was granted, on the ground that the proceedings by which the decree was obtained against him were altogether illegal.—*Dhurondhur* v. *Agra Bank*, 5 C. 86: 4 C. L. R. 434 (reversing in review 4 C. 380, 2 C. L. R. 283; 3 C. L. R. 421). *See* also, *Amir-Dulhin* alias *Muhamdyan* v. *Administrator-General of Bengal*, 23 C. 351; and *Appu* v. *Raman*, 11 M. 425. But see, *Venkatesa Tawker* v. *Ramasami*, 18 M. 338, where the suit for injunction to restrain execution of decree was dismissed on the ground that the injunction sought for was not necessary to prevent a multiplicity of proceedings within the meaning of section 56, cl. *(a)* of the Specific Relief Act (I of 1877).

(g) **Injury or Obstruction to Rights to Property.**—A tank for the use of the public having been dug by the ancestor of the plaintiffs, claimed the exclusive conservancy and repairs, and prayed for an injunction restraining others from interfering with the general conservancy of the tank. *Held*, that whether or not they were entitled to exclude others from interfering with the repairs of the tank they were not entitled to an injunction prohibiting others from interfering with the general conservancy of the tank.—*Muttaya* v. *Siviraman*, 6 M. 229 (affirmed by the Privy Council in 12 M. 241).

The plaintiff's ancestor built a temple and a ghat close to it, to which persons on the point of death were removed and certain ceremonies performed. The defendants used the ghat for landing goods. *Held*, that if, when the plaintiff's ancestor erected the buildings he inteded to grant to the Hindu community merely a right of easement over the property and not to transfer the ownership to the community; the plaintiff was entitled to maintain a suit to restrain defendants from using the ghat for trading purposes.—*Jaggamoni Dasi* v. *Nilmoni Ghosal*, 9 C. 75: 11 C. L. R. 502.

Plaintiff's beams overhung defendant's soil and defendant [illegible] a building which overhung those beams. *Held*, that the defendant being the owner of the soil was entitled *prima facie* to all above it and [illegible] diminution in his rights by reason of the beams did not extend beyond the protrusion of the beams themselves.—*Ranchod Shamji* v. *Abdulabhai*, 28 B. 428.

Where a man erects a building overhanging the land of another, he commits a trespass for which an action will lie against him and he may by prescription acquire a right to the space occupied by such projection and the right to maintain it in its position. A cornice overhanging a neighbour's land cannot be removed by such neighbour, if it has been in existence for more than 12 years.—*Rathinavelu* v. *Kolandavelu*, 20 M. 511 (3 B. 174, *followed*).

If a stranger builds on the land of another believing it to be his own, the owner is entitled to recover the land and the party building on the land of another is allowed to remove the building, unless there are [illegible] circumstances amounting to a standing by so as to induce the belief [illegible] the owner intended to forego his right or to an acquiescence in [illegible] on the land.—*Govind Venkaji* v. *Sadashiv*, 17 B. 771; *Premji* v. *[illegible] cassum*, 20 B. 298.

Where the plaintiff's eaves had projected over the defendant's roof, which rested on a wall common between the parties for more than 30 years, and the plaintiff had thus acquired a right to have the water carried from his roof on to the defendant's roof, and where the defendants raised the common wall and removed the plaintiff's eaves. *Held*, that the plaintiff was entitled to relief either by damages or injunction.—*Nasarbhai Ahmedbhai* v. *Badruddin*, 16 B. 533.

(h) **Erection of Building.**—Building erected after suit filed but before hearing—At the hearing the Court may grant mandatory injunction directing removal of the building, although only preventive relief was prayed for in the plaint.—*Magan Lal* v. *Chhotalal*, 26 B. 136. *See*, however, *Sri Rangachariar* v. *Rungasami*, 32 M. 231.

(i) **Intrusion upon Office.**—A *Vatandar Joshi* of a village has the right to recover damages from a person who has intruded upon his office and received fees properly payable to him, but the Court will not grant any injunction against such intruder which would have the effect of forcing upon any section of the community the services of a priest whom they are unwilling to recognize, and forbidding them to employ a priest whose ministrations they desire.—*Raja Valad Shivapa* v. *Krishnabhat*, 3 B. 232.

The plaintiff, who had bought a share in a *Kulkarnivatan* and *Joshi Vritti* was obstructed by the defendants in the performance of his duties. *Held*, that he was entitled to an injunction against the defendants.—*Moro Mohadev* v *Anant Bhimaji*, 21 B. 821.

Plaintiffs sued for an injunction to prevent defendant from interfering with their right to present to certain persons at a certain festival in a certain temple a crown and water. The lower Court found that the plaintiffs possessed the right claimed and granted the injunction *Held*, that the injunction was properly granted —*Srinibasa* v. *Tiruvengada*, 11 M 450.

The trustees of a temple may be restrained by injunction from making unjustifiable changes which would affect the character of the temple as a religious institution—Introducing a new metal idol in addition to the existing stone idol.—*Krishnasami* v. *Samarav*, 30 M. 158.

(j) **Obstruction to Light and Air.**—When the Court is asked to interfere by injunction to restrain the obstruction of light and air to a dominant tenement, the question to be determined is—Is the obstruction such as seriously to interfere with the comfort or enjoyment of the owners of the dominant tenement, or such as to cause material injury to it, an injury which cannot be completely compensated by damages? The Court will in such cases interfere as well by mandatory as by preventive injunction, provided that in the circumstances of the case there is nothing inequitable in putting in force the former remedy.—*Ratanji Harmasji* v. *Edalji Harmasji*, 8 Bom. H. C. 181.

The right of the owner of the dominant tenement is a right to the reception of light and air in a lateral direction; but to constitute an actionable obstruction the same must amount to a nuisance. The question that has to be decided, is not how much light is left in spite of the obstruction, but whether there has been such a diminution of light as to

constitute an actionable nuisance.—*Anath Nath* v. *Galstaun*, 35 C ... 12 C. W. N. 519.

To constitute an actionable obstruction to light and air, it is not enough that the light is less than before and the plaintiff enjoys less ... of air. The test is whether the obstruction complained of is a nuisance. An injunction was granted where it was found that a wall built by the defendant on his own land would cause such privation of light and ... the flow of air to such an extent as would prevent the plaintiff's carrying on their business as beneficially as before.—*Anderson* v. *Hardit* ... 9 C. W. N. 543.

To establish that the plaintiffs have suffered substantial damage ... their rights to light and air they must show material diminution in the value of their heritage or material interference with their physical comfort. Meaning of the expression "physical comfort" explained.—*Framji* v. *Framji*, 30 B. 319.

In cases of obstruction to light and air, where the plaintiff prays for a perpetual injunction: *Held*, that, under section 54 of the Specific Relief Act (I of 1877), an injunction is not to be given when the remedy by damages is considered adequate.—*Dhunjabhoy Gowasji* v. *Lisboa*, 13 B. 252, *Ghansham Nilkant* v. *Moroba Ram Chandra*, 18 B. 474, ... *Nawazjung* v. *Rustomji Nanabhoy*, 20 B. 704; *Boyson* v. *Deane*, ... 251; *Kahan Das* v. *Tulsi Das*, 28 B. 786; *Delhi and London Bank* v. *Hem Lall Dutt*, 14 C 839; and *Chota Lal* v. *Lallubhai*, 29 B 15 ... where the obstruction to light and air is of such a nature as to render the house quite unfit for the ordinary purposes of habitation or business, and renders it practically useless, an injunction and not merely damages is the only appropriate remedy.—*Kadarbhai* v. *Rahimbhai*, 13 B. 674, *Delhi and London Bank* v. *Hem Lall*, 14 C. 839; *Yaro* v. *Sanaullah*, 19 A. 2..; and *Jethalal* v. *Lalbai*, 28 B. 298.

Re-erection of his house by the defendant, notwithstanding ... from the plaintiff, so as to darken some of the principal rooms of the plaintiff's house, making them unfit for occupation during the day without artificial light, is an injury which cannot be redressed by award of damages and against which the Court will grant relief by issuing a mandatory injunction directing the defendant to pull down so much of the house as is necessary, to stop the injury.—*Jamna Das* v. *Atmaram*, 2 B. 1..

The plaintiff had two windows in his house. He rebuilt his house and opened new windows, which were of nearly the same size, but were ... higher than the old ones. Subsequently the defendant built his house and blocked up these two new windows. The plaintiff sued for injunction. *Held*, that where the position of the old windows has been changed the old easement is lost and the easement respecting the new windows can be acquired only by enjoying it for the required length of time.—*Hariganga* v. *Tricamlal*, 26 B. 374.

There are at least two necessary ingredients for a quia timet action. There must, if no actual damage is proved, the proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial or irreparable.—*Gangabai* v. *Patch...*, 13 B. 146: 9 Bom. L. R. 912.

Where the defendant without leave or license took possession of the plaintiff's window as completely as if he had blocked it up altogether. *Held*, that no precedent warranted the substitution of damages for an injunction in such a case against the plaintiff's will.—*Nandkishore* v. *Bhagubai*, 8 B. 95. *See* also, *Kunni Lal* v. *Kundan Bibi*, 29 A. 571: 4 A. L. J. 477.

Where the plaintiff and the defendant, being owners respectively of two adjoining houses and the verandahs immediately in front of those houses, agreed that they should keep the verandahs open, and not build upon them or divide them by a wall *Held*, that the mere fact that the defendant, when rebuilding his house, built its new front wall in advance of the plaintiff's thus encroaching on the defendant's own verandah in breach of the agreement, is not sufficient in itself to justify the Court in granting a mandatory injunction ordering its removal.—*Ranchhod Jamna Das* v. *Lallu Haribhai*, 10 Bom H. C. 95

(k) **Effect of Delay and Acquiescene.**—Where a plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, but has waited till the building has been completed, and then asks the Court for its removal, a mandatory injunction will not generally be granted. Mere notice not to continue building so as to obstruct a plaintiff's rights, is not, when not followed by legal proceedings, a sufficiently special circumstance for granting such relief —*Benode Coomaree* v. *Soudaminey*, 16 C. 252 (2 B. 133 *referred to*) Followed *Ulagappan* v *Chidambaram*, 29 M. 497, and in *Haji Syed Muhammad* v *Gulab Rai*, 20 A. 325. *See*, however, *Provabutty* v *Mohendra Lal*, 7 C 453, where a mandatory injunction was granted, although the plaintiff brought his suit two days after completion of the building, and also *Maganlal* v. *Chottalal*, 26 B. 136.

(l) **Obstruction to a View of a Shop.**—The defendants built a shed and put screens on their own land in front of the plaintiff's shop, the view to which was obstructed on account of these constructions *Held*, that the plaintiff was not entitled to have the construction removed on the ground that the view to his shop was interrupted from the neighbouring road.—*Gopi Nath* v. *Munno*, 29 A 22 3 A L J 637

(m) **Obstruction to Watercourse or Right to Flow of Water.**—In cases of obstruction of right to an uninterrupted flow of water, it must appear from the circumstances in evidence in each case that the interference or obstruction complained of is not a trivial, but a substantial injury in order to warrant relief by way of injunction.—*Ponnusawmi Tevar* v. *Collector of Madura*, 5 M. H C. 6; *Krista Ayyan* v. *Venkatachella*, 7 M. H. C. 60.

Alteration of watercourse by opening a new channel—Where the new channel effected a material alteration in the mode of passage of the water from the defendant's land into that of plaintiff, the plaintiff was entitled to the injunction.—*Raja of Venkatagiri* v. *Rajah Muddukrishna*, 28 M. 15. See, *Rama* v. *Subramania*, 31 M. 171: 18 M. L. J. 179, where injunction was granted for blocking up the entrance of a channel; and *Belbhadar Pershad* v. *Barkat Ali*, 11 C. W. N. 85, where an injunction was granted restraining the defendant from interfering with the natural flow of water.

In a suit for an injunction to compel defendant to reduce to its original dimensions an embankment which he had recently raised to a greater height on the ground that the effect of defendant's act had been, and would be, to injure plaintiff's land by preventing the passage of water which used to overflow that land; *Held*, that the plaintiff was bound to establish an injury caused by infraction of some right which plaintiff possessed or by the omission of something which defendant was legally bound to do.—*Prankisto* v. *Horo Chunder*, 10 W. R. 435. *See* also *Venkata Chelam* v. *Zamindar of Sivaganga*, 27 M 409 (18 M. 158 distinguished).

Obstruction to plaintiff's right to have the water carried from his roof on to the defendant's roof. *See*, 16 B. 533.

***(n)* Obstruction to Right of Way.**—The defendants closed a gate leading across a level crossing of their railway over which there was a public right of way. The plaintiff alleged that by the closing of this way access to his bungalow during the monsoon was completely stopped, and he sued to have the gateway re-opened. *Held*, that the inconvenience caused to the plaintiff was real and substantial; that the plaintiff was entitled to the use of the right of way in question, and under the circumstances to an injunction against its obstruction.—*G. I. P. Railway Company* v. *Nowroji*, 19 B. 390.

Right of way—Ownership of soil—Suit for trespass, injunction and to close doors. *Held*, that the plaintiffs had not such a property in the soil of the lane as would entitle them to prevent the defendant from making new doors on the lane, and to restrain him using the doors so made; they had only a right of way, but an injunction was granted restraining the defendant from using his doorways for the purpose of cleaning his privies, or in any other manner so as to obstruct the free use by the plaintiffs of the lane.—*Madan Mohan* v. *Chandra Kumar*, 9 B. L. R. 828: 18 W. R. 379.

***(o)* Right of Co-sharer to Deal with Joint Property.**—Before a Court will, in case of co-sharers make an order directing that a portion of the joint property alleged to have been dealt with by one of the co-sharers without the consent of others should be restored to its former condition (as, for instance, where a tank has been excavated), a plaintiff must show that he has sustained, by the act he complains of, some injury which materially affects his position.—*Joy Chunder* v. *Bipro Churn*, 14 C. [illegible] Approved and followed in *Atarjan Bibee* v. *Sheikh Ashak*, 4 C. [illegible] *See* also, [illegible] 788 and in *Ananda Chundra* v. *Parbati*, 4 C. L. J. 198 *See* also *Watson & Co.* v. [illegible] *nugger Jute Factory & Co.* v. *Ram Narain*, 14 C. 189; *Lachmi* [illegible] *Ram Chund Dutt*, 18 C. 10 P. C. (reversing 15 C. 214); *Lal* [illegible] *Singh* v. *Manowar Hossein*, 10 C. 253 P. C.; and *Paras Ram* v. *Sher* [illegible] 661. In all these cases it has been laid down that there is no such broad proposition as that one co-owner is entitled to an injunction restraining another co-owner from exceeding his rights, absolutely and without reference to the amount of damages to be sustained by the one or the other from the granting or withholding of the injunction. *See* however, *Shadi* v. *Anup Singh*, 12 A. 436, F. B.; and *Najju Khan* v. *Imtiaz-uddin*, 18 A. 115 where it has been held that one of several joint owners is not entitled to erect a building upon the joint property without the

consent of the other joint-owners, notwithstanding that the erection of such building may cause no direct loss to the other joint-owners.

In disputes between members of a joint Hindu family in respect of joint property, the exercise of a Court's discretion to grant relief by injunction should be confined to acts of waste, illegitimate use of the family property, or acts amounting to ouster.—*Anant Ramrav* v. *Gopal Balvant*, 19 B. 269. Followed in *Soshi Bhusan* v. *Gonesh Chunder*, 21 C. 600, where it has been further held that in a case where the act of the defendant amounts to an ouster of the plaintiff from his possession of joint property, pecuniary compensation not being an adequate relief, an injunction would be the proper remedy.

(p) **To Restrain the Act of Public Functionaries.**—The High Court has jurisdiction by proceeding in the nature of a *quo warranto* to restrain the functions of a municipal corporation in the matter of municipal elections—*In the matter of Corkhill*, 22 C. 717. *See* also, *In the matter of Mutty Lal Ghose*, 19 C. 192, 195-*note* and 198.

Suit for injunction restraining the Municipality from pulling down a house which is alleged to be in a ruinous condition—Meaning of dangerous structures—Power of Municipality to remove dangerous structures—Person affected by the action of the Municipality is entitled to be heard as a matter of common justice.—*Lalbhai* v. *Municipal Commissioner of Bombay*, 33 B. 334.

There is no authority for the proposition that an individual is entitled to protection by way of injunction against the act of a corporation, though in excess of their powers, which affects that individual's character and reputation whether private, professional or commercial, to which he would not have been entitled, had the act complained of been committed by an individual defendant, on the ground that the act in question was one which the corporation had no power to do under their instrument of incorporation.—*Shepherd* v. *Trustees of the Port of Bombay*, 1 B. 231.

A suit to restrain the Municipality from cutting off pipe water connection from the plaintiff's house is maintainable.—*Surat Municipality* v. *Tyabli*, 32 B. 460: 10 Bom. L. R. 622.

A suit does not lie against the corporation for an injunction restraining the same from causing portions of plaintiff's buildings to be demolished which had been erected without sanction from the Chairman or the General Committee in alleged breach of the building regulations.—*Bholaram* v. *Corporation of Calcutta*, 18 C. W. N. 740.

Where a public body has received by statute a discretionary power to buy, and is laid under an obligation to collect a rate, an injunction cannot be granted by a Court so as to deprive such public body of the power of exercising its discretion or to prohibit it from discharging the obligation.—*Municipal Commissioners of Madras* v. *Branson*, 8 M. 201.

(q) **Trade Mark.**—In an application for an injunction to restrain the use of a trade-mark, it is not a sufficient defence to say there was no fraudulent intention, and that is no reason for granting the application.—*Graham* v. *Ker Dods & Co*, 3 B. L. R. App. 4.

The defendants adopted a label, which though different in respects from the picture on the plaintiff's label, was in its general appearance so similar to plaintiff's trade-mark as to amount to a colourable imitation thereof, and to be likely to deceive purchasers: *Held*, the plaintiff were entitled to an injunction against the defendants.—*B. Aniline* v. *Maneckji*, 17 B. 584.

The right of exclusive user of a name or a number as a trade-mark is not an absolute and unqualified right which would entitle the [illegible] to prevent another person from using it under all circumstances; only when the use of that name or number deceives, or is reasonably likely to deceive the public that it can be interfered with or prevented; there must be a reasonable probability of purchasers being deceived: it is not enough to show a mere possibility of deception.—*Barlow* v. *Gobind*, 24 C. 364: 1 C W. N 281. *See* also, *Reddaway & Co.* v. *[illegible] Smidt & Co.*, 8 C W. N. 151 (*affirmed in* 32 C. 401).

An importer and seller of matches bearing manufacturer's or producer's trade-mark is not entitled to an injunction to restrain the defendants from importing or selling in Bombay or other parts of India [illegible] similar in appearance to a certain class of matches imported [illegible] the plaintiff.—*Heiniger* v. *Deoz*, 25 B. 443.

(*r*) **Copy Right.**—The plaintiff brought out a new and [illegible] edition of a certain well-known Sanskrit work on religious [illegible]. The defendants printed and published one edition of the same [illegible] text of which was identical with that of the plaintiff's work, which, moreover, contained the same additional passages and *the same* [illegible] the same places, with many slight differences. *Held*, that the plaintiff's work was an original work and entitled to protection and that the defendants had pirated the plaintiff's work, they must be restrained by injunction.—*Gangavishnu Srikisondas* v. *Mushra Bapuji*, 13 B. [illegible]

Copy-right in a portion of a publication, how protected.—*Lee* v *Bushnell*, 12 C W N. 753.

(*s*) **Landlord and Tenant.**—Where land has been let out for agricultural purposes, the erection of an indigo factory on any part of the land renders it unfit for the purposes of tenancy and the landlord is entitled to a permanent injunction restraining the tenant from [illegible] the factory.—*Surendra Narain*, v. *Hari Mohan*, 31 C. 174: 9 C. W. N. *Reversed* in 34 C 718: 11 C. W. N. 791, P. C.

The tenant of an agricultural holding planted his jote with [illegible] trees to the knowledge, but without the consent of his landlord [illegible] changing the character of the land. More than three years after [illegible] the landlord sued *for a mandatory* injunction to have the [illegible] removed. *Held*, that having stood by more than three years, and [illegible] the tenant to spend his labour and capital, the landlord was not entitled to a mandatory injunction.—*Nayna Mister* v. *Rupikhan*, 9 C [illegible] C L. R 300 *See*, however, *Lakshmana* v. *Ram Chandra*, [illegible]

A landlord cannot have a mandatory injunction in respect [illegible] building erected by a tenant of an agricultural holding, if knowing [illegible] construction he does not object.—*Ulagappan* v. *Chidambaram*, [illegible]

A zemindar sued for an injunction to compel the defendant who held agricultural lands with occupancy rights, to demolish a dwelling-house which he had erected thereon for purposes not connected with agriculture, and to restrain him from altering the character of the land. *Held*, that the plaintiff was entitled to the injunction sued for.—*Ramanadhan* v. *Zamindar of Ramnad*, 16 M. 407. *See*, however, *Prosunno Coomar* v. *Jagunnath*, 10 C. L. R. 25 (reversing 9 C. L. R. 221).

In the absence of custom, the general rule is that the property in timber on a tenant's holding vests in the landlord, but the landlord has no right to interfere with the enjoyment by the tenant of the trees upon his holding so long as the relation of landlord and tenant subsists. *Held*, therefore, that a landlord is not entitled to an injunction restraining the tenant from offering obstruction to the cutting down and removal of the trees upon the holding.—*Ganga Dei* v. *Badham*, 30 A. 134: 5 A. L. J. 99 [W. R. (1864) 367 *referred to*].

(*t*) **Nuisance.**—Nuisance by erection of a privy close to plaintiff's house by order of Municipality—Injunction granted to remove the privy.—*Jafir Shaheb* v. *Kadir Rahiman*, 12 B. 634.

Where the defendant, the owner of a shellac factory, discharged into the *municipal drain, which was not constructed or intended for carrying* of such stuff, refuse liquid of offensive character which interferred with the ordinary comfort of the plaintiff's occupation of property and caused him special injury: *Held*, that the plaintiff was entitled to restrain him: that an injunction was the only effectual remedy in the case and substantial damages should be awarded against the defendant who has persisted in a nuisance causing material injury to plaintiff.—*Galstaun* v. *Doonia Lal*, 32 C. 697: 9 C. W. N. 612.

Nuisance for using land as a burial and burning ground.—Injunction refused as it was not proved to be actionable nuisance.—*Mahammad Mohidin* v. *Municipal Commissioners of Madras*, 25 M. 118.

The right of Muhammadans to slaughter kine is one to which they are legally entitled to irrespective of custom, and it is only when they abuse the right that its exercise can be interfered with.—*Shahbaz Khan* v. *Umrao Puri*, 30 A. 181: 5 A. L. J. 147.

Nuisance from cotton-mill—Noise, smoke, and fluff of mill—Damages—Combination of injunction and damages. The Court, after going into the evidence, considered that the case would be best dealt with by a combination of damages and injunction, and made an order for injunction to issue against noise, smoke, and cotton fluff so as to be a nuisance to the plaintiffs. Such injunction not to issue in case the defendants should pay to the plaintiffs the sum of Rupees 40,000 before the expiration of a fortnight from the date of the decree.—*Land Mortgage Bank of India* v. *Ahmedbhoy Habibhoy*, 8 B. 35.

(*u*) **Trees Overhanging Neighbour's Land—Injunction.**

It is competent to a Court to grant perpetual injunction directing the defendant to remove the branches of trees overhanging his neighbour's land and also to restrain him from planting trees so close to his neighbour's land that their roots may not extend or penetrate his land.—

Lakshmi Narain v *Tara Prasanna*, 31 C. 944: 8 C. W. N. 71 *Lal* v. *Ghisa Lal*, 24 A. 499; *Hari Krishna* v. *Shankar Vithal*, I In *Ram Lal* v. *Dalganjan*, 5 A. 369, it has been held that has no right to the removal of trees planted by the defendant land until the plaintiff's enjoyment of his own land is directly diately interfered with by the growth of the trees.

(v) Stay of Criminal Proceedings Pending Civil Suit.

Per Ghose, J.—The High Court has power to direct that proceedings in the Court of a Magistrate should be stayed, disposal of a Civil suit, in which the question at issue in the proceedings shall have been decided. *Contra—Per* Rampini, J ing B. L. R. Sup. Vol. 426: 5 W. R. Mis. 94) —*Raj Kuman Sundari*, 23 C. 610. *See* also, *Jogiah* v. *Emperor*, 31 M. 510 (F B., 426 *distinguished*); *Anna Ayyar* v. *Emperor*, 30 M. *Charan* v *King-Emperor*, 5 C. L. J. 223; *Queen* v. *Achut Le* R. Cr. 46; *In re Nana Maharaj*, 16 B. 729; *In re Balgangadhar* B 785, and *Dwarka Nath* v. *Emperor*, 31 C. 858 But see, *In Valad Bhavani*, 18 B. 81.

No suit is maintainable for an injunction to restrain under an order made by Magistrate for maintenance But maintainable for a declaration that the defendant had no right in the maintenance out of plaintiff's properties.—*Deraji* *Marati*, 30 M. 400 (14 C. 276 *followed*, 18 A. 29 *explained*)

Injunction to restrain repetition or continuance of the breach.

2. (1) In any suit for restraining the defend committing a breach of contract or othe of any kind, whether compensation is in the suit or not, the plaintiff may, time after the commencement of the either before or after judgment, apply to the Court for a te injunction to restrain the defendant from committing th of contract or injury complained of or any breach of con injury of a like kind arising out of the same contract or to the same property or right.

(2) The Court may by order grant such injunction terms as to the duration of the injunction, keeping an giving security, or otherwise, as the Court thinks fit.

(3) In case of disobedience, or of breach of any su the Court granting an injunction may order the propert person guilty of such disobedience or breach to be atta may also order such person to be detained in the civil pr term not exceeding six months, unless in the meantime t directs his release.

(4) No attachment under this rule shall remain in f more than one year, at the end of which time, if the dis

or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto. [S. 493.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s 493, C P. Code of 1882, with some additions and alterations

In sub-rule (1) the words "*of any kind*" have been added after the words "other injury."

Sub-rule (2) corresponds to para 2 of the old section with omission of the words "*or refuse the same*" which occurred after the words "thinks fit."

Sub-rule (3) has been substituted for para. 3 of the old section; the wording and the language of the old para. have been completely changed; para. 3 of the old section is reproduced below to observe the changes made in sub-rule (3): "*In case of disobedience, an injunction granted under this section or s. 492, may be enforced by the imprisonment of the defendant for a term not exceeding six months or the attachment of his property or both.*"

Sub-rule (4) corresponds to para 4 of the old section with some alterations. The words "*if the disobedience or breach continues*" have been substituted for the words "if the defendant has not obeyed the injunction"; and the words "*shall pay the balance to the party entitled thereto*" have been substituted for the words "may pay the balance (if any) to the defendant," which occurred in the old section

Temporary Injunction to Restrain Breach of Contract.—To prevent the violation of contracts, the Court has the power to interfere by injunction and to compel parties to perform their covenants and agreements by injunction, temporary or perpetual, mandatory, or otherwise. This rule deals with temporary injunctions to restrain the breach of a contract. Perpetual injunctions to restrain the breach of a contract are regulated by s 56 (*f*) and s 57 of the Specific Relief Act, 1887. The ordinary remedy for breach of contract is damages Hence no injunction can be granted where damages afford adequate relief *See* also, *Firm of Sopanlal Chiman Lal* v *Jai Narain Babu Lal*, 54 I C. 546, where *principles governing grant of temporary injunction to restrain breach of contract have been explained*

"Or other Injury." The words "*or other injury*" in this rule mean any legal injury other than that arising from breach of contract, as in the case of obligation arising from transfer of property or trust or in cases of tort. The addition of the words "*of any kind*" in this rule makes it clear that injunction can be granted to prevent injury from any wrongful act whatever be its nature. The word "*injury*" in Or. XXXIX, r. 2 (1), C. P Code, means an act which is contrary to law. To justify a temporary injunction plaintiff must show irreparable injury or inconvenience likely to result to him before the disposal of the suit, if the opposite party were not restrained by injunction.—*Firm of Manohar Lal*

Mahabir Pershad v. *Firm of Jai Narain Babu Lal*, 2 Lah L J ... I. C. 403; *Firm of Kirpal Das Kalian Das* v. *Firm of Gajram*... L. R. 5; *Rameshwardar Das* v. *Yakin-ud-din*, 75 I C. 428

A suit for a declaration that a certain person is not eligible to ... as a candidate cannot be said to be a suit for restraining him from ... mitting an injury of any kind. To restrain the defendant in such ... would be tantamount to granting the plaintiff the relief sought ... suit and might deprive the defendant of a right to which he is ... entitled.—*The Election Officer, Gujrat* v. *Abdul Ghani*, 1923 Lah ...

Mode of Execution of a Decree for Injunction.—See, the cases under *Or. XXI, r.* 32.

Sub-rule (3)—Disobedience of Order for Injunction—Contempt of Court.—The proper remedy for disobedience of an order of ... passed by a Civil Court is committal for contempt —*In the matter ... petition of Chandra Kanta De*, 6 C. 445: 7 C. L R 350

Order XXXIX, r 2 (3) applies not only to disobedience of ... issued under clauses (1) and (2) of that rule, but has a more ... application and applies equally to disobedience of all injunctions ... under s 94 of the Code. Where an injunction order issued by a ... Bench of the High Court on the Appellate Side is disobeyed by a ... residing in the mofusil, the Judges constituting the Bench, in ... him for contempt, can adopt the procedure laid down in s 136 of the Code, and send to the appropriate District Court the warrant of ... the order of attachment for necessary action being taken In such ... the District Court, on receipt of the warrant and order, will ... procedure laid down in s. 136.—*Adaikala Theran* v. *Imperial ... Madras Branch*, 50 M. L J. 401: A. I. R 1926 Mad. 574. 95 I C ...

In case of disobedience, the Court which actually granted the ... junction may punish.—*Jaharuddi* v. *Hari Charan*, 18 C. W N ... *Mathura Das* v. *Varkat Rao*, 21 M. L J. 829 The Court can select ... arrest or attachment of property and is not bound in the first ... attach and then only to order imprisonment.—*Suppi* v. *Kunhi K*... 907 (F B.)

A judgment-debtor applied to the High Court for stay of sale of ... property attached in execution of a decree of a subordinate Court ... the order of stay subject to certain conditions but afterwards ... a part of the property ignoring the condition. *Held*, that the C... punish him for disobedience under Or XXXIX, r 2—*Ram* ... *Benares Bank Ltd*, 17 A. L. J. 1127.

When an injunction has been granted restraining a person from ... rupting the access of light and air to certain windows, and the C... siders that the injunction has been infringed, an attachment ... even though the defendant has proceeded according to the ... surveyor and legal adviser in constructing the building ... a breach of the injunction. The Court in such cases is not bound ... opinion of surveyors.—*Pranjivan Dass* v. *Mayaram*, 1 B 148

Where a plaintiff has once obtained a decree for perpetual ... directing the defendant to refrain from certain acts, it is not necessary ...

if in future, the defendant ignores such injunction, to sue again ı similar relief; such a suit would be barred by the principle of *res :ata*. When the person to whom the order has been issued disobeys order, he is guilty of contempt of Court, and the Court can take eedings to enforce its authority notwithstanding anything contained in 182 of the Limitation Act —*Ram Saran* v *Chatar Singh*, 23 A. 465, ›wed in *Bagwan Das* v *Sukdev*, 28 A. 300: 3 A L. J. 836

The jurisdiction which a Court has to commit in case of disobedience a injunction is conferred by this Rule; but the powers conferred therein only exercisable when the Court is set in motion by a party who deems self aggrieved —*Kochappa* v *Sacchi Devi*, 26 M 494.

By this rule, the Legislature indicated that the imprisonment for con- pt should not extend beyond six months. Where, however, the de- ant had been in jail for more than 20 months for the criminal offence tempt of Court), the Court would not be justified in indirectly adding s duration.—*Advocate General of Bombay* v *Gangji Akbar*, 19 B. 152

By s. 43 (4) of the Guardian and Wards Act 1890, in case of dis- bience to an order passed under sub-sections (1) and (2) of that section, elation to the conduct or proceedings of guardians, the order may be orced in the same manner as an injunction granted under Or. XXXIX, 1 and 2 of the C. P. Code.—*Abdul Rahiman* v *Ganpathi*, 23 M 517.

No second appeal lies against an order under this rule, dismissing a tion to commit for disobedience to an injunction.—*Venkatapathi Naidu Tirumalai Chetti*, 24 M. 447

Temporary Mandatory Injunction.—A doubt was expressed in *Rasul im* v. *Pirubhai*, 38 B. 381 as to whether mofussil Courts have power to e mandatory injunctions. It was not followed in *Kandasami* v *Subra- nia*, 41 M. 238: 33 M L J. 448, where it has been held that the des- tion of a temporary injunction in s 53 of the Specific Relief Act does exclude injunctions of a mandatory nature. *See* also, *Israil* v *inser*, 41 C. 436; *Chamsey Bhimji & Co* v *The Jamna Flour Mills* , 16 Bom L R 566 · 28 I C. 121.

Whether the injunction be one restraining a party from altering the ition of affairs or directing him to restore the conditions which prevailed the time the cause of action arose, that order must not go further and st not create a totally new state of things —*The Lahore Electric Sup- Co. Ltd.* v *Bombay Motor Cycle Co*, 67 I C 742

Disobedience to Injunction.—*See* Notes under the same heading to 1. The defendant having built a wall on the plaintiff's land, the plain- brought a suit in which he asked for damages for trespass, and an unction, and a decree was passed for damages, and for a mandatory unction, directing the defendant within two months to remove the wall. o years subsequently the plaintiff brought another suit for damages *ld* that the suit would not lie for damages for non-compliance with the ndatory injunction, to compel the performance of which the plaintiff d his remedy in execution.—*Jawitri* v. *Emile*, 13 A. 98 (11 App. Cas. 7 *distinguished*).

Appeal.—An appeal lies to the District Court from an ord District Munsif refusing to take action under Or. XXXIX, r 2 (alleged breach of a temporary injunction granted under Or X 2 (2).—*Suppi* v. *Kunhi*, 39 M. 907 (F. B.); *Dewan Chand* v *H Co.*, 5 Lah. L. J. 142.

Before granting injunction Court to direct notice to opposite party.

3. The Court shall in all cases, except where it that the object of granting the in would be defeated by the delay, befor ing an injunction, direct notice of th cation for the same to be given to the party. [S

COMMENTARY.

This rule exactly corresponds to s 494 of the C P. Code, 1

Notice.—This rule enacts that as a general rule where an a for the issue of an injunction is made, notice of the same must to the opposite party but such notice may be dispensed with cases where the Court thinks that the object of granting the i would be defeated by the delay. The power to issue an *ex part* tion no doubt exists, but the greatest care should be employe exercise, and it should be exercised only in cases where m mischief might ensue if the issue of the process were delayed un was given —*Hari* v. *Secretary of State*, 27 B. 424, 451; *Amolak Sahib Singh*, 7 A 530; *Burma Oil Co. Ltd.* v. *Sampson*, 13 Bur L

Where a Court made an order granting a temporary injunction directing notice of the application for injunction to be issued to t side, and its order, directing stay of sale of property in exec passed *ex parte*, without the other side being given an opportunity cause *Held* that the order was irregular.—*Amolak Ram* v. *Sa* 7 A. 530 *See* also, *Baddam* v. *Dhunpat Singh*, 1 C. W. N. it has been held that an injunction should not issue without not opposite party.

A petition praying for a temporary injunction was presented plaintiff in a Subordinate Court The Judge refused to pass ord without notice to the opposite party. On appeal, the District Ju ed the injunction. *Held*, that no appeal lay from the order of the nate Court, and that the District Judge had acted illegally.—*L* 12 M 186

Order for injunction may be discharged, varied or set aside.

4. Any order for an injunction may be discharg varied, or set aside by the Court, on a tion made thereto by any party dis with such order. [S

COMMENTARY.

This rule exactly corresponds to s. 496, C. P. Code, 1882

Compensation to Defendant for Issue of Injunction on Insufficient Grounds.—Section 497, C. P. Code, 1882, contained the provisions for awarding compensation to a defendant for issue of injunction on insufficient grounds; the provisions of that section have been embodied in s. 95 of the present Code.—*See notes under that section.*

Appeal.—An appeal will lie under Or XLIII, r. 1 cl. (r), from an order under this rule. See, *Zabada Jan* v. *Muhammad Taiab*, 15 A. 8.

Injunction to corportaion binding on its officers

5. An injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain. [S. 495.]

COMMENTARY.

This rule corresponds to s. 495, C. P. Code, 1882, with the omission of the words "*or public company*" which occurred in the old section after the word "corporation"

Corporation.—There is no authority for the proposition that an individual is entitled to protection by way of injunction against the act of a Corporation, though in excess of their powers, which affects that individual's character and reputation, whether private, professional, or commercial, which he would not have been entitled to, had the act complained of been committed by an individual defendant, on the ground that the act in question was one which the Corporation had no power to do under their instrument of incorporation —*Shepherd* v *Trustees of the Port of Bombay*, 1 B. 132.

Agreement that the plaintiffs should be the agents of a company for 25 years—Resolution of the directors ousting the plaintiff from their agency.—Suit by agents of the company to restrain it from carrying into effect the resolution of the directors *Held*, that in as much as the Court would not, by a decree for specific performance or by injunction, compel the company to retain the plaintiff in the confidential position of the agents, it would not restrain the defendants or the company from appointing a solicitor, which was only a violation of what was ancillary or incidental to the principle part of the contract, *viz*, the agreement that the plaintiff should be the agent of the company for 25 years —*Nusservanji* v. *Gordon*, 6 B 266

INTERLOCUTORY ORDERS.

Power to order interim sale.

6. The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks, fit, of any moveable property, being the subject-matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once. [S. 498.]

COMMENTARY.

Alterations in the rule.—This rule corresponds to s. 498, C. P. C. 1882, with some additions and alterations.

The words "*or attached before judgment in such suit*" and the words "*or which for any other just and sufficient cause it may be desirable to have sold at once,*" have been added

"Words have been added to s. 498, so as to empower the Court to order a sale of securities when the state of the market requires such a course."—See, *the Report of the Special Committee.*

Detention, preservation, inspection, etc., of subject-matter of suit

7. (1) The Court may, on the application of any party to a suit, and on such terms as it thinks fit—

(*a*) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein ;

(*b*) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; and

(*c*) for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(2) The provisions as to execution of process shall apply, *mutatis mutandis*, to persons authorized to enter under this rule. [S. 49?]

COMMENTARY.

This section corresponds to s. 499, C. P. Code, 1882, with some additions and alterations. In clause (*a*) the words "*or as to which any question may arise therein*" have been added; the other changes are verbal

Inspection of Subject-matter of Suit.—In a suit for damages alleged to have been caused to plaintiff's house by the erection by the defendant of an adjoining house the defendant applied for an order allowing him to enter into the plaintiff's house for the purpose of inspecting, examining and surveying the alleged injuries. *Held*, that the house and the premises of the plaintiff formed the "subject of the suit," within the meaning of this rule and the Court had the power to make the order applied for.—*Dharany Dhur* v. *Radha Gobind*, 24 C. 117: 1 C. W. N. 6?

"For all or any of the purposes aforesaid, etc."—The Court has jurisdiction to make an order for preparation of any inventory under this rule. Amjad v. Ali Hossain, 12 C. L. J. 519 ,15 C. W. N. 353. But see Mohomed Rasek v. Tahidunnissa, 52 I. C. 33

Production of Property.—*In a suit by a pledgor against the pledgee* for redemption of the pledge, *held*, that the Court is competent to make order for the production of the property pledged under Or XXXIX, r. 7 (1) (a) —*Jitendra Nath v. Asoke Nath*, 30 C. L. J. 64 52 I. C. 4

Application for such order to be after notice.

8. (1) An application by the plaintiff for an order under r. 6 or 7 may be made after notice to the defendant at any time after institution of the suit.

(2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance.

[S.500.]

COMMENTARY.

This rule corresponds to s. 500, C. P. Code, 1882, with some modifications.

In sub-rule (1), the words "*after institution of the suit*" have been substituted for the words "after service of summons" which occurred in *the old section*, and in *sub-rule (2) the word "appearance"* has been substituted for the words "after the applicant has appeared" which occurred in the old section. The other changes are merely verbal.

Notice.—An application under this rule can only be made by a plaintiff, after summons has been served, and after reasonable notice of the intention to apply for the order has been given in writing to the defendant. —*Sengotha v. Ramasami*, 7 M. 241

Appeal or Review.—If an interlocutory order is wrongly refused by the Judge, the proper course is to apply for a review or to appeal from it, not to seek to obtain the order by resorting to another Judge, even though arguments should then be forthcoming which were not put before the first Judge.—*Motiralu v. Premralu*, 16 B. 511.

When party may be put in immediate possession of land the subject-matter of suit.

9. Where land paying revenue to Government, or a tenure liable to sale, is the subject-matter of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure ;

and the Court in its decree may award against the de
the amount so paid, with interest thereon at such rate
Court thinks fit, or may charge the amount so paid, with i
thereon at such rate as the Court orders, in any adjustm
accounts which may be directed in the decree passed in th
[S

COMMENTARY.

This rule exactly corresponds to s. 501, C. P. Code, 1882,
substitution of the word "*where*" for "when" in the beginni

Plaintiff was put in possession of property in suit under this r
the suit was dismissed; but no order was passed under the la
of the rule to enable the defendant for recovery of what he
during the period of dispossession by the plaintiff. *Held*, t
defendant was entitled to obtain mesne-profits in execution of th
and that a separate suit was unnecessary.—*Radhey Singh* v. *Ma*
6 C. W. N. 710.

10. Where the subject-matter of a suit is money o
other thing capable of delivery and a
thereto admits that he holds such m
other thing as a trustee for another p
that it belongs or is due to another party, the Court m
the same to be deposited in Court or delivered to such la
party, with or without security, subject to the further di
the Court. [

Deposit of money etc., in Court.

COMMENTARY.

This rule exactly corresponds to s. 502, C. P. Code, 1882
substitution of the word "*where*" for "*when*" in the begin

"**Holds.**"—This rule would seem to apply only when
making the admission holds the property or other thing which
in whose favour the order is made, seeks to have delivered to
even if that rule was intended to apply to a case where the
not so held by the party making admission, it would not co
where the money was held by another Court to the credit of a
Rajah Parthasaradhi v. *Rajah Rungiah*, 27 M. 168; 13 M. L.

Deposit.—As to liability for interest for money not dep
Ram Dass v. *Prosunno Moyee*, 16 W. R. 297.

Appeal.—An appeal lies from an order under this rule
XLIII, r. 1 cl. (r).

ORDER XL.

APPOINTMENT OF RECEIVERS.

Appointment of receivers.

1. (1) Where it appears to the Court to be just and convenient, the Court may by order—

(*a*) appoint a receiver of any property, whether before or after decree;

(*b*) remove any person from the possession or custody of the property;

(*c*) commit the same to the possession, custody or management of the receiver; and

(*d*) confer upon the receiver all such powers as to bringing and defending suits and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove. [S. 503.]

Remuneration.

2. The Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver. [S. 503, Cl. d.]

Duties.

3. Every receiver so appointed shall—

(*a*) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property;

(*b*) submit his accounts at such periods and in such form as the Court directs;

(*c*) pay the amount due from him as the Court directs; and

(*d*) be responsible for any loss occasioned to the proper by his wilful default or gross negligence.

[S 503, Para 2

COMMENTARY.

Section 503 of the C. P. Code, 1882, has been divided into these th rules.

The wording and the language of the first para of the old sect. have been materially changed, and several additions, alterations and om sions have been made

In sub-rule (1) the words "*where it appears to the Court to be ju and convenient*" have been substituted for the words "whenever appears to the Court to be necessary for the realization, preservation better custody or management of any property, moveable or immoveabl the subject of a suit, or under attachment," which occurred in the fir para of the old section.

By the above change the power of the Court in the matter of appoin ment of receivers has been enlarged. According to the language of sub rule (1), the Court can appoint a receiver where it appears to it to b *just and convenient*. The conditions attached to the para of the old sec tion are no longer necessary for the appointment of a receiver The omi sion of the words "*the subject of a suit*," or "*under attachment*," material, as the words "property the subject of a suit" were the subje of much discussion in 17 C. 61 and in 30 M. 155, noted below. By th omission of the above two expressions, a receiver can now be appointe where a personal remedy is sought against the defendant or the property not under attachment (30 M 255). The other alterations are mere chang of words and phrases.

Receiver in Proceedings Other than Suit.—S 503 of the Code o 1882 contained the words "subject-matter of a suit" Under the ol Code, therefore, a receiver could only be appointed in a suit By th omission of these words in the present rule, a receiver may now be appoint ed even in proceedings other than a suit.—*Asadali* v *Mahomed*, 43 C 986 36 I C. 177 A receiver may be appointed in a testamentary suit —*Yeshwant* v. *Shankar*, 17 B. 388; or in proceedings under the Guardia and Wards Act —*In re Bai Jummabai*, 36 B. 20. 11 I C 554; *Chan drawati* v *Jagannath*, 7 Lah L J. 281. 90 I. C 611: A I R 1925 Lah 489 But a Court has no jurisdiction to appoint a receiver in proceeding under the Succession Certificate Act.—*Kanhaiya* v *Kanhaiya Lal*, 46 A 372 79 I C 363. A I R 1924 All. 376

"Just and convenient."—The words "just and convenient" have been taken from the English Judicature Act, 1873 They mean that th Court should appoint a receiver for the protection of property or the pre vention of injury, according to legal principle, and not that the Court can make such appointment because it thinks convenient to do so. The confer no arbitrary and non-regulated discretion on the Court.—*Habibullah* v *Abtia Kallah*, 23 C. L. J. 1567; *Pana Seenee* v. *Ana*, 8 I. C 1191 ... Court must take

the whole circumstances of the case into consideration and then decide bether it would be "*just and convenient*" to appoint a receiver Priarily this discretion is to be exercised by the Court in which the case pending and to which the application is made. The Court has full scretion to appoint or remove a receiver and the Appellate Court will it as a rule when the first Court has acted after considering all the cirmstances, interfere with the exercise of that discretion —*Haji Kadir akhsh* v. *Ghulam Mahomed*, 55 I C 50, *Amar Nath* v. *Mt Tehal Kaur*, U. P. L. R. 73 67 I C 383; *Dhumi* v *Nawab Muhammad Sajjad* I. C. 600; *Satis Chandra* v *Benoy Krishna*, 96 I C 30 A I R 926 Cal 1092

The appointment of a receiver is a matter of judicial discretion and ourts should proceed cautiously viewing all the circumstances of the ise The words "just and convenient" mean that the Court should ppoint a receiver for the protection of property or prevention of injury ccording to legal principles and not because it thinks it convenient to do . They confer no arbitrary and non-regulated discretion on the Court he receiver appointed in an action should as a general rule be a disterested person, but it is competent to the Court upon the consent of arties and in a proper case without such consent, to appoint a person ixed up in the subject-matter of the litigation, if it will be beneficial to le estate —*Bhupendra Nath* v *Manohar Mukerjee*, 28 C W N 86

"May by order."—The order on an application under Or XL, r 1, hould not express an opinion on the merits of the case —*Bhupendra Nath Manohar Mukerjee*, 28 C W N. 86

The appointment of a receiver is a matter resting in the discretion of ie Court The powers of appointing a receiver conferred by this rule, iust be exercised with a sound discretion, upon a view of the whole cirumstances of the case, not merely the circumstances which might make he appointment expedient for the protection of the property, but all the ircumstances connected with the right which is asserted and has to be stablished The Court will not interfere by appointing a receiver where ight is asserted to property in the possession of a defendant claiming to old it under a legal title, unless a strong case is made out.—*Sidheswari* . *Abhayaswari*, 15 C 818, *Meyappa Chetty* v *Narayourn Chetty*, 43 . C. 550, *Mt Ishri* v *Shib Ram*, 71 I C 743: 1923 Lah. 239. Where roperty is shown to be *in medio*, *i e.*, in the enjoyment of no one, the ourt can hardly do wrong in appointing a receiver, for it is the common nterest of all parties to prevent a scramble.—*Alkama Bibi* v. *Syed Istak*, 29 C. W N 836 89 I C 183 A. I. R. 1925 Cal. 970 The mere ircumstances that the appointment of a receiver will do no harm to any one is no ground for appointing a receiver.—*Srimati* v. *Beni Madhab*, 5 A. 556; *Kunhan* v. *Mannan*, 46 M L. J. 133: 79 I. C. 561: A. I. R. 1924 Mad 482. Neither can a receiver be appointed simply for the puriose of ascertaining the income of an estate in order to fix the amount of naintenance to be paid out of it.—*Rajammal* v. *Tyaru*, A. I. R. 1925 Mad 1245: 89 I. C. 913 In *Chandidat* v. *Tadmanand*, 22 C. 459, it has een further held that *the distinction between a case in which a temporary injunction may be granted and a case in which a receiver may be appointed*, is that, while in either case, it must be shown that the property should be preserved from waste or alienation; in the former case, it would

be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged, while in the latter case, a good *prima facie* title has to be made out.—*Siragnunathammal v Aruna Chalam*, 2 M. W. N. 75: 21 M. L. J. 821 *See also*, *Mikasha v. Dassmal Gangaram*, 45 I. C 224.

"Appoint a receiver of any property, whether before or after decree."—The power conferred by the Court by Or XL, r 1 (a) to appoint a receiver of *any property* whether before or after decree, refers only to the appointment of a receiver in respect of the property in regard to which, the litigation is pending that is to say as long as the suit before the Court remains *lis pendens*, the function of the receiver will continue until he is discharged by the Court.—*Chandreswar Prasad v Bisheswar Pratap*, 5 Pat. L. J. 513: 1 Pat L. T. 648.

Whether Issue of Notice to the Opposite Party Before Appointment of Receiver is Necessary.—Or. XL, r. 1, C. P. Code, does not lay down that notice to the opposite party should be issued before appointing a receiver and it is obvious that in many cases the object of the appointment might be nullified if notice were issued.—*Mt. Ishri v Shibram*, 21 I. C. 743 (22 C 459, 21 M. L. J. 821, 107 P. R. 1908 *distd*).

Courts Empowered to Appoint Receivers.—Another most important change in this order is the omission of s. 505, C. P. Code, 1882, under which only the High Courts and the District Judges were empowered to exercise the powers conferred by Chap. XXXVI of the C. P Code, 1882. The Subordinate Courts could only nominate a person and District Judge could authorize the Subordinate Courts to appoint the person so nominated or he could pass such other order as he might think fit

Having regard to the standard of efficiency, the Committee see no reason to withhold from Subordinate Judges, the power to appoint receivers. They therefore propose that s. 505 of the Code should no longer be retained for its effect in practise is often to defeat the purpose for which an application is made.'—*See the Report of the Special Committee*

Power of Court to Appoint Receivers and Grounds for Appointment.—The powers conferred by this rule are not to be exercised as a matter of course, and it is not a reason for allowing an application for the appointment of a receiver that it can do no harm to appoint one The discretion is one that should be exercised with greatest care and caution Because a plaintiff in his plaint makes violent and wholesale charges of waste and malversation against a defendant in possession of property as executor under a will or as the tenant for life, and upon this basis applies for a receiver to be appointed, it is not a necessary consequence that such appointment should be made —*Prosonnomoye v Beni Madhab*, 5 A. 556, *Kumar Satya Narain v Srimati Rani Keshabaty*, 18 C W N 537.—*Mele Vittil Kunhan v. Kannan*, 46 M. L J. 133

In an application for the appointment of a receiver, one has got to see the nature of the charges made, and if one finds that they are somewhat vague in character, it is a ground for declining to interfere on an interlocutory application for the appointment of a receiver.—*Satis Chandra v Benoy Krishna*, 96 I. C. 30: A. I. R. 1926 Cal. 1092.

When an application is made to the Court to take the property into its hands by appointing a receiver, the plaintiff must prove that *prima facie* he has a very excellent chance of succeeding in establishing the case made out in his plaint, and in the next place he must satisfy the Court that the property in possession of the opposite party is in danger of being wasted. The mere fact that there is dispute is no reason whatever for appointing a receiver.—*Govind Narayan Rao* v. *Vallabhrao Narayan Rao*, 22 Bom. L R 2 (7); 55 I C 827; *Banwari Lal* v. *Mati Lal*, 3 Pat. L. T. 466. 68 I C. 656; *The Firm Raghubir Singh Jaswant* v. *Narijari Singh*, 72 I C 569; 1923 Lah. 48.

Waste or misappropriation of property is a ground for appointing a receiver.—The fact that the acts complained of amount to misappropriation rather than waste makes no difference for the purposes of this rule — *Hanumayya* v *Venkata Subbaya*, 18 M. 23.

The mere fact that a Mahomedan widow is entitled to a lien, for dower on her husband's estate is no ground for refusing the appointment of a receiver summarily without enquiry into the merits of the application There is nothing in Or XL, r 1, to prevent the appointment of a receiver in such a case.—*T Syed Ali* v *Ahmad Syed*, 68 I. C 502: 1923 Nag. 21.

Where both the claimants are mendicants and have no worldly property of their own, the property in dispute is of considerable value and acts of waste have been found to have been committed by the defendant who is in possession. *Held*, that the appointment of receiver is the proper order.—*Ram Sunder* v *Kamal Jha*, 32 C. 741.

That the income of the property is very large and the defendant is a poor man from whom it would be impossible to realise any mesne profits which might be decreed without any allegation of misappropriation or waste by the defendant, are not adequate reasons for the appointment of a receiver —*Mahomed Askari* v. *Nisar Husain*, 43 A. 311: 19 A. L J. 50.

The removal of a large amount of property by the defendant and under circumstances which might fairly give rise to suspicion during the pendency of the suit in which the question of title to that property would be determined is a sufficiently strong ground for the appointment of a receiver —*Sita Ram Das* v *Mahabir Das*, 27 C. 279: 5 C. W. N. 362 (15 C. 818, and 22 C. 459 *referred to*). *See* also, *Sham Chand Giri* v. *Bhaya Ram Pandey*, 5 C W. N. 365.

Where the subject of dispute between the parties to a litigation was a large impartible zemindari with valuable forests, mines and minerals and the zemindari had long been under the management of the Court of Wards. *Held*, that the case was a fit one for the appointment of a receiver pending the appeal and for stay of execution of the decree by the successful claimant —*Sri Pratap Chandra Deo* v. *Sri Raja Jagadish Chandra*, 37 C L J 417: 75 I C. 417.

Or XL, r 1, of the Code prevents the Court from ejecting a person not a party to the suit unless one or other of the parties to the suit has such a right But the Court has always the power to appoint a receiver to take possession of the properties from the parties to the suit itself and

be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged; while in the latter case, a good *prima facie* title has to be made out —*Sivagnanathammal v. Aruna Chalam*, 2 M. W. N. 75: 21 M L J. 821 *See also*, *Mikosha v. Dassimal Gangaram*, 45 I. C 224.

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In an application for the appointment of a receiver, one has got to see the nature of the charges made, and if one finds that they are somewhat vague in character, it is a ground for declining to interfere on an interlocutory application for the appointment of a receiver.—*Satis Chandra v. Benoy Krishna*, 96 I. C. 80: A. I. R. 1926 Cal. 1092.

must be had to the provisions of the Companies Acts.—*Kailash* v. *Sadar Munsif, Silchar*, 52 C. 513: 88 I. C. 826: A. I. R. 1925 Cal. 817.

Receiver for Execution of Decree.—A receiver may be legally appointed for the purpose of executing a decree, even though the decree is one merely directing the payment of money It is not essential that the estate, the rents and profits of which are to be realised should itself be liable to attachment in execution.—*Lahanu Bai* v. *Harak Chand*, 11 N. L. R. 113: 31 I. C 285; *Tikait Damodar Narain Singh* v *Gangaram*, 1923 Pat. 372.

Where a decree-holder had in execution of his decree attached two decrees held by the judgment-debtor against third parties, it was held that this rule gave power to the Court to appoint a receiver to realize the amount of attached decrees where it appeared that by so doing the interests of both decree-holder and judgment-debtor would be better protected.—*Partap Singh* v *Delhi* and *London Bank* Ltd , 30 A. 593: 5 A. L. J. 583

In a *decree for maintenance* charged on immoveable property, a receiver should be appointed in the decree with directions to take possession in case of default and to pay the maintenance allowance —*Hemangini* v. *Kumud Chunder*, 26 C 441: 3 C W N 139.

In a *testamentary suit*, the High Court has power to appoint a receiver under the provisions of the C. P. Code, which by s. 55 of the Probate and Administration Act (V of 1881) have been made applicable to proceedings under the Act.—*Yeshwant Bhagwant* v. *Sankar Ram Chandra*, 17 B 388.

The rule of the Court of Chancery, that a receiver will not be appointed against an executor unless gross misconduct was shown, is not applicable to the case of an executor of the will of a Mahomedan —*Hafizabai* v. *Abdul Karim*, 10 B. 83.

Held, that a Court executing a simple money-decree obtained against a sonless Hindu widow was not competent to appoint a receiver of the rents accruing since her husband's decease, of the judgment-debtor's immoveable property, then in the hands of the widow, such rents not being assets of the deceased, but the personal moveable property of the widow.—*Rani Kanno Dai* v *B J Lacy*, 19 A 235

Receiver of Property in Hand of Common Manager.—A receiver can be appointed in respect of property in the hands of a common manager appointed under s. 95 of the B. T Act —*Madaneswar* v *Mahamaya Prasad*, 15 C W. N 672 · 13 C. L J 487; and the fact that an application for the appointment of a common manager is pending before the District Judge does not preclude the Sub-Judge before whom the suit is from appointing a receiver, 17 C W. N 581

The District Judge has no jurisdiction to appoint a receiver of properties which are the subject of a suit or attachment in other Courts, even though such Courts may have been subordinate to his Court.—*Latafat Hossein* v *Anunt Chowdhry*, 23 C 517.

A Court of Small Causes cannot appoint a receiver —Nursing Das v. *Tulsiram*, 2 B 558.

It is within the discretion of a Court appointing a receiver in a s to order that the office should continue permanently after the decr when such continuance is necessary or for so long as it may be so decree of the High Court directing the permanent receivership was b not in variation of the judgment which it purported to follow; and t the Court had a discretion to make such an order when necessary for t preservation of the estate.—*Mathusri Umamba* v *Mathusri Dimam* 19 M. 120, P. C.

The words "the owner" in r. 40, cl. (1) (*d*), mean the whole bo of owners to whom the joint estate belongs. In a suit for partition of joint estate, the Court has jurisdiction to place the whole of a joint est out of which a plaintiff seeks to have his share partitioned in the hand of a receiver, and to order that the receiver shall be at liberty to ra money on the security of the whole joint estate.—*Paresh Nath* v *Omr Nauth*, 17 C. 614.

Receiver in Joint Family Partition Suit.—The Court will not app a receiver in a partition suit between members of a joint family except by consent and specially where the family property consists of land The in order that a receiver should be appointed of joint family property in a partition suit special circumstances will have to be proved before the Court will be entitled to appoint a receiver.—*Govind Narayan Rao* v *Vallabh Rao*, 22 Bom. L. R. 217: 55 I. C. 827.

Receiver in Mortgage Suit.—A receiver may be appointed at the su of a first mortgagee when there is reason to apprehend that the pro perty was insufficient to pay the incumbrances thereon Whether the mortgagee is or is not entitled to possession, he may invite the Court to appoint a receiver, if the demands of justice require that the mortgagee should be deprived of possession. A receiver can be appointed at the instance of a mortgagee who holds a simple mortgage.—*Maharajah S Rameswar Sing Bahadur* v. *Chuni Lal Saha*, 31 C. L J. 385; *Gobind Ra* v *Jwala Pershad*, 43 I. C. 533; *Punjab National Bank Ld* v 102 I. C. 353; A. I. R. 1927 Sind 230. The Court may appoint a receiver at the instance of a mortgagee where the action is either for foreclosure or sale, if there is reason to suspect that the security is insufficient or the interest is in arrear (7 C. W. N. 452, 16 C. W N. 997 *referred to*), and the right of the mortgagee to ask for a receiver is not affected by the fact that a decree for sale has been passed, because the suit cannot be said to terminate till the property is sold or the mortgage money paid.—*Man dra* v *Suniti Bala;* 95 I. C. 632; A. I. R. 1926 Cal 1006

A receiver can be appointed under this rule, in a suit to enforce mortgage.—*Ghanshyam Misser* v. *Gobinda Moni*, 7 C. W. N 452 (3 C 935; 1 C. L R. 295 *declared obsolete*). *As regards Court's power to appoint receiver of mortgaged property*, see also, *Latafut Hossein* v *Anunt Chowdhry*, 23 C. 517; and *Jaikisson Das* v *Janabai*, 15 B 431 *Weatherall* v *Eastern Mortgage Agency Co*, 13 C. L J. 495

Receiver of Future Earnings of Judgment-debtor.—*The Court has* no jurisdiction to enforce satisfaction of a judgment-debt by appointing a receiver of the future earnings of the judgment-debtor.—*Asad Ali* v *Haidar Ali*, 38 C. 13; *Ranee Annapurna* v. *Swami Natha*, 34 M 7 Likewise, no receiver can be appointed in respect of future allowance

of maintenance payable to a judgment debtor.—*Pali Kandy* v. *Krishnan*, 40 M. 302.

"Remove any person."—The word "person" in rule 1 (1) (b) refers to a person other than the receiver.—*Ramaswami* v. *Ayylu*, 46 M. L. J. 196: 78 I. C. 625: A. I. R. 1924 Mad. 614; *Sripati* v. *Bibhuti*, 53 C. 319: 92 I. C 940; A. I. R. 1926 Cal. 593. It refers to persons interested in the property and in possession or custody of it prior to the passing of an order appointing a receiver.—*Sripati* v *Bhupati*, 53 C. 319; 92 I. C 940: A. I. R 1926 Cal. 593.

The Court on an objection being made by persons who are not parties to the suit, claiming the properties to be theirs and in their possession, is bound by Or. XL, r. 1 (2), C P. Code to come to a definite finding as to the truth of these allegations before it can make an order directing the receiver to take possession of the property.—*Hamida Rahaman* v. *Jamila Khatun*, 34 C. L. J. 123.

A Civil Court has no power to appoint a receiver in supersession of a receiver appointed by a Magistrate under s 146, cl. (2) of the Code of Criminal Procedure.—*Bidyaprasad* v. *Ashorafi*, 40 C. 862, similarly when a Civil Court appoints a receiver, a magistrate has no jurisdiction under s. 145, Cr P Code, to interfere with him in respect of his possession of the property without the sanction of the Civil Court.—*Dunne* v. *Kumar Chandra*, 30 C 593 One subordinate Court has no power to restrain the action of another subordinate Court with co-ordinate powers. Therefore where a subordinate Judge had appointed a receiver; *held*, that it was not competent to another subordinate Judge to issue a *rubkari* to the first Court requesting it to restrain the receiver from taking possession of a part of the property in respect of which the receiver had been appointed.—*Chaudhry Kidar Nath* v *Mahmood Ali Khan*, 2 Pat. L. T. 716: 6 Pat. L. J. 268

The powers of a receiver are regulated by Or XL of the C P. Code, and the only ground upon which his possession can be resisted is under sub-clause (2) of r. 1 of Or. XL of the Code. Where a person who refuses to deliver possession to a receiver is ordered by the Court to do so, his remedy is by appeal under Or XLIII, r 1 (s) of the C P Code.—*Mussamat Dulhin Sona Kuer* v. *Jamil Ahmad*, 43 I. C 779

Where a creditor is put into possession of property for the purpose of enabling him to realise the proceeds and appropriate the same towards the repayment of his debt, his possession or custody is not protected by Or. XL, r. 1 (2) of the C P Code.—*Hitendra Singh* v *Maharaja Sir Rameshwar Singh*, 6 Pat L. J 37 2 Pat L T. 593

Power as to the "Execution of documents."—A receiver has powe to execute a conveyance, under this rule, including the share of a mino defendant.—*Basir Ali* v *Hafiz*, 43 C 121 30 I. C. 406

"Realization of property."—Where a receiver has been appointed the Court, after the dismissal of a suit, has no power to give the receive any fresh power as for instance liberty to sell.—*Rabcholme* v *Smith*, 3 C. 336.

"All such powers as to bringing and defending suits etc., as the owner himself has."—Where a receiver is appointed with full powers

under Or. XL, cl. (1) (*d*) that is, with such powers as to bringing ... as the owner himself has, the receiver is entitled to sue in his own ... though not expressly authorized to do so.—*Fink* v. *Maharaj Ba...* *Singh*, 25 C. 642; *Jagat Tarini Dasi* v. *Naba Gopal*, 34 C. 305 ... words "*all such powers, etc.*," are wide enough to empower the ... to authorise a receiver to sue in his own name; where, therefore a re... is so authorised he may sue in his own name.—*Oriental Bank Corp...* v. *Gobin Lall*, 10 C. 718.

A receiver appointed under this rule with such powers as to br... suits as the owner himself has is entitled to institute a suit for po... though as regards suits for possession of property the ordinary rule i... the person in whom the present title to the property is, should su... *Cassim* v. *K. B. Dutt*, 19 C. W. N. 45. As a receiver takes su... as the owner himself had, he cannot therefore sue for possession ... property in a case where the owner himself could not.—*Mah...* *Panchapekesa*, 35 M. 578.

A receiver empowered to collect outstandings and do all things ... sary for the realization and preservation of the assets of a firm, ... power to mortgage the property of the firm.—*Subramanian* v. *Lu...* 50 I. A 77: 1 Rang. 66: 71 I. C. 650: A. I. R. 1923 P. C 5... receiver of mortgaged properties, on whom has been conferred "th... powers of realization, management and protection as the owners ... selves have," has a discretionary power of sale.—*Sir Rameshwar* ... *dra*, 26 Bom. L. R. 1153: 81 I. C. 576. A. I. R. 1924 P. C 202

"Collection of the rents and profits thereof."—Where the ... was given power to collect outstandings and do all things nece... the realization and preservation of the assets of a firm; *held*, the ... had no authority to mortgage the property of the firm.—*M. Sub...* v. *M. L. R. M. Lutchman*, 44 M. L. J. 602: 50 C. 338: 28 C. ... 50 I. A. 77, P. C.

Position and Powers of a Receiver and Whether he is an ... the Court.—The preservation of the subject-matter of the litigat... ing a judicial determination of the rights of the parties theret... object and purpose for which a receiver is appointed. The r... appointed for the benefit of all concerned; he is the representati... Court and of all parties interested in the litigation, wherein he ... ed.—*Jagat Tarini* v. *Naba Gopal*, 34 C. 305, 316-17.

The receiver in a suit is nothing more than the hand of ... for the purpose of holding the property of the litigants, when ... necessary that it should be kept in the grasp of the Court ... preserve the subject-matter of the suit, *pendente lite*, and the ... of the receiver is simply the possession of the Court He has n... rights in the property, nor can he take any steps with regard ... out the sanction of the Court.—*Wilkinson* v *Gangadhar*, 6 B ... *Administrator-Gener...* *See* also, *Orr* v. *Muthia*, 17 M. 501, 503; ... *Lal*, 22 C. 1011, 1015

A receiver is a servant of the Court, and has only such ... authority as the Court may choose to give him.—*Manick Lal* ... *Coomaree*, 22 C. 648.

The receiver does not represent the estate for which he is receiver, but is merely an officer of the Court, and, as such, cannot sue and be sued except with the permission of the Court.—*Miller* v. *Ram Ranjan*, 10 C. 1014; *Secunder* v. *J. A. M. Kasaiar & Co.*, 1 Rang. 188: 1923 Rang. 208. The receiver can neither sue nor be sued without the leave of the Court.—*Dunne* v. *Kumar Chandra Kishore*, 30 C 593. *See* also, *Pramatha Nath* v. *Khetra Nath*, 32 C 270: 9 C. W N. 247, where it has been further held that subsequent application for permission to continue the action brought without leave of Court cannot cure the defect. But see, *Rustomjee Dhunkibhai* v *Frderick Gaebele*, 46 C. 352: 23 C W. N. 496: 51 I. C. 486, in which it has been held (dissenting from 10 C. 1014, 32 C. 270, 30 C. 593) that it is competent for the Court to grant leave to continue a suit instituted by or against a receiver of the Court without such leave, provided a proper case is made out

This rule authorizes the Court to grant to the receiver all such powers as to bringing and defending suits as the owner himself has. It is competent to a Court to authorize a receiver to sue in his own name and a receiver who is authorized to sue, though not expressly in his own name, may do so by virtue of his appointment with full powers under this rule. *See* also, the cases referred to in this connection.—*Jagat Tarini* v. *Naba Gopal*, 34 C. 305: 5 C. L J. 270; *Satya Kirpal* v *Satya Bhupal*, 18 C. W. N. 146: 19 C. L J. 191 Cl. (*d*) of Or. XL, r 1, gives the Court complete discretion as to the powers to be conferred on a receiver.—*Secy. of State* v. *Komaragiri*, 30 M. L. J. 456.

A receiver appointed by the High Court, without special leave of the Court, served a notice to quit, on certain tenants of the estate, who claimed to hold a permanent lease, and afterwards instituted a suit to eject them. *Held*, that as the order appointing him did not give him power to serve such notice or to institute such suit without special leave of the Court, and as he was not vested with the general powers referred to in this rule, but only with limited power referred to in the order appointing him, and as a receiver is not otherwise authorized to institute such suits, the suit must be dismissed.—*Drobomoyi* v. *Davis*, 14 C. 323. But see, *Meer Mahomed* v. *J. Homasji*, 38 I. C. 92. But where under the terms of the order appointing the receiver he was authorized to sue to eject, without obtaining the permission of the Court, it was held that the receiver had a right to sue without permission of Court —*Hari Dass* v. *Macgregor*, 18 C. 477. The Court has authority, under this rule to confer on a receiver the power to sue in his own name, and if the order appointing the receiver gives him liberty, he may do so —*Fink* v. *Moharaj Bahadur*, 25 C. 642: 2 C. W N. 494. *See* also, *The Oriental Bank* v. *Gobin Lall*, 10 C. 713

Where a receiver is validly appointed on the ground that the property was the subject of the suit and it afterwards turns out in appeal that the decree only operates against the defendant personally, the A[illegible] Court has jurisdiction to maintain the receiver as a means of [illegible] the amount from the judgment-debtor personally, and the [illegible] considered under attachment, although not attached under s. [illegible] Code, 1882 (Or. XXI, r 54) —*Ramasami* v. *Ramasami*, 30 M. L. J. 201

Although the dismissal of a suit may in some cases mean [illegible] of the receiver still the Court has jurisdiction over the rec[illegible]

officer of the Court and the Court may require him to furnish accounts, allow parties to examine accounts, and to deal with all the matters connected with the management by the receiver.—*Chandershwar Prasad v. Bisheshwar Pratap*, 5 Pat. L. J. 513: 1 Pat L. T. 643

A zemindari having been attached by a creditor, a receiver was appointed with full powers under this rule, and he sued to recover rent at the rate reserved in the lease granted by the zemindar before his appointment. *Held* that the receiver was entitled to recover the rent claimed. The provisions of s. 503 of the Code, 1882 (this rule), were intended to declare that the receiver, in respect of all property which was or could be attached, had the powers of the owner as they existed at the time the property was brought under the orders of the Court by attachment, provided that they have not ceased by operation of law.—*Gopala Sami v. Sankara*, 8 M. 418

A zemindari was attached in execution, and the plaintiff was appointed receiver with full powers under this rule. Before the appointment of the receiver the zemindar had expended certain sums at the defendant's request to repair a tank for the irrigation of lands held by them in common with him. The receiver sued to recover the sum so expended. It was objected that the receiver could not sue as the sum sued for was neither the subject of a suit against the zemindar nor properly attached in execution against him. *Held*, that the receiver could maintain the suit.—*Sundaram v. Sankara*, 9 M. 334.

For the purpose of preserving property in the possession of a receiver from loss or injury, the Court may authorize the receiver to borrow money as first charge on the property. Where mortgage is executed by a receiver under an order of Court directing that such mortgage should be a first charge, it takes priority over any charge of earlier date. *Contra in Rampini, J., Giridhari Lal v. Dhirendra Krista*, 11 C. W. N. 1: 34 C. But when a suit in which a receiver has been appointed, has been dismissed, the Court has no jurisdiction to give the receiver any fresh power as, for instance, liberty to sell.—*Rabcholme v. Smith*, 34 C. 336

Where a receiver is given full powers under the provisions of Or. XL, r. 1 (*d*) of the C. P. Code, no special leave of the Court is necessary for giving notice to quit or for a suit for compensation for use and occupation.—*Meer Mahomed v. J. Hormasji*, 38 I. C. 92: 10 Bur L. T. 244

Possession of Receiver Enures for the Benefit of the True Owner.—Where the Court has appointed a receiver and the receiver is in possession, his possession is the possession of the Court and the possession of the Court by the receiver is the possession of all parties to the action according to their titles. The property passes into legal custody as the receiver is in the position of a stake holder and such custody is for the benefit of the true owner.—*Dwijendra Narayan v. Joges Chandra*, 39 C. L. J. 40 (22 C. L. J. 283, 30 M. 12: 17 C. 814, 5 C. L. J. 270 *refd. to*).

Duties and Liabilities of Receivers and of the Estate.—A creditor is entitled to proceed against the representative of an estate for recovery of debt incurred by the receiver during his management: the right to maintain such suit against the representative is founded on the just and equitable principle that as the acts of a receiver, acting within his authority, are the acts of the Court, the estate cannot be permitted to enjoy the benefit of

those acts without being held responsible for the obligations arising out of them. *A receiver occupies a position towards an estate in his hands different from an executor or trustee*: the latter not acting through or under directions of the Court do not and cannot under ordinary circumstances create obligations binding on the estate in favour of creditors.—*Mohari Bibi* v. *Shyama Bibi*, 30 C. 937: 7 C. W N 799

In execution of a decree, a receiver was appointed to collect certain rents due to the judgment-debtor Some of the judgment-debtor's tenants paid the rents due by them into the hands of the receiver, but the receiver did not pay the monies collected by him into Court, but misappropriated them. *Held*, that the payment by the tenants to the receiver did not, *pro tanto*, discharge the judgment-debtor from liability under the decree —*Orr* v. *Muthia Chettie*, 17 M 501 (on appeal 20 M 224)

A receiver appointed under this rule to collect the rents of an estate, is bound to make good a loss caused to it by a breach of his duties A receiver is not justified in delegating or entrusting to another a duty entrusted to him by the Court. He should in all important matters apply for and obtain the direction of the Judge who appoints him A receiver is entitled to his costs, charges and expenses properly incurred in the discharge of his duties —*Balaji Narain* v. *Ram Chandra Govind*, 19 B 660

A Court has jurisdiction in special cases and on special conditions, to order a receiver to pay the pressing claims of creditors against the estate or part-owners thereof, out of the money in his hand.—*Motivahu* v. *Premvahu*, 16 B. 511. But the Court has no power to order that the receiver should, out of the estate, satisfy the claims of persons other than the decree-holders.—*Thakoor Chunder* v. *Chowdhry Chotee Singh*, *Marsh*, 261: 2 Hay 112.

Sale of Property by Receiver.—A sale of properties, the subject of a suit, by the receiver under the order of the Court, cannot, in the absence of fraud, be attacked collaterally by persons who were parties thereto or their representatives.—*Gorachand* v. *Makhan Lal*, 11 C. W. N. 489: 6 C. L. J. 401 (6 B. L. R. 486 *referred to*).

A sale of properties, the subject of a suit, by the receiver is not a sale by the Court. The fact that such person is the Court's receiver does not place him in a different position When the receiver sells under such an order, it is necessary that he, being in possession of the property, should be a party to the conveyance.—*Chandra Nath* v. *Biswa Nath*, 6 B. L. R. 492-*note*.

Receiver's Liability to Account.—A Court, having appointed a receiver in a suit, has authority, incidental to its jurisdiction, to order him to account, although the suit may be no longer pending. The estate is in its hands, and the receiver is its officer, and the dismissal of the suit by an Appellate Court does not alter that state of things. The Original Court in such a case may permit parties interested to intervene on questions as to the accounts, and may deal with costs and other matters.—*Administrator-General of Bengal* v. *Prem Lal Mullick*, 22 C. 788 P. C and 1011 P. C.

A receiver is responsible for all properties which comes to his custody or management, and he is responsible not only for actual sums received by him, but for those which might have been received by him, but for his wil

ful neglect and default. *The mode of examining and passing receiver's accounts pointed out.*—*Coomar Suttya Sankar* v. *Ranee Golap Monee*, 5 C. W. N. 223 (19 B. 660 *referred to*). *See* also, *Mohini Mohan* v. *Ram Narain and Barada Kanta*, 14 C. L. J. 445, in which *the duties of receivers and their liability to account* have been fully stated.

A receiver is not liable to account for any period other than that for which he is appointed.—*Sampautta Singh* v. *Bhagwari Singh*, 5 Pat L. J. 97—55 I. C. 15

In all applications for payment of money by a receiver, the receiver ought to appear and give information to the Court about funds in his hands and whether there are any attachments or claims on the same.—*Charu Charan* v. *Gocool Chandra*, 1 C. W. N. 303.

The accounts submitted by the receiver should be supported by vouchers which will be admitted as evidence of payment unless reasonable ground for impeaching them is shown.—*Teller* v. *Golam*, 40 C. L. J. 23: 82 I. C. 419: A. I. R. 1924 Cal. 1063.

Remuneration of Receivers.—Under this rule, *the Court is to determine what fee or commission a receiver is entitled to by way of remuneration.* The receiver is an officer of the Court, and the parties cannot by any act of theirs add to or derogate from, the functions of the Court without its authority. An agreement between a Receiver and a party regarding his remuneration without the knowledge of the Court is a gross contempt of Court and is void.—*Prokash Chandra* v. *Adlam*, 30 C. 696 (22 C. 648 *referred to*).

A receiver is generally remunerated by the method of percentage or commission, but there is no absoute rule that he should be so remunerated. The Court has a discretion, if it thinks fit, to allow him a remuneration at a fixed rate.—*Srcpat Singh* v. *Ram Sarup Surya Prasad*, 1923 Cal 516

A receiver appointed in insolvency proceedings under the C. P. Code is entitled to a lien for the amount of his commission on the net assets remaining after payment of the charges specified in s 356, cls (*b*) (*c*) and (*d*) of the C. P. Code, 1882.—*Mahadeva* v. *Kuppusami*, 15 M. 293

A receiver is entitled to his costs, charges, and expenses properly incurred in the discharge of his duties.—*Balaji Narayan* v *Ram Chandra Gobind*, 19 B. 660.

A receiver who is divested by an erroneous order, has a lien on the estate for his claims and allowances.—*Prem Lall* v. *Sumbhoo Nath*, 22 C. 960

The Court has inherent jurisdiction to order a plaintiff to refund to a party, whom he has wrongly impleaded in a suit, the commission and charges incurred by a receiver of the property of that party, when the suit as against him is dismissed and the receivership cancelled.—*M S Naikwara* v. *Ma Aye Byu*, A. I. R. 1924 Rang. 181· 79 I. C. 721

Suit By or Against Receiver.—Leave of Court.—A receiver cannot sue or be sued except with the leave of the Court by which he was appointed receiver.—*Miller* v. *Ram Ranjan*, 10 C. 1014; *Dunne* v *Kumar*

Chandra, 30 C. 593; *Fink* v. *Corporation of Calcutta*, 30 C. 721. The rule is firmly established that, as against a stranger to the action who is in actual possession, the appointment of a receiver is of no effect. But it is equally well-settled that you cannot sue a receiver except with the leave of the Court. The latter rule is founded upon the doctrine that a suit against the receiver is in substance a suit against the Court that appointed the receiver and that a suit against the receiver should not be permitted except upon leave duly obtained from the Court that appointed the receiver.—*Amulya* v *Kashinath*, 102 I. C 797. A I R 1927 Pat. 297.

Where a receiver appointed in a suit interferes with the possession of third parties, it is open to the latter to apply to the Court for redress and for an injunction restraining the receiver from such trespass It is not necessary for them to file a separate suit —*Thavasimuthu* v *Balaguruswamy*, 17 L. W. 64 · 70 I. C. 673

When a party feels aggrieved at the conduct of a Receiver, he should seek redress against him in the proceeding in which he was appointed If separate proceedings be taken against him, either in that Court or elsewhere they should be with the leave of the Court, under whose authority the receiver was acting.—*Kamatchi* v. *Sundaram Ayyar*, 26 M, 492. The Court will dispose of the matter summarily in simple cases.—*K. K. Secunder* v. *J. A. N. Kasiyar*, 1 Rang. 138: 76 I. C. 441: A. I. R. 1923 Rang. 308; and if the applicant has shown diligence.—*Sreedhar* v. *Nilmoni*, 41 C. L. J. 197: 86 I. C. 677. A I R. 1925 Cal 681 But if questions of title are involved, the Court will authorise a suit to be brought against the receiver. —*Sreedhar* v. *Nilmoni*, 41 C L. J. 197 86 I. C. 677: A. I. R. 1925 Cal. 681. There is no statutory provision which requires a party to take the leave of the Court to sue a receiver It is a rule based upon public policy and has come down to us as a part of the rules of equity binding upon all Courts of Justice in this country.—*Braja Bhusan* v *Sris*, 4 Pat. L. J. 20: 47 I C. 719 In *Pramathanath* v *Khetra*, 32 C. 270, it was held by the Calcutta High Court that the leave of the Court to sue a receiver was a condition precedent to the right to sue and that if the leave was not obtained before suit, it could not be granted subsequent to the institution of the suit and the suit should be dismissed. This decision was dissented from in *Banku Behari* v. *Harendra*, 15 C. W. N. 54, *Sarat* v. *Apurba*, 15 C. W. N. 925, *Maharaja of Burdwan* v. *Apurba*, 15 C. W. N. 872, where it was held that the leave may be granted even after the institution of the suit. The Bombay High Court, in *Jamsedji* v. *Husseinbhai*, 44 B. 903, also held that failure to obtain leave prior to the institution of the suit was cured by subsequent leave. As regards suits by a receiver, the Calcutta and Madras High Courts have held that if the suit is instituted without the leave of the Court, the Court may grant leave, after the institution of the suit, to continue the suit.—*Rustomjee* v. *Frederic Garbele*, 46 C. 352: 51 I C. 480; *Ammukuthy* v. *Manarikraman*, 43 M. 793: 59 I. C. 568

The omission to obtain the previous sanction of the Court appointing a receiver, for bringing a suit against the receiver, does not affect the jurisdiction of the Court trying the suit. It is a mere irregularity which can be effectively cured by the plaintiff obtaining the requisite sanction during the course of the litigation.—*Karooth Parakoti* v. *Manarikraman*, 43 M. 793: 12 L. W. 831

No summary order can be passed to set aside lease executed and gra ed by receiver. The proper course is to institute a regular suit against t receiver and lessees. Claims against a receiver cannot be decided in a sun mary proceeding, the aggrieved party must bring a regular suit—*Kri Chandra* v. *Kristo Sakha*, 12 C. W. N. 1023.

A receiver appointed by the High Court, who has under its order tak possession of property, cannot be prosecuted for criminal breach of trust respect thereof without first obtaining the leave of the Court.—*Sant Chand* v *Emperor*, 46 C. 422.

A receiver in a suit even though he may have been appointed with t consent of parties could be discharged before the termination of the pr ceedings if it appears that it could be done without injury to the estate *Venkatalingama* v. *Venkatarama*, 13 L. W. 367: 29 M L T. 175 6 I. C. 562.

A suit for accounts is not maintainable by the owner of an est against a *Tahsildar* appointed by a receiver in charge of the estate und an order of Court.—*Harihar Mukerjee* v. *Jaharaddin*, 62 I. C. 768

Receiver If Necessary Party to a Suit.—The receiver is not a nece sary party to a suit for possession of immoveable property or for declarati of title when the beneficial owner has been made a party.—*Rodger* v *Ashutosh*, 6 C W. N 829; *Kumar Suttya Ghosal* v. *Rani Golap Moni*, C. W. N. 27; *Maharani Janki Koer* v *Sham Sivendra*, 10 C. L. J. 2 *Moos* v. *Abdul Husain*, 27 Bom. L R. 1147: 90 I. C. 600: A. I. R 192 Bom. 523.

Where a receiver appointed under this rule, institutes civil proceeding and is then replaced by another receiver, it is necessary that the new re ceiver should be made a party to those proceedings.—*Akula Paradesi* v *Dhelli Jagannadha*, 28 M. 157.

Suit By or Against Receiver.—Leave of Court.—See notes under head ing "*Position and Powers of a Receiver*," above

Appointment of Receiver by Two Courts in Respect of the Same Property.—A receiver is merely the officer of the Court through whom the Court takes possession of property, the subject of a litigation Consequently where a receiver of certain properties had been appointed by a Court, it is inexpedient that another Court of independent jurisdiction should appoint another receiver for the same property.—*Sridhar* v. *Mugniram*, 192 Pat. 54.

Appeal from Orders under this Rule.—An order granting or refusing an application to appoint a receiver is appealable.—*See* Or. XLIII, r 1, cl (s) and *Venkatsami* v. *Stridavamma*, 10 M. 179 (6 M 350 *overruled*). *See* also, *Khagendra Narain* v. *Shasadhar*, 31 C. 495: 8 C. W N 6 *Anonymous case*, 10 M. 180-*note*; *Gossein Dulmir Puri* v. *Tekait Het Narain*, 6 C. L R 467; *Abdul Rahiman* v. *Ganapathi Bhatta*, 23 M 517 *Sangappa* v *Shivbasawa*, 24 B. 38; *Baidya Nath* v. *Makham Lal*, 1 C. 680; *Muni Lal* v. *Jagannath*, 1916 I C. 785; *Lachmi* v. *Rani Charan* 35 A. 425.

An order appointing a receiver, but without specifying anybody by name and adjourning the application to a future date for so appointing some-

body is not an order within the meaning of Or. XL, r. 1 and is therefore not appealable under Or. XLIII, r. 1, cl. (s).—*Upendranath* v. *Bhupendra Nath*, 13 C. L. J. 157; *Narbadashankar* v. *Kevaldas*, 17 Bom. L. R. 510, *Ramji* v. *Komon*, 13 A. L. J. 79; *Tcoomal* v. *Giganomal*, A. I. R 1927 Sind 202. But see, *Palaniappa* v. *Palaniappa*, 40 M. 18 (F B), and *The Firm Raghbir Singh Jaswant* v. *Narijan Singh*, 72 I. C 569; 1923 Lah. 48, where a contrary view has been taken

When a receiver has been appointed conditional on his furnishing security, the appointment is not complete till the security is furnished, and therefore the order is not appealable before the security is furnished. —*Raja Shyam Lal* v *Raj Kumar*, 31 C. W N. 235: 45 C. L. J. 63 A. I. R. 1927 Cal. 253 (14 C. L. J 489, 17 Bom. L. R 510, 13 A L. J. 79: 42 A. 227 *folld.*)

An order refusing to remove a receiver is appealable, being an order made in respect of a question arising between the parties to a suit relating to the execution of the decree —*Mithibai* v *Limiji Nowroji* 5 B. 45 But see, *Ramaswami Naidu* v *Ayyalu Naidu*, 46 M L J. 196, where a contrary view has been taken An order removing a receiver is also appealable even though another receiver is not appointed in his place.—*Sripati* v. *Bibhuti*, 53 C 319: 92 I. C 940: A I R. 1926 Cal. 593.

There is no appeal to Her Majesty in Council against an order refusing the appointment of a receiver in a suit —*Chundi Dutt* v. *Pudmanund*, 22 C. 928.

Where the Court appoints a receiver of the defendant's property in a suit and a third person not a party to the suit but who claims to be in possession of the property objects to [illegible] tion is dismissed, the order dismissing the [illegible] v. *Morgan*, 36 C. 713, *Agabag* v. *Sundari*, [illegible] na-*swami* v *Janaki Ammal*, 16 L W. 833: (1922) M. W. N. 725 (39 C. 713, and 3 Pat. L J 573 *relied on*).

An appeal lies from an order appointing a receiver pending an application for the appointment of a common manager under s. 93, B. T. Act, 1885, as falling under Or. XLIII, r. 1, cl. (s) —*Asadali* v. *Mahomed*, 43 C. 986

The directions which a Court gives in passing a receiver's account are not appealable as such directions do not come within any of the clauses of Or. XL, r. 1—*Rani Keshabati* v. *MacGregor*, 35 C. 568: 12 C. W. N. 618. See also, *Samhautta Singh* v. *Bhagwan Singh*, 5 Pat L. J 97: 55 I. C. 15

An order under r 1 or 4 of Or. XL is appealable, see Or. XL, r. 1, cl. (s)

Letters Patent Appeal.—An order directing a receiver in a suit to advance money to a guardian *ad litem* to enable him to conduct the defence on behalf of a defendant, is not a judgment within the meaning of article 15 of the Letters Patent, and no appeal lies therefrom —*Kuppuswami* v. *Rathnavelu*, 24 M. 511.

Revision.—Where a Court appoints a receiver in a case in which it has no jurisdiction to do so (as where a receiver is appointed in a proceeding under the Succession Certificate Act, 1889), the Court acts without

jurisdiction, and the High Court may interfere in revision.—*Kanhaiya v Kanhaiya*, 46 A. 372: 79 I. C. 363: A. I. R. 1924 All 376

Bond.—For Form of bond to be given by receiver, *see* App F, Form No. 10, and for Form of appointment of receiver, *see* App F, Form No 9

Miscellaneous Cases.—Practice of the original side of the Court followed in recognising the right of a purchaser at a receiver's sale to obtain the assistance of the Court in obtaining possession under the provisions of the Code relating to sale in a suit.—*Minatooneesa v. Khatooneesa*, 21 C. 479.

Property in the hands of a receiver of the High Court cannot be proceeded against by attachment in the mofussil.—*Hem Chunder v Pran Kristo*, 1 C. 403. This case has been distinguished in *Jogendra Nath v. Devendra Nath*, 26 C. 127: 3 C. W. N. 90, where it has been held that a judgment-creditor can sell properties in the hands of the receiver of the Court in execution of a mortgage decree, although he cannot execute a decree against such properties by way of attachment and sale.—*Semble*—A proceeding by way of attachment is an interference with the possession of receiver.

The possession of a receiver should be regarded as possession for the party who might ultimately turn out to be the true owner and entitled to possession as such. The effect of such possession by the receiver is to destroy the adverse possession, if any, of either of the parties.—*Sarda Sundari v Sarada*, 2 C. L. J. 602 (11 C. 496, 17 M. 501, and 20 A 341 *applied*).

A servant of a firm, the business of which is being managed by a receiver appointed under this rule, has no preferential claim over the attaching creditor on the assets of the firm for wages due before the appointment of the receiver.—*Short v. Pickering*, 6 M. 188.

An attachment of money in the hands of the receiver made without previous permission or sanction of the Court is improper and irregular, for such an attachment is an interference with the Court's possession through its official receiver, and the Court will refuse to recognize it.—*Mohammed Zohuruddeen v. Mahomed Nooroodden*, 21 C. 85. *See* also, *Khan v Ali Mohamed*, 16 B. 577.

Under the Code of Civil Procedure, once a suit has been dismissed, the Court dismissing it is *functus officio*, save that it may stay execution of its own decree or order for costs. An application therefore made to a Court of first instance after dismissal of the suit, but before appeal filed, asking that the receiver may be restrained from parting with funds in his hands pending an appeal, cannot be granted.—*Yaminuddowlah v. Ahmed Ali Khan*, 21 C. 561.

Attachment by a judgment-creditor of a debt due to judgment-debtor by a third party. Where the existence of the debt is denied, there is no other course open to the judgment-creditor than to have it sold, or to have a receiver appointed under this rule.—*Toolsa Goolal v. Antone*, 11 B. 448.

Application for the appointment of a receiver on the retirement of another receiver should be made in Court and not in chambers.—*Stalkartt v. Stalkartt*, 28 C 250.

Where a Court executing a decree made an order directing the payment of the rents of certain property which had been attached as they became due from the tenant to the judgment-debtors; and subsequently default having been made by the tenant in the payment of the rents of certain years, the decree-holder applied for an order directing the payment of the rents which were in arrears to be made by the tenant in accordance with the previous order. *Held*, that the effect of the order in the execution proceedings was virtually to appoint the decree-holder receiver under the provisions of this rule.—*Radha Kishore* v. *Aftab Chundra*, 7 C. 61

The fact that there exists in respect of immoveable property an order of a Magistrate passed under s. 145 of the Code of Criminal Procedure is no bar to the exercise by a Civil Court of the power conferred on it by s. 503, C. P. Code, 1882, of appointing a receiver in respect of the same property — *Barkatunnissa* v. *Abdul Aziz*, 22 A. 214

A receiver appointed in an administration suit, instituted by a creditor of a deceased, against his executor is not an agent of the executor and an [illegible] within the mean[illegible] er of the Court — [illegible] e effect of a payment or acknowledgment by receiver on the question of limitation, *see also*, *Periasami* v. *Seetharama*, 27 M. 243: 14 M. L. J. 85

4. When a receiver—

Enforcement of receiver's duties.

(a) fails to submit his accounts at such periods and in such form as the Court directs, or

(b) fails to pay the amount due from him as the Court directs, or

(c) occasions loss to the property by his wilful default or gross negligence,

the Court may direct his property to be attached, and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.

COMMENTARY.

"We have redrafted this rule on the lines of s. 18 (4) of the Provincial Insolvency Act, 1907. We think that the power to imprison receivers is too wide and should be omitted."—See, *the Report of the Select Committee*.

"Occasions loss to the property by his wilful default or gross negligence."—"Property" includes also the income derived from it.—*Raman* v. *Gopala*, 30 M. 584. Where owing to the wilful default or gross negligence of the receiver any loss is caused to the property, the loss is to be made good out of the estate in the first instance and not by the

party on whose application the receiver was appointed, failing which the party damnified by the loss may proceed against the receiver.—*Orr v. Muthia*, 17 M. 501; *Muthia v. Orr*, 20 M. 224.

Removal of Receiver.—A receiver should not be allowed to continue in office if he fails to comply with the order of the Court to submit his accounts.—*Bihari Lal v. Shankar*, 7 Lah. L. J. 6: 89 I. C. 80: A. I. R. 1925 Lah. 309.

The Court may Direct his Property to be Attached.—Where a receiver dies, the property may after his death be attached in the hands of his legal representatives.—*Raman v. Gopala*, 39 M. 584. "Property" means income derived from the property.

Appeal.—An order under r. 1 or r. 4 of this Order is appealable.—*See*, Or. XLIII, r. 1, cl. (*s*). But where an order declaring a receiver liable in respect of a sum of money does not contain any direction for the attachment of his property, no appeal lies from such order.—*Ganesh Lal v. Kumar Satya Narayan*, 4 Pat. L. J. 636; *Gokal Chand v. Uddharam*, 70 I. C. 224; *Khan Chand v. Abdul Majid*, 76 I. C. 203

When Collector may be appointed receiver.

5. Where the property is land paying revenue to the Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector the Court may, with the consent of the Collector, appoint him to be receiver of such property. [S. 504]

The rule exactly corresponds with s. 504 of the C. P. Code, 1882

ORDER XLI.

APPEALS FROM ORIGINAL DECREES.

Form of appeal. What to accompany memorandum.

1. (1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded.

Contents of memorandum.

(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively. [S. 541.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s. 541, C P. Code, 1882, with some additions.

Sub-rule (1) corresponds to para. 1 of the old section, with change of some words and phrases No alteration seems to have been made in the meaning The word "*every*" has been substituted for the word "*the*" in the beginning; the word "*preferred*" has been substituted for the word "made"; and the words, "*signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf,*" have been substituted for the words "in writing presented by the appellant." The first para. of s 541 ran as follows. "*The appeal shall be made in the form of a memorandum in writing presented by the appellant, and shall be accompanied by a copy of the decree appealed against, and unless the Appellate Court dispenses therewith of the judgment on which it is founded.*"

Sub-rule (2) corresponds to para 2 of the old section, with some verbal alterations only.

The provisions of this Order are subject to the general provisions contained in Part VII of the Code.

Presentation and Certification of Grounds of Appeal.—A *vakalatnama* executed in favour of two vakils was accepted only by one who presented the appeal. The appeal was subsequently transferred to the Sub-judge, who held that it had not been duly presented, and made an order rejecting it. *Held*, that the appeal had been duly presented —*Ayyanna* v. *Nagarbhooshanam*, 16 M. 285. But where a memorandum of appeal is presented by a vakil whose name does not appear in the *vakalatnama* throu-

an oversight, it cannot be said to be properly presented In such a case the appeal should be dismissed though the objection as to its validity was *taken at a very late stage of the proceedings (after the order of remand)* —*Muhammad* v. *Jas Ram*, 36 A. 46. Presentation by a pleader other than the one duly authorized is not a valid presentation, *Chittar* v. *Laxmi Narain*, 62 I. C. 259 A power of attorney expressly authorizing presentation of the appeal is sufficient.—*Kura* v. *Udmi*, 7 Lah. L J 29 86 I C. 209: A I. R 1925 Lah. 331.

Where a pleader who has signed the *memorandum of appeal refuses* to argue the case on the ground of unpreparedness, he is liable to be either dealt with by the Court for neglect of duty, or sued by the client for neglect of his *interests.—Buldeo Misser* v *Ahmed Hossein*, 13 W. R 149.

A pleader is not guilty of grossly improper conduct, if he examines copies of the record, and not the original *record, before* he draws the grounds of appeal and certifies them.—*In the matter of Noor Ahmed*, 17 W R. 338.

Pleaders should see that the grounds of appeal they certify to are full, and need no addition.—*Ram Kristo* v. *Raj Chunder*, 11 W. R 246

The presentation of an appeal by a person who is not an advocate, vakil, or attorney of the Court, nor suitor is not a valid presentation in law.—*Shiam Karam* v. *Raghunakdan*, 22 A. 331.

Where a party appealing to the High Court is himself a vakil of the Court he is not at liberty to certify his own grounds of appeal —*Thakur Dass* v. *Ameer Mundal*, 14 W. R. 168.

Date of Presentation of Appeal for the Purposes of Limitation.—As to the period of limitation for appeals, *see*, Limitation Act, 1908, Sch I, Arts. 151, 152 and 156; *see* also, ss. 5 and 12.

The date of presentation of an appeal for the purposes of limitation should be reckoned from the date of the presentation of the memo of appeal and not from the date on which the deficit Court-fees are paid— *See*, s. 149, *and the cases noted thereunder*

An appeal under the C. P. Code, is not preferred within the meaning of s 3 of the Limitation Act unless it is accompanied by the copies required by the Code.—*Balkaram Rai* v. *Gobind Nath*, 12 A. 129 (2 A. 241, 832, 875, and 24 W. R. 258 *referred to*). *See* also, *Yakutunnissa* v *Kishoree Mohun*, 19 C. 747.

For the purposes of limitation, an appeal is preferred when the memorandum of appeal is presented to the proper officer, and not when, where the memorandu [illegible] stamped, and is returned to order that the [illegible] again presented When an Appellate ([illegible] mped memorandum of appeal, in order that it may be sufficiently stamped, it should fix a time within which the deficiency is to be supplied —*Sheo Partab* v. *Sheo Gholam*, 2 A. 875 (1 A. 16 *referred to*).

The words " where there has been an appeal," in Art. 182, clause 2, of Schedule II, of the Limitation Act, mean where a memorandum of

appeal has been presented in Court. In execution of a decree against which an appeal has been presented, but rejected on the ground that it was after time, limitation begins to run from the date of the final decree or order of the Appellate Court.—*Akshoy Kumar* v. *Chunder Mohun*, 16 C. 250.

Where a guardian *ad litem* of a defendant-respondent was not made a party to an appeal filed by the plaintiff until after the period of limitation for filing such appeal had expired, the appeal was not barred for this reason.—*Rupchand* v. *Dasodha*, 30 A. 55 (4 A. 37 *followed*).

To be Accompanied by Copy of Decree and Judgment.—An appellant filed an appeal without a copy of the decree. Subsequently he filed the decree within the time allowed for appeal and the Judge accepted it. *Held*, that the irregularity was cured and the appeal should not have been dismissed on the ground of such irregularity.—*Luller* v. *Ram Pershad*, 2 Agra 84. But if a copy of the decree is filed after the expiration of the period of limitation prescribed for the appeal, the appeal is time-barred because there is no valid appeal until a copy of the decree is filed. —*Quasin Ali* v. *Bhagwanta*, 40 A. 62. On the same principle, the appeal must be dismissed as time-barred if the memorandum is not accompanied by a copy of the judgment.—*Dhanput Mal* v. *Mela Mal*, (1917) P. R. No. 67, p. 251: 41 I. C. 918.

A memorandum of appeal is not a good memorandum of appeal in law, unless it is accompanied by a copy of the decree appealed against. The Court cannot dispense with it and a copy of the judgment only is not sufficient.—*Chamela Kuar* v. *Amin Khan*, 16 A. 77; *Bhawani* v. *Kallu*, 17 A. 537 (553); *Chaturbhuj Sahay* v. *Muhammad Habil*, 54 I. C. 36; *Quasim Ali* v. *Bhagwanta*, 40 A. 12; *Bashi Ram* v. *Municipal Committee Chiniot*, 4 Lah. L. J. 193; *Sundaram Aiyar* v. *Muthuramalinga*, 44 M. L. J. 279: 72 I. C. 308: A. I. R. 1923 Mad. 482; *Mubarak* v. *Secy. of State*, 6 Lah. 218: A. I. R. 1925 Lah. 438. A copy merely of the judgment is not sufficient even if the decree has not yet been drawn up.—*Bashi Ram* v. *Chinot Municipality*, 4 Lah. L. J. 193: A. I. R 1922 Lah. 191.

An order determining any question referred to in s. 47, is a decree under s 2; when therefore an appeal is preferred against such an order it is sufficient to attach to the memorandum of appeal a copy of the order itself and it is not necessary to attach to the memorandum a copy of the decree even though such decree may have been drawn up. In the case however of a suit or proceedings which have the character of a suit (*e.g.*, contentious probate proceedings, etc), it is necessary to file a copy of the decree.—*Khirod Sundari* v. *Jnanendra Nath*, 6 C. W. N. 283 Distinguished in *Gopal Chandra* v. *Preo Nath*, 32 C 175

A second appeal filed without a copy of the trial Court's judgment within time is not competent inasmuch as Or. XLI, r. 1 C. P. Code, requires that only a copy of the lower Appellate Courts' judgment is to be filed and does not require the filing of the judgment of the trial Court.—*Ramdeo Singh* v *Makhan Singh*, (1923) Pat 19: 74 I. C. 330.

Under the rules of the Allahabad High Court, a copy of judgment appealed from is required to be presented with the memorandum of appeal under cl. 10 of the Letters Patent—*Fuzul Mohammad* v. *Phul Kuar*, 2 A. 192.

Where from the decree in a suit two appeals were preferred and two decrees were drawn up by the Appellate Court, Or XLI, r. 1, C. P. Code requires both decrees to be filed for the presentation of a second appeal to be valid.—*Mahommad Dai* v. *Musst. Zerunnissa*, 3 Lah. 215

An appeal if presented in time is validly presented for the purpose of the Limitation Act if it is accompained by copies required by the C P. Code. The High Court has no power to frame a rule modifying any rule or mode as to computation of limitation prescribed in the Limitation Act.—*Shuni Lal* v. *Dahyabhai*, 32 B. 14: 9 Bom L R 1138.

Delay in Presenting Appeal—Discretionary Power of Court to excuse —Sufficient Cause.—Section 5 of the Limitation Act (IX of 1908), provides that an appeal may be admitted after the period of limitation if the appellant satisfies the Court that he had " sufficient cause " for not preferring the appeal within such period.

Section 5 of the Limitation Act is a mandatory section, but does not exclude the discretionary power of the Court to excuse delay in presenting an appeal.—*Shrimant Sagajirao* v. *Smith*, 20 B. 736

The presentation of an appeal to a wrong Court under a *bona fide* mistake may be " sufficient cause " within the meaning of section 5 of the Limitation Act.—*Dadabhai Jamsetji* v. *Maneksha*, 21 B. 552 See also, *Balaram* v. *Sham Sundar*, 23 C. 526 (5 A. 591 *followed*). But see *Dadabhai* v. *Emnabhai*, 28 B. 235.

The time during which an appellant was prosecuting his application under s. 108, C. P. Code, 1882 (Or. IX, r. 13), should not be excluded in computing the period of limitation for presenting an appeal Section 14 of Limitation Act does not apply to appeals but only to suits—*Ardha Chandra* v *Matangini*, 23 C. 325.

The words " *sufficient cause* " should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides, is imputable* to the *appellant* Where the appellants being themselves pleaders, and well acquainted with the facts of the case, preferred the appeal to a wrong Court, they had not acted in good faith, but with gross negligence and carelessness and are not entitled to extension of time under s. 5 of the Limitation *Act.*—*Sarat Chandra* v *Saraswati Debi*, 34 C 216: 5 C. L J. 380. *See* also, *Gobinda Lal* v *Shibdas*, 33 C. 1323 · 10 C. W. N. 986: 3 C. L. J. 545.

When the time for appealing is once passed, the Court must be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of time —*Karsondas* v. *Gungabai*, 30 B. 329: 7 Bom L R 965. *See* also, *Bhim Rao* v. *Ayyappa*, 31 B. 33: 8 Bom. L R 853

When owing to the mistake of the clerk of the appellant's pleader, certain persons were not added as respondents till after the period for preferring the appeal had expired. *Held*, that as the omission was not intentional, the appeal should be heard as duly filed.—*Promoda Nath* v *Kinoo Mollah*, 13 C. W. N. 167 · 8 C. L. J. 135. *See* also, *Rup Chand* v. *Dasodha*, 30 A. 55.

Where the original decree was signed on the 6th July, 1903, and the plaintiffs applied for amendment of the decree and the amendment was

made on the 22nd August. *Held*, that the period of limitation for presentation of an appeal should be reckoned from the 22nd August as the date when the correct decree was prepared. *Amar Chandra* v. *Asad Ali*, 32 C. 908. Referred to in *Brojo Lal* v. *Tara Prosanna*, 3 C. L. J. 188. *See* also, *Visvanathan* v. *Ramanathan*, 21 M. 646, where the decree was amended and appeal was allowed to be preferred from the amended decree, though the appeal against the original decree was barred.

When a memorandum of appeal was filed accompanied by a copy of the judgment and by a translation of the decree in Urdu and where the attention of the counsel filing the appeal was drawn to the fact that a copy of the original decree in English should have been filed.—*Held*, that there was no sufficient cause for extending the time within the meaning of s. 5 of the Limitation Act inasmuch as counsel had been put on his guard and he was remiss in not making a further application for the copy of the decree in English.—*Daim* v. *Hayat*, 4 Lah. L J. 381.

Section 5 of the Limitation Act gives a discretion to a Court to admit an appeal filed out of time, for sufficient cause. Poverty is " not sufficient cause " within the meaning of that section.—*Manickya Moyee* v. *Baroda Prasad*, 9 C. 355 · 11 C. L R 430; *Moshaullah* v. *Ahmedullah*, 13 C. 78; *Huro Chunder* v. *Surma Moyi*, 13 C 266; *Husaini Begum* v. *Collector of Muzaffarnagar*, 9 A. 11 and 655.

The discretion conferred by s. 5 of the Limitation Act, is a discretion which the Court cannot exercise loosely, but which should be exercised on a consideration of the circumstances of each case as it arises. At the same time the words " sufficient cause " should receive a liberal construction, so as to advance substantial justice when no negligence, nor inaction, nor want of *bona fides* is imputable to the appellant.—*Kichilappa Naicker* v. *Ramanujam*, 25 M. 166.

When the High Court refused to admit an appeal filed out of time, the Judicial Committee refused to interfere with the discretion exercised by the High Court.—*Ram Narain* v. *Parmeshwar Narain*, 30 C 309, P. C. *See* also, *Hamid Ali* v *Gaya Din*, 26 A. 327.

When a lower Appellate Court admits an appeal filed out of time, the High Court ought not to interfere with the discretion exercised by the District Court in admitting the appeal under s. 5 of the Limitation Act.—*Fatima Begum* v. *Hansi*, 9 A. 244. See *Parvati* v. *Ganpati*, 23 B. 513

Presentation of an appeal within the period of limitation prescribed therefor to a wrong Court in ignorance of the provision of law, is not a sufficient cause within the meaning of s. 5 of the Limitation Act, for admitting the same appeal in the proper Court after the period of limitation prescribed therefor had expired.—*Jog Lal* v. *Har Narain*, 10 A. 524. and *Ram Jiwan* v. *Chand Mal*, 10 A. 587.

Delay in filing appeal—Sufficient cause—Deduction of time spent in another litigation in respect of the same subject matter—Mistake of law. *Held*, that the time spent in the actual proceedings in the suit to set aside the order in execution might be deducted in computing the delay that occurred before the appeal was filed. But the plaintiff was not entitled to a deduction of the time that intervened between the date of the ord

appealed against and the date of filing the suit.—*Siatram* v. *Nimba Valad*, 12 B. 320. Explained in *Dadabhai Jamsetji* v. *Naneksha*, 21 B. 352

The mere presentation of an application for review where it is not shown that the grounds therefor are reasonable and proper, is not a sufficient reason for admitting an appeal after the period of limitation prescribed for such appeal has passed.—*Ashanulla* v. *Collector of Dacca*, 15 C. 242.

Where an appellant was misled by his legal adviser as to the course to be followed, he is entitled to the benefit of s. 5 of the Limitation Act—*Kura Mal* v. *Ram Nath*, 28 A. 414: 3 A. L. J. 218, followed in *Anjora Kunwar* v. *Babu*, 29 A. 638: 4 A. L. J. 515.

A mistake in law may be under some circumstances a "sufficient cause" for admitting an appeal presented out of time—*Krishna* v. *Chathappan*, 13 M. 269. But *see*, the judgment of Mahomood, J., in *Bechi* v. *Ashanullah*, 12 A. 461 (13 C. 266 *dissented from*).

Withdrawal of appeal by an appellant by which the respondent loses the opportunity of having his cross-objections heard affords no sufficient reason for enlarging the time for the cross-appeal which he might have presented —*Chudasama* v. *Iswargar*, 16 B. 249.

After admission and registration of appeal by District Judge, whether Sub-Judge can dismiss it on the ground of limitation —See notes under rule 9.

Time Requisite for Obtaining Copy—Exclusion of Time in Computing Period of Limitation for Appeals.—See, s. 12 of the Limitation Act (IX of 1908), by which the time requisite for obtaining copies of decree and judgment is excluded.

The time which intervenes between the putting in of stamps and obtaining a copy of the decree should be excluded from the time prescribed for the presentation of an appeal.—*Lall Gopal Nath* v. *Pud...* *Koonwar*, 5 W. R. Mis. 44; *Gopee Nath* v. *Gopee Nath*, 6 W. R Mis 116

Time requisite for copies of decree and judgment should be excluded from the computation of the time. The application for copy need not be made by the appellant or his authorized agent; it is not necessary to show for what purpose the copies were obtained.—*Ram Kishen* v. *Kashi Ba...* 29 A. 264: 4 A. L J. 152.

In computing the period of limitation prescribed for an appeal, the appellant is, as a matter of right entitled to deduct the number of days required for taking a copy of the decree only. The word "decree" in this rule does not include the "judgment."—*Jagarnath* v. *Sheoratan* 24 W. R 105; 15 B. L. R. 272, F. B.; *Haril Pattuck* v. *Bhowaniram*, 15 B. L R 273-*note*: 21 W. R. 308. *See*, however, *Haji Hassum* v. *Nur Mahomed*, 23 B. 643

Application for copy of decree—Delay in filing the papers and fees for the copy—The mode of computing the period of limitation for appeals—*Nobin Chunder* v. *Brojendro Coomar*, 12 C. L. R. 541. *See also*, *Ramanuja* v. *Narayana*, 18 M. 374.

So long as the right of appeal is subsisting, an appellant is entitled under s. 12 of the Limitation Act, 1877, to apply for the copy of the lower Court's decree. The time requisite for obtaining such copy should be excluded in computing the period of limitation prescribed for the appeal — *Tukaram* v. *Pandurang*, 25 B. 584 (19 A. 342 *followed*). *See* also, *Pandhari Nath* v. *Shankar*, 25 B. 586 (19 A 342 *followed*)

In computing the period of limitation prescribed for an appeal, the time *requisite for obtaining a copy of the judgment appealed from cannot* be deducted, such copy not being required under the rules of the High Court to be presented with the memorandum of appeal.—*Fazel Muhammad* v. *Phul Kuar*, 2 A. 192.

When a decree for possession of immoveable property directs an enquiry into the amount of mesne profits under s. 212, C P. Code, 1882 (Or. XX, r. 12), and an order is finally made determining the amount and formal decree is necessary to be drawn up. and when the final order or decree is appealed against, the time requisite for obtaining a copy of the decree shall be excluded, in computing the period of limitation prescribed for the appeal —*Gopal Chandra* v. *Preonath*, 32 C. 175 (6 C. W. N. 283 *distinguished*) *See* also, *Beer Chunder* v. *Mohamed Asgur*, W. R. 1864, 145.

Where a suitor is unable to obtain a copy of a decree from which he desires to appeal by reason of the decree being unsigned, he is entitled under s. 12 of the Limitation Act to deduct the time between the delivery of the judgment and that of the signing of the decree in computing the time taken in presenting his appeal.—*Beni Madhaub* v. *Matungini*, 13 C. 104, F. B. (10 C. 652 *overruled;* 11 W. R. 512 *referred to*). But see, *Bechi* v. *Ahsanuulah*, 12 A 461.

The " time requisite for obtaining a copy of the decree " appealed against which under s. 12 of the Limitation Act, is to be excluded in computing the period of limitation for an appeal is determined when the copy is ready for delivery.—*Gopal Chunder* v. *Brojo Behary*, 9 C. L R. 293.

In computing the period of limitation for an appeal, a party is not entitled to deduct the period during which the lower Court was closed, when he could have made such application before the Court closed and where on the day he actually applied the period limited for appeal had expired.—*Venkata Row* v. *Venkata Chella*, 28 M. 452 (25 B. 584 and 586 *distinguished*).

Where a decree was passed on the 22nd September, an application for a copy was not made until the 29th, and then with insufficient folios, and the Court was closed for the vacation from 30th September to 1st November, the deficient folios being filed on the day it reopened, 2nd November, the copy delivered on the 6th, and the appeal filed on the 14th. *Held, that the appeal was out of time, the appellant not being entitled to a* deduction of the time occupied in ascertaining what the requisite number of folios was.—*Gunga Dass* v. *Ram Joy*, 12 C. 30. But see, *Duldit Bewra* v. *Sardar Kinkar*, 3 C. W. N. 55; *Siyadatunissa* v. *Muhammad*, 19 A. 342; *Kali Sankar* v. *Baikanta Nath*, 7 C. W. N. 109; *Nawab Syed Amir Hossain* v. *Tulsi Dass*, 8 C. W. N. 141; and *Saminatha* v. *Venkatasubba*, 27 M. 21.

On a petition for leave to appeal to the Privy Council presented on the 8th April, it appeared that the period of six months from the date of the decree to be appealed against had expired on the 23rd of March, if the time occupied by the petitioner in getting a copy of the decree was to be computed in that period. *Held*, that the petition was barred by limitation.—*Lakshmanan* v. *Periyasami*, 10 M. 373.

Sections 5 and 12 of the Limitation Act apply to applications under s. 596 of the C. P. Code, 1882 (s. 110), for leave to appeal to His Majesty in Council.—*Shib Singh* v. *Gandhrup Singh*, 28 A. 391: 3 A L J 109 (*See* s. 5 of the Limitation Act, 1908, as amended)

The provisions of s. 12 of the Limitation Act do not apply to appeals under s. 69 of the Madras Rent Recovery Act (VIII of 1865)—*Kumara* v. *Sithala*, 20 M. 476.

The provisions of s. 5 of Limitation Act do not apply to Registration Act.—*Baban Sahai* v. *Udit Narain*, 5 C. L. J. 188. But see, *Suraj Bux* v. *Thomas*, 28 A. 48: 2 A. L. J. 714.

Exclusion of Time Occupied in Seeking Review of Judgment.—An appellant is not entitled as of right to the exclusion of the time occupied by him in seeking a review of judgment, in the computation of the time within which his appeal is preferred.—*Govinda* v *Bhandari*, 14 M 81 *See* also, *Nobokissen* v. *Kaminee*, B. L. R Sup. Vol 349: 2 W R Mis 35; *Vasudeva* v. *Chunia Sami*, 7 M. 584. But see, *Kuller Singh* v. *Jewan Singh*, 22 W R. 79; *In the petition of Brojendro Coomar*, B L. R. Sup. Vol 728: 7 W. R. 529; and *Poresh Nath* v. *Gopal Krishto*, 15 W. R. 61. Though, under certain circumstances, the presentation of an application for review may be considered as sufficient cause for delay in filing an appeal, the appellant is bound to satisfy the Court that such circumstances did exist in his case, and that he had sufficient cause for not presenting the appeal within the prescribed period.—*Pundlik* v *Achut*, 18 B. 84. The mere presentation of an application for review where it is not shown that the grounds therefor are reasonable and proper, is not a sufficient reason for admitting an appeal after the period of limitation prescribed for such appeal has passed.—*Ashanulla* v. *Collector of Dacca*, 15 C. 242.

The general rule for extending the time to prefer an appeal and for excluding the time taken up in prosecuting an application for review is, that the delay may be excused if the applicant can show that he had reasonable grounds for applying for review instead of preferring an appeal —*Gobinda Lal* v. *Shibdas*, 33 C. 1323: 3 C. L. J. 545: 10 C. W. N 986 (*See* the cases referred to in this case).

What is or what is not sufficient cause within the meaning of s 5 of the Limitation Act, depends upon the circumstances of each particular case *Bona fide* application for review is a sufficient cause for not presenting an appeal within the prescribed period. An application for review made without any good reason is not made *bona fide* merely because it was admitted in the first instance.—*Haradhan* v. *Pran Krishna*, 10 C L J. 39 (33 C. 1323: 3 C. L. J. 545: 10 C. W. N. 986 *referred to*)

Other Sufficient Cause for Delay.—Two suits brought at the same time by executors raising same questions of construction in respect of the

same will—Similar decisions in both suits—On appeal in one suit the decree of the lower Court was reversed—Subsequent application for leave to appeal in the second after expiry of time. *Held*, that there was no sufficient cause for the delay.—*Thucker Vussonji* v. *Canji*, 14 B. 365.

A mistake in law is under no circumstances a sufficient cause within the meaning of s. 5 of the Limitation Act.—*Krishna* v. *Chathapan*, 13 M. 269 Referred to in 33 C. 1323: 10 C. W. N. 986: 3 C. L J. 545.

But where the guardian of a minor neglected to appeal, leave to appeal was granted to the minor under section 5 of the Limitation Act after attaining majority.—*Cursandas* v. *Ladkavahoo*, 20 B. 104. *See*, however, *Thurai Rajah* v. *Jainilobdeen*, 18 M. 484.

Stamp on Memorandum of Appeals.—The Court-fees which an appellant has to pay on a memorandum of appeal from a decree which gives him only partial relief are to be calculated upon the difference between the value of the relief which he claims and the relief granted by the decree appealed against.—*Lukhun Chunder* v. *Khoda Buksh*, 19 C. 279.

The Deputy Registrar has no authority to return an insufficiently stamped appeal The right course for that officer is to lay the matter before the Court. But if the appellant is ready to pay what is required, then, whether the time for filing the appeal has expired or not, the Deputy Registrar is bound to receive it if it was originally presented in time —*Ambur Ali* v. *Kali Chand*, 24 W. R. 258

The subject-matter of an appeal should be valued for the purpose of jurisdiction according to the law in force at the date of the appeal, and not of the suit which has led to it. For the purpose of jurisdiction, a claim under section 331, C. P Code, 1882, is a fresh suit, and not a continuation of the suit in which the claim is made —*Mutummal* v. *Chinnana*, 4 M. 220.

Petitions of appeals in cases to obtain an order for measurement may be written on the stamp used for miscellaneous petitions —*Smith* v *Nundan Lal*, 6 W. R., Act X., 13

Where a zemindar values his right to measure at a certain amount, the petition of appeal must be written on a regular stamp according to such valuation and not upon a stamp used for miscellaneous petitions —*Ooma Churn* v. *Shib Nath*, W. R. 14.

Court-fee payable on a memorandum of appeal from an order of reference under the Land Acquisition Act is that prescribed by art. 11 of Schedule II of the Court-fees Act —*Harish Chandra* v *Bhoba Tarini*, 8 C. W. N. 321.

In an appeal in a suit for recovery of profits under section 93 (*h*) of the North-Western Province Rent Act in respect of several years, the proper Court-fee leviable on the memorandum of appeal is one calculated on the aggregate amount of the profits claimed, and not one calculated separately on the amount of profits claimed for each year —*Muhammad Malik* v *Nirhai Bibi*, 7 A 761.

An appeal to the District Court from the rejection of a claim by a forest settlement-officer, under clause 2 of section 10 of the Madras Forest

Act of 1882, falls under Art. 17, clause 6, and not under Art 11 (a) of Schedule II of the Court Fees Act, 1870.—*Kamaraja* v. *Secretary of State*, 8 M. 22.

The Court-fee payable on a memorandum of appeal from an order under s. 523, C. P. Code, 1882, disallowing an application to file an agreement to refer to an arbitration, is *ad valorem* fee computed on the value of the subject-matter in dispute in the appeal.—*Daya Nand* v. *Bakhtawar* 5 A. 333.

An appeal from the decision of a dispute under s 332 B, C. P Code, 1882, falls directly within the exception of art. 11, Schedule II of the Court Fees Act, and the memorandum of appeal should therefore be presented as for a decree in a suit upon an *ad valorem* stamp —*Ahmad Khan* v. *Madho Das*, 7 A. 565 (4 M. 420 *dissented from*).

The stamp-fee payable on appeals to the High Courts in suits asking for "partition, the separation of a share, and for *khas* possession of the share after separation," is that leviable under art. 6, *clause 17, Schedule* II, of the Court Fees Act. For the purposes of jurisdiction the Court should be guided by the value of the property in suit, but the amount of the stamp-fee should be governed by a different principle —*Kirty Churn* v. *Aunath Naih*, 8 C. 757. 11 C. L. R. 95.

A memorandu [illegible] directing ejectment and awarding mesne-profits [illegible] lculated both on the land and on the [illegible] .*Lakshminarasimham*, 16 M. 310.

For the purposes of determining the stamp-fee payable on an appeal a suit for possession and mesne-profits is to be taken as one entire claim and not two distinct subjects.—*Kishori Lal* v. *Sharut Chunder*, 8 C 593 10 C. L. R. 359. *See* also, *Reference under the Court Fees Act*, 1870, 16 A. 401 and *Bunwari Lal* v. *Daya Sankar*, 13 C. W. N. 815

In a suit in the Court of a Sub-Judge to redeem certain land on payment of Rs. 1,625, being a quarter of a debt for which *it had been* mortgaged, together with other land, a decree was passed *for redemption* of part of the land, but the Court held the plaintiff had not established his right to the rest. The plaintiff appealed to the High *Court*, paying *ad valorem* Court-fees computed on the value of *the land* exonerated only. *Held*, that the *ad valorem* Court-fee should be computed one-fourth of the mortgage debt, and that the appeal lay to the *District* Court—*Vasudeva* v. *Madhava*, 16 M. 326.

Memorandum of Appeal to lower Appellate Court was insufficiently stamped—Up to the date of hearing the special appeal, *the deficit* Court-fee was not paid. *Held*, that the proper procedure was *not to* dismiss the appeal in the lower Appellate Court but to stay issuing of the decree until the deficit Court-fee is paid.—*Mohan Lal* v. *Nand Kishore*, 28 A. 270 (20 A. 362 *followed*).

Refund where Memorandum of Appeal is Overstamped.—Where in an appeal to the High Court the memorandum of appeal is overstamped that Court has no power to direct a refund of the amount paid in excess Such a refund can only be granted by the collector of the district on an

application to him made in his behalf.—*In re Lalta Prasad* v. *Sheoraj Singh*, 57 I. C. 26.

Form of Memorandum of appeal.—For Form of Memorandum of Appeal, *see* App. G, Form No. 1.

Ground which may be taken in appeal.

2. The appellant shall not except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this rule:

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground. [S. 542.]

COMMENTARY.

This rule corresponds to s 542, C P Code, with some alterations. Some of the words and phrases of the old section have been changed, but no change seems to have been made in the meaning. The language of the present rule has been made more clear by substitution of some appropriate words and phrases.

The words "*except by*" have been substituted for the word "without;" the words "*any ground of objection not set forth in the memorandum of appeal,*" have been substituted for the words "any other ground of objection"; the words "*grounds of objection set forth in the memorandum of appeal or taken by leave of the Court this rule,*" have been substituted for the words "grounds set forth by the appellant"

In the proviso the words "*unless the party who may be affected thereby,*" have been substituted for the word "respondent" The other changes are merely verbal.

Grounds of Objection.—The grounds of objection must be such as are necessary for the decision of the case and arise from the pleadings and evidence—*Nabar* v. *Ojoodhyaram*, 10 M. I. A. 540, 558.

In an appeal the applicant must not be permitted to make out a new case or a case different from and inconsistent with the case set up by him in the lower Court.—*Indur Chunder* v *Radha Kishore*, 19 C. 507; *Annamalay* v. *Pitchu*, 28 M. 122; *Gajapathi* v *Vasudeva*, 15 M. 503; *Ilahi Khan* v. *Sher Ali*, 26 A 331; *Puran Mal* v *Kran Singh*, 20 A 8, 10; *Ram Chand* v. *Ramanand*, 3 Lah L. J. 392: 68 I. C. 227; *Basant Ram* v. *Muhammad*, 4 Lah. L. J. 293.

Grounds Not Set Forth in the Memorandum of Appeal.—Although, as a rule, the Court will not permit grounds of appeal to be taken in argu-

ment which have not been taken in the memorandum of appeal, yet, where a decree comes before it which is upon its very face illegal, the Court is bound to take up the point itself and rectify the mistake.—*Paran Sookh v. Parbutty* 3 C. 612: 1 C.L. R. 404. *See* also, *Vemi Reddi* v. *Nallappa Reddi*, 11 L. W. 611.

Held that, in disposing of a second appeal, the High Court is competent under this rule to consider the question whether the plaintiff has any cause of action of not although such question has not been raised by the defendant appellant in the Courts below, or in his memorandum of second appeal, but is raised for the first time at the hearing of such appeal.—*Luchman Prasad* v. *Bahadur Singh*, 2 A. 884.

Held, that not only may the plea of *res judicata*, though not taken in the memorandum of appeal, be entertained in second appeal under this rule but that even when such plea has not been urged in either of the lower Courts, or in the memorandum of appeal, if raised in the second appeal, it must be considered and determined either upon the record as it stands or after a remand for findings of facts.—*Muhamad Ismail* v. *Chattar Singh*, 4 A 69. *See* also, *Koylash Nath* v. *Monmohiney*, Marsh 276: 2 Hay 154; *Mugnamoye* v. *Hur Chunder*, 3 W. R Act X, 146

The principle that an Appellate Court should not go beyond the subject-matter of the appeal applies to an objection, called a cross appeal, which enables the respondent to take any objection to the decision of the lower Court which he might have taken if he had preferred a separate appeal. An Appellate Court was held to have acted without authority, and to have contravened the Court Fees Act, in having voluntarily suggested what it thought to be an error of the Court below, and allowed the respondent to take it as an objection, giving effect to the objection subject to the payment of the Court-fee stamp.—*Soonduree Debee* v *Gobind Monee*, 24 W. R. 179.

This rule was intended to confer upon the Court a power exerciseable by it alone; it was not intended to enable an appellant to take the respondent by surprise by urging a matter of which he had no notice.—*Banarsi* v. *Sita Ram*, 13 A. 381.

A ground not taken in the memorandum of appeal cannot be allowed to be urged successfully.—*Gourmoni* v. *Jugul Chunder*, 17 C. 57 (64)

Unless such objection is taken in his memorandum of appeal, it is not open to an appellant at the hearing of an appeal from the decree to question the validity of an order of remand previously made in the same suit under s. 562 of the C. P. Code, 1882.—*Tilak Raj Singh* v *Chakradhari Singh*, 15 A. 119

Where non-joinder of parties in a mortgage suit is brought to the notice of the Court, the Court will give effect to the objection and dismiss the suit even though such objection be raised for the first time in appeal.—*Ghulam Kadir* v. *Mustakin Khan*, 18 A. 109

Where the finding of the lower Appellate Court against the *factum* of adoption was not questioned in the grounds of second appeal, *held*, validity of the adoption could not be allowed to be urged at the further proceedings; *Rajambal Ammal* v. *Shunmuga Mudaliar*, 70 I. C. 653.

An objection to the jurisdiction of the Court was allowed to be taken r the first time in appeal.—*Ranchod Morar* v. *Bezanji Edulji*, 20 B. 86. :e also, *Ramayya* v. *Subbarayudu*, 13 M. 25 and *Ajodhyanath* v. *Keshub* *iundra*, 11 C. W. N. 1127.

Appellant not allowed to raise in appeal a contention inconsistent with e case relied upon in the Courts below.—*Gajapathi Radhika* v *Vasu-va*, 15 M. 503 (12 M. I. A 470 *followed*) See also, *Ilthikhan* v. *Sher* *i*, 26 A. 331.

Where a document was admitted in evidence by the first Court with-it any objection by the parties, but the Appellate Court rejected it on e ground that it was insufficiently stamped, although no objection was ade to it in the memorandum of appeal. *Held*, that the Appellate ourt ought not to have rejected it —*Kastur Bhavani* v. *Appa*, 5 B. 621.

An *objection to the form of the notice of sale under section 8 of Ben-*l Regulation VIII of 1819 was allowed to be taken for the first time in e Appellate Court —*Ashanulla Khan* v. *Hari Charan*, 20 C. 86 P. C.

Objection upon the Question of Limitation—Though an objection upon e question of limitation was not raised in the memo, of appeal, leave ould yet be given to argue it when the point arose on the face of the aint, and no question of fact had to be enquired into to enable the Court dispose of it and when the point was thus taken, the Court was bound give effect to it, the provisions of section 3 of the Limitation Act being andatory.—*Balaram* v *Mangta Das*, 34 C. 941 F. B.· 11 C. W. N. 9: 6 C. L. J 237 (13 A. 580, 15 A. 123, and several other cases ferred to in the order of *reference*).

An appellant in a second appeal raised orally at the hearing a plea t taken in his memorandum of appeal to the effect that the respondents' peal to the lower Court (where they had been appellants) had been rred by limitation when it was presented. *Held* that, even though the ea proposed to be raised was one involving a question of limitation, the pellant was not entitled as of right to be heard in support of it without e leave of the Court granted under this rule —*Ahmad Ali* v *Waris* *osain*, 15 A. 123 (8 B. 535, *referred to*). *See* also, *Ram Kishan* v. *Dipa*, A. 580; *Deonarain* v *Webb*, 28 C. 86; *Venkata* v. *Bhasyakarlu*, 25 367; *Bhadai* v. *Shaikh Manwar*, 4 Pat L J 645, 649-59

An appellant in regular appeal may not, at one hearing, raise a con-ntion of law expressly abandoned by him in the Court below, and not ntained in the memorandum of appeal —*Pabitra Dasi* v. *Damudar*, 7 . L. R. 697 24 W R 397-*note*. But see, *Abdullah* v *Asraf Ali*, 7 . L J. 152, where it has been held that the question of limitation, raised the written statement, but abandoned in the Court of the first instance in be raised in the Court of Appeal, as it is a clear question of law.

Court competent to raise question of limitation not raised by the arties—Time requisite for obtaining copy of decree—Exclusion of time etween delivery of judgment and signing of decree—Exclusion of time etween furnishing of estimate of costs of copy and compliance with esti-iate.—*Bechi* v. *Ashanullah* 12 A. 461 (7 W. R. 337· 13 C. 104 *dissent-d from*).

Effect of Not Raising or Waiving an Objection in the Lower Court.—As a general rule, objections not taken in the lower Court ought not to be allowed to be set up in the Appellate Court; but where the Judge in appeal had allowed such an objection to be taken, and had overruled it, the High Court allowed it to be raised in special appeal, and being of opinion that it was a valid objection, reversed the decision of the Court below.—*Dinabandhu* v. *Surendra Nath*, 3 B. L. R. A. C. 78-*note*: 10 W. R. 77.

The errors of procedure of the Court of first instance are not to be remedied when they have not been made a ground of complaint before the lower Appellate Court.—*Anurup Chandra* v. *Hiramani*, 3 B. L. R. Ap 35: 11 W. R. 418.

An objection which if taken might have been cured and which has not been taken in the Court below cannot be taken in the Court of Appeal.—*Dhurm Dass* v. *Shama Soondery*, 6 W. R. P. C. 43: 3 M L A 229. *See* also, *Nural Hossein* v. *Sheosahai*, 20 C. 1.

A plaintiff will not be allowed to raise any objection as to defendant's setting up alternative defences, at the appellate stage of the suit where no such objection was raised in the first court.—*Purender Narain* v. *Devijendra Narain*, 8 C. L. J. 289.

An objection as to the plaintiff having no cause of action may be taken at any stage of the suit.—*Parbati Charan* v. *Kalinath*, 6 B. L. R. Ap 73 *See* also *Lachman* v. *Bahadur Singh*; 2 A. 884. But *see*, *Kalicoomar* v. *Bromomoyce*, 1 W. R. 23; and *Sudakhina* v. *Raj Mohan*, 11 W. R. 330.

An objection as to non-joinder and defect of parties cannot be allowed to be raised in appeal. Such objection should be taken at the first hearing.—*Paramasiva* v. *Krishna*, 14 M. 498. But see, *Ghulam Khadir* v. *Mustakim Khan*, 18 A. 109 (13 A. 432, 16 A. 478, and 17 A. 537, *referred to*). An objection as to misjoinder of cause of action cannot be taken for the first time in appeal.—*Maula* v. *Gulzari*, 16 A 130 (5 B 554 *followed*)

An objection to the jurisdiction of the Court may be taken for the first time in appeal.—*Ranchod Morar* v. *Bezanji Edulji*, 20 B 86 But the objection cannot be taken in appeal, where the question is not a pure question of law, but depends upon facts.—*Biru Mahata* v. *Shyama Charan*, 22 C. 483.

An objection not raised in the lower Court cannot be raised for the first time in appeal.—*Magon Lal* v. *Govind Lal*, 15 B. 697.

Question of permanent tenancy cannot be raised for the first time in the appeal.—*Mahabir Pershad* v. *Fox*, 9 C. L. J. 467.

An objection not taken in cross-appeal before the lower Appellate Court cannot be taken in special appeal; but, if the case be remanded for new trial, such objection may then be taken before the Court of first instance.—*Durgaram* v. *Norsing Deb*, 2 B. L. R. A. C. 354: 11 W. R. 1[illegible]

An objection that an attachment under s. 240 of Act VIII of 1859 was invalid, because the formalities required by s. 239 had not been complied with was not allowed to be taken on appeal, it not having been raised in the Courts below.—*Ram Krishna* v. *Sarfunnissa*, 6 C. L. R. [illegible]

Where objection to the validity of the award, on the ground that it was made beyond the time allowed, was not taken by the defendant in the first Court, *held*, that he was not thereby estopped from raising the objection for the first time in appeal, inasmuch as it was not shown that, in the first Court, he was aware of the defect or had done anything to imply consent to extension of the time.—*Chuha Mal* v. *Hari Ram*, 8 A. 548.

If no objection is taken in the Court of first instance to the reception of a document in evidence, it is not within the province of the Appellate Court to raise or recognize it in appeal.—*Chimnaji Govind* v. *Dinkar Dhondev*, 11 B. 320. No objection should be allowed to be taken in the Appellate Court as to the admissibility of a copy of a document which was admitted in evidence in the Court below without any objection.—*Kishori Lal* v. *Rakhal Das*, 31 C. 142 (19 A. 76, P. C., *distinguished*); *Hridoy Krishna* v. *Prasanna Kumari*, 28 C. 142 (19 A. 76, P C., *distinguished*). *See* also, *Shahazadi Begum* v. *Secretary of State*, 34 C. 1059, P. C.: 6 C. L. J. 678: 9 Bom. L. R. 1192; and *Ram Prasad* v. *Sham Narain*, 6 C. L. J. 22.

Held, that the Court is bound in regular appeal to entertain an objection that a document is invalid for want of registration, even though no objection may have been raised to its admissibility in the Court below.—*Basawa* v. *Kalkapa*, 2 B. 489; *Oomatool Fatima* v. *Vhunnoo*, 19 W. R. 22. But see, *Girish Chunder* v. *Amina Khatum*, 3 B. L. R. Ap. 121.

Where a point is taken on appeal, the Appellate Court should consider and decide it, although the vakil may omit to argue it.—*Dada Valad* v. *Bavasha Valad*, 6 Bom. H. C. 9.

Where a judgment of the Appellate Court contained a statement that a particular point had been abandoned which statement was challenged, the Judicial Committee considering the surrounding circumstances, *held* that the point was not abandoned —*Aalka Parshad* v. *Mathura Prasad*, 13 C W. N. 1, P. C : 8 C. L. J 447.

Appellate Court shall Not Rest Its Decision on any Ground Not Set Forth in the Memo. of Appeal.—The appellate Court is not precluded from basing its decision upon a ground not set forth in the memorandum of appeal nor taken by leave of this Court under this rule —*Thakuri* v. *Kundan*, 17 A 280. This Power is however to be exercised by the Court alone and neither party can claim it as of right —*Bunsidhar* v. *Sitaram*, 13 A. 38.

The Appellate Court has no power to rest its decision on a ground not set forth in the memorandum of appeal if a particular point taken in the pleading has been deliberately abandoned by a party at the trial of the suit before the lower Court —*Govindrav* v *Balu*, 16 B 58

A Judge is not permitted to make, on appeal, a different case for the appellant from that which he alleged for himself in the Court of first instance.—*Kachubhai* v. *Krishnabai*, 2 B 635; *Irangowda* v *Seshapa*, 17 B. 772; *Nathu* v. *Umedlal*, 32 B 85.

An Appellate Court should not ordinarily travel beyond the record, or take up points which are not the subject of appeal before it —*Kashinath* v. *Roy Dwarkanath*, 7 W. R. 61.

A lower appellate Court is not justified in determining an appeal on issue which was not raised between the parties in the Court of first instance.—*Ustoorun* v. *Mohun Lal*, 21 W. R. 333. *See* also, *Prankishore* v. *Mahomed Ameer*, 21 W. R. 338; *Rukmini* v. *Foodun Koomaree*, 23 W. R. 408; *Sookhanundamoyee* v. *Baney Madhub*, 1 W. R. 73; *Ramrao Khanderav* v. *Gobind Pandshet*, 6 Bom. H. C 63.

A finding of the first Court not appealed against cannot be interfered with by the Appellate Court.—*Kalee Das* v. *Khiroda*, 16 W. R. 3...; *Wadawa Singh* v. *Sunder Singh*, 21 P. W. R. 1921: 59 I. C. 689.

In a suit for ejectment in which neither party set up a tenancy, the lower Appellate Court found that the defendant was a yearly tenant and hence dismissed the suit for want of notice to quit. *Held*, that the lower Appellate Court could not make for the defendant a case which was different from and inconsistent with that set up by him.—*Sujjad Ahmad* v. *Ganga Charan*, 9 C. W. N. 460: 1 C. L J. 116 (13 C. 248, 17 M. 218, 15 B. 47, *distinguished*).

Where a plaintiff has rested his case upon fraud, and the case of fraud has failed, he cannot be permitted to support it upon an entirely different and inconsistent ground.—*Ghurphekni* v. *Purmeshar*, 5 C L. J. 653 (9 C 631, 6 B. 110, 7 C. 381, *referred to*).

An Appellate Court can *suo motu* raise the question of limitation for the first time, where it appears on the face of the plaint that the suit is barred.—*Mozaffar Ali* v. *Girish Chandra*, 1 B. L R. 25: 10 W. R. 71

Power of Appellate Court to Take Cognizance of Facts which have Happened Since the Date of Judgment of the Lower Court.—*See* 11 C W. N. 732, 6 C. L J. 74, and 6 C. L. J. 92, 102 and 662, noted under r. 30 of this Order.

Rejection or amendment of memorandum.

3. (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

(2) Where the Court rejects any memorandum, it shall record the reasons for such rejection.

(3) Where the memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall sign or initial the amendment. [S 543]

COMMENTARY.

This rule corresponds to s. 543, C P. Code of 1882, with some alterations of verbal character.

The word " *where* " has been substituted for the words " *if* " and " when ", and the words " *shall sign or initial* " have been substituted for

the words "shall attest by his signature," which occurred in the old section. No change seems to have been made in the meaning.

Under s. 107, sub-rule (2), read with Or. VII, r. 11 (c), an Appellate Court can reject a memorandum of appeal if it is insufficiently stamped, and the appellant fails to supply the deficit stamp within the time fixed by the Court.—*See notes to Or. VII, r.* 11.

Under s. 3 of the Limitation Act (IX of 1908), an Appellate Court can reject a memorandum of appeal if it is filed after the prescribed period of limitation. As to the discretionary power of the Appellate Court to excuse delay, *see* the cases noted under r. 1 of this order.

Returned for Amendment.—A memorandum of appeal containing language disrespectful to the Court of the first instance and containing allegations of bias and partiality against that Court should be returned for amendment.—*Zamindar of Tuni* v. *Benaya*, 22 M. 155.

Where a memorandum of appeal is returned for the purpose of being corrected, the Appellate Court should specify a time for such correction.—*Jagannath* v. *Lalman*, 1 A. 260. When an Appellate Court returns an insufficiently-stamped memorandum of appeal, in order that it may be sufficiently stamped, it should fix a time within which the deficiency is to be supplied.—*Sheo Partab* v *Sheo Gholam*, 2 A. 375 (1 A. 260 *referred to*).

" May be rejected."—Whenever a memorandum of appeal is rejected under the discretionary power vested in the Court, a judicial order to that effect, and the reasons for the same, ought to be recorded.—*Lalla Jugesh* v. *Kassenauth*, 1 Ind Jur. O. S. 121.

An Appellate Court should state its reasons for rejecting an appeal as barred by limitation.—*Raghunath* v. *Nilu*, 9 B. 452 (454).

When a memorandum of appeal is summarily rejected, under this rule, the reason for such rejection should be recorded —*Rudra Prasad* v. *Baij Nath*, 15 A 367.

The time for rejecting an appeal is when it is presented, and not after it has once been admitted.—*Gopee Bullub* v *Goluck Proshad*, W. R. 1864, (135) But registration of appeal is a ministerial act, so it can be rejected after registration —*Jaffer Hossein* v. *Mahomed Amir*, 4 B. L R App. 103: 13 W R. 351

There is no limitation as to the time when a memorandum of appeal may be rejected or ruturned for amendment —*Damodar Das* v *Gokal Chand*, 7 A. 79 (85).

Appeal.—A decision rejecting a memorandum of appeal on the ground that it is barred by limitation has the force of a decree and is therefore appealable —*Gulab Rai* v *Mangli Lal*, 7 A 42; *Raghunath* v *Nilu*, 9 B. 452; *Gunga Dass* v *Ramjoy*, 12 C 30 For the same reason, a decision that a memorandum of appeal is insufficiently stamped or that it was not duly presented, is appealable as a decree.—*Rup Singh* v. *Mukhraj*, 7 A. 887; *Ayyanna* v. *Nagabhooshanam*, 6 M. 285.

One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all.

4. Where there are more plaintiffs or more defendants th one in a suit, and the decree appealed fro proceeds on any ground common to all t plaintiffs or to all the defendants, any o of the plaintiffs or of the defendants may a peal from the whole decree, and thereupon t Appellate Court may reverse or vary the decr in favour of all the plaintiffs or defendants, as the case may be. [S. 544

COMMENTARY.

This rule corresponds to s. 544, C. P. Code, with the substitution the words "*appealed from*" for the words "appealed against," and of th word "*very*" for the word "modify," which occurred in the old sect. No other alteration has been made in this rule.

This rule is to be read with rule 33 of the order which has been take from English Or. LVIII, r. 4, and which has been inserted with the object that the Appellate Court should have the fullest power to do complete justice between the parties.

Any One of the Plaintiffs or Defendants may Appeal.—This rul relates only to cases where one or more of the parties arrayed on the same side appealed against a decree passed on a ground common to all, and n to cases where either of two opposite parties appealed from a part of the decree upon a Court-fee sufficient for an appeal from the whole.—*Ch Lal* v *Badullah*, 11 A 85 (7 M. I. A. 283, 10 M. I. A. 340, and 12 M I A. 157, *referred to*)

One of several defendants who appeals in respect only of the s decreed against her is not entitled to take advantage of this rule and qu tion the full amount claimed.—*Sheeroo Comaree* v. *Mahatab Chand*, W R. 1864, (380).

One of two defendants may appeal as respects the whole, and not h of the property in dispute in the absence of proof that they owned the pr perty in two equal shares.—*Katyaney* v. *Madhub*, 4 W. R 68.

Where one of several plaintiffs prefers an appeal in which the oth plaintiffs are also interested, Or. XLI, r. 4 does not authorize him to pr ceed with the appeal without making the other plaintiffs parties thereto.— *Ambika Prasad* v *Jhinak Singh*, 45 A. 286: 21 A. L. J. 91: 71 I C 2

In a suit for arrears of rent, an intervenor who alleged that he was receipt of the rents from the ryots was made a party. The first Court passed a decree in favour of the plaintiff, but the decree was reversed on appeal and the suit dismissed. *On appeal to the High Court, held,* th the intervenor was properly made a defendant to the suit, and that he could prefer an appeal from the decree of the Court of first instance, and that the Court of appeal could, on his appeal, set aside the whole decree *Daya Chand* v. *Nobin Chandra*, 8 B. L. R. 180: 16 W. R. 235

By consent of parties the High Court allowed an appeal by one plaintiff against another plaintiff, and adjudicated upon their rights.—*Bhagirthibai* v *Baya*, 5 B. 261.

In a suit in which the defence of two defendants was a common one to the extent of denying that the plaintiff had any such mokurrari ryoti title as he alleged, and the first Court's decision went on the ground that the plaintiff had a title against both, *held*, that one defendant alone might appeal —*Mahomed Saefoolah* v *Anwar Ali*, 21 W R. 112.

Reversal or Modification of Decree on Ground Common to All.—This rule applies as well to *ex parte* decrees as to other decrees, the only question being whether the decision of the lower Court proceeded on a ground common to all the defendants.—*Sreenath* v *Grey*, 13 W R. 114; *Ram Tahal* v. *Sukeswar*, 1 Pat. L. J 143.

A decree against several defendants, one of whom alone appeals, can be reversed as against the rest when it proceeds on any ground common to all.—*Ram Kamal* v. *Ahmad Ali*, 30 C. 429 (17 M. 265, *dissented from*); *Annamalay Chettiar* v. *Pichu Ayyar*, 28 M. 122 15 M. L. J. 28; *Dhuttaloor* v. *Paidigantam*, 30 M. 470, F. B : 17 M. L. J. 119; *Kali Pada* v. *Mati Lal* 9 C. L. J. 461, 20 A. 8, 28 A. 95, *referred to*); *Asibunnessa* v. *Wali Ahammad*, I C. L. J. 144; *Somasundaram* v. *Vathilinga*, 40 M. 846 (867); *Ambika Prasad* v *Pardip Singh*, 19 C. W N 233; *Salaludin* v. *Afsar Begum*, 39 C. L J. 590 · 84 I. C. 68 A I R 1925 Cal 23; *Durga Kunwar* v. *Balwant Singh*, 23 A. 478 (481); *Sriram Ghatak* v. *Ratnam* 13 M. 249 (252), *Nagamma* v *Subba*, 11 M 197; *Seshadri* v. *Krishnan*, 8 M. 192; *Sindar Das* v. *Shajidur Rahman*, 60 I C 460. If however, the appealing defendant values the appeal at a sum which represents the amount decreed against him alone, the appeal cannot be regarded as being against the entire decree so as to bring the case within Or. XLI, r 4 —*Jogendra Nath* v *Rajenda Nath*, 63 I C 95

The word " may " in this rule shows that the Appellate Court is given a discretion in the matter. It may therefore reverse the decree in favour of some only of the plaintiffs or defendants It is not bound to do so in favour of all of them.—*Narain* v *Binaik*, 36 A 510 An Appellate Court can reverse or alter a decree on appeal by one party only when it finds that the Lower Court had no jurisdiction to try the suit —*Nagamma* v. *Subba*, 11 M. 197.

A decree was passed for the plaintiff in a suit to redeem a *kanom* brought against various persons most of whom disclaimed all interest An appeal was preferred by one of the defendants who claimed to be the *jenmi* of the premises comprised in the *kanom* from him The first-mentioned appellant withdrew from the appeal, which however, was prosecuted by the other and the Appellate Court reversed the decree *Held*, that since the appellants were the only substantial defendants, the Appellate Court was right in allowing the appeal to proceed —*Sri Mana Vikraman* v *Rayan*, 16 M 293

In 1880, *Z* leased certain property to defendant, in 1892 the successor of *Z* leased the same property to plaintiff, who sued the defendant and *Z*'s successor and obtained a decree for possession The defendant gave up possession. The successor of *Z* appealed making defendant a party The High Court reversed the decree and dismissed the plaintiff's suit, holding

that defendant's lease was valid. *Held* that, under this rule, the decree of the High Court enured for the benefit of the defendant also and that he was entitled to restitution.—*Erat Madhavan* v. *Venganat*, 18 M L J 30

Where parties who have been made co-defendants do not appear, and the Court deals with the case under s. 116, C. P. Code, 1859, the decree given is not in the nature of an *ex parte* decree even as against the absent defendants; and proceeding as it does on a ground common to all the defendants, the decision may, under s. 337, be modified in appeal even in favour of defendants not before the Appellate Court.—*Doorga Churn* v. *Sham nund*, 12 W. R. 376.

Two suits brought by different parties claiming different interests in certain share to set aside the sale of that share having been dismissed, one of the plaintiffs appealed, and the sale was set aside. *Held*, that the decision must be considered as setting the sale aside as to the whole of the share, although the other parties did not appeal —*Nagar* v *Shumutoolli* 20 W R. 77.

Under Or. XLI, r. 4, C P. Code, an Appellate Court has power to reverse a judgment in favour of a deceased defendant as regards the whole of the plaintiff's claim and not only as regards that part of it in which the surviving defendant or defendants were particularly interested —*Subbaraya Mudaliar* v. *Kandasami*, 16 L. W. 330: (1922) M. W. N 674

Where certain tenants appealed making only some of the co-sharer landlords respondents, *held*, that as the respondents alone could not have sued for rent, the appeal impleading them without joining the other landlords as respondents, was unsustainable. Under Or I, r 9, C P Code a person who is a necessary party to the suit is a necessary party to the appeal —*Jitendra Nath* v *Jhaker Mandar*, 3 Pat L T 456: 66 I C 780

Decree Against Some of the Defendants—Alteration of Decree by Appellate Court.—When a decree has been given against one defendant only, an Appellate Court can alter the decree so as to render liable another defendant against whom the plaintiff has preferred no appeal—*Rup Janu* v *Abdul Kadir*, 31 C 643, F. B.: 8 C. W. N 490, F. B (2 C 565 *approved;* 26 C. 109, and 18 B 520 *referred to,* 7 W R 4 and 366 *impliedly overruled*) Dissented from in *Farzand Ali* v. *Bismilla Begum*, 27 A 23 (*following* 2 A. 487, and 5 A. 266), and also in *Kuli Kada* v *Viswanatha*, 28 M 229: 15 M L. J. 212 (7 M. 214, 18 B 52 26 C 109 (144), 31 C. 643, *distinguished*). In these latter cases it has been held that an Appellate Court is precluded from modifying the decree of the lower Court in favour of a party who has filed neither an appeal nor a memorandum of objection under r. 22 of this Order

Where it is necessary for a proper decision of an appeal before it, it is competent to an Appellate Court to take into consideration objections filed under s 561, C P. Code, 1882 (r. 22), by one of the respondents not only as against the appellant, but, it may be, as against the co-respondents with the objector also, and to modify the decree as against them accordingly.—*Abdul Ghani* v *Muhammad Fasih*, 28 A 95: 2 A L J 667 (26 C 114 *followed;* 21 W. R 338 *referred to,* 23 A 6 *distinguished*).

If, in a mortgage suit, in which the plaintiffs ask for relief against two sets of defendants in the alternative, the first Court gives a decree against one set of defendants and dismisses the suit as against the other, the Appellate Court has, on appeal by one set of defendants, in which the other set of defendants is made a party respondent, power to alter the decree, so as to make the latter liable, the real contest in the case being between the defendants.—*Iswardhari Singh* v *Sahebzadi*, 35 C. 538: 12 C. W. N. 720 (25 C. 565, 26 C. 109, 31 C. 613 *followed*, 26 C. 114 *does not lay down any different principle*) In this connection, *see* r. 33 of this Order, which virtually supersedes 27 A 23, 28 M. 229, and other cases, in which similar view has been taken.

In a suit against A and B for recovery of possession of property, the Court gave a decree against A and in favour of B The plaintiff appealed from that part of the decision which was in B's favour *Held*, that the Judge on appeal had no jurisdiction to reverse the decision of the Court below against A, he being no party to the appeal —*Hurro Chunder* v *Lall Chand*, Marsh. 256: 2 Hay 48 *See* also, *Lalla Ramsurun* v *Lokabas Kooer*, 18 W. R 39

A and B were sued on a joint liability to pay rent A did not defend, B did; and a decree was passed against both B appealed. *Held*, that it was competent to the Judge on appeal to reverse the decree, on the ground that there was no joint liability, but that B occupied a separate estate at a separate rent —*Lukhee Kant* v *Ram Dayal*, Marsh 281 2 Hay 288

Appeal by one of several plaintiffs claiming under a joint right—Decree in such appeal binds other co-plaintiffs although not parties to the appeal— Procedure.—*Babaji Dhondshet* v *Collector of Salt Revenue*, 11 B. 596.

Altering decree against defendant on co-defendant's appeal It was considered, under the circumstances of this case, not consistent with the principles of equity and good conscience to refuse a clearly proved right on the technical ground that on one co-defendant's appeal, no decision adverse to another co-defendant can be come to.—*Oodoy Singh* v. *Poluck Singh*, 16 W. R. 271

The Court of Appeal has power, under s 544, C P Code, 1882 (this rule), to draw up what would be a fair decree as regards all the parties to a suit although some of them may not have appealed —*Joykisto* v. *Nittyanund*, 3 C 738 2 C L R 440

Where the Decree does Not Proceed on any Ground Common to All.—A decree against several defendants, one of whom alone appeals, cannot be reversed as against the rest when it did not proceed on ground common to all.—*Doyamoyee* v *Eshur Chunder*, 1 W R 203, *Woomesh Chunder* v. *Matungnee*, 2 W R 170, *Abdul Ali* v *Banoo*, 2 W R 287, *Boydo Nath* v. *Oian Bibee*, 11 W R 238, *Koloda Pershad* v *Goura Chand*, 17 W R 353, *Chunder Monee* v *Modhoo*, 23 W R 166

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S. 544, C P Code, 1882 (this rule), does not enable an Appellate Court to decide, upon a ground which it considers to be common to all the defendants, an appeal preferred by one only of such defendants, and to

reverse or modify the decree of the Court below in favour of all the defendants, unless the lower Court has proceeded upon a ground common to all the defendants.—*Puran Mal* v *Krant Singh*, 20 A. 8 (14 W. R. 130 *referred to*). *See* also, *Chajju* v *Umrao Singh*, 22 A. 386; and *Protab Chunder* v *Koarhannissa*, 14 W R 130.

Where one of several defendants appeals not against the whole decree but only against that portion of it which affects him, and his defence in the lower Court is not a defence common to the other defendants, the decree of the lower Court cannot be reversed in favour of those defendants who have not appealed.—*Ram Chunder* v *Omara Churn*, 18 W. R 26 *See* also, *Nahur Chunder* v *Judoo Nath*, 24 W R. 389.

Appeal by *pro forma* defendants, by making the real defendants, who did not appear, respondents as between themselves, cannot open out that portion of the case which, as between the plaintiff and the non-appealing defendant, has not been appealed against.—*Godadhur* v. *Monmohinee*, 7 W. R 366 *See* also, *Khemunkuree* v *Nilambur*, 2 W. R. 227. But see, *Sorru Padmanath* v *Narayanrao*, 18 B 520 (7 W. R. 366 and 5 A. 266 *distinguished*)

Appeal—Joint appellants—Presentation of appeal beyond time—Affidavit excusing delay in appealing made by only one of the appellants stating reasons personal to himself—Appeal admitted—Variation of the decree on a point affecting other appellants, but not the appellant who made the affidavit—Variation not allowed.—*Viswanath* v. *Vasudev*, 20 B 699 (27 C 57, 22 B 849 *referred to*)

Persons not parties to proceedings in appeal not bound by the result of those proceedings Where there are several respondents before the Court of first appeal, though one of them may represent his fellows in a further appeal, he cannot represent a person who was not his co-respondent, and against whom therefore no decree could have been made on a point common to the two, or any point at all.—*Devgopal* v. *Vasudev*, 12 B 371

Death of One of Several Joint Appellants or Respondents does Not Cause the Appeal as a Whole to Abate.—Where several plaintiffs or defendants jointly appeal against a decree to which this rule applies the death of one of such appellants, if no legal representative of the deceased appellant is brought upon the record within limitation, can only have the effect of causing the appeal to abate so far as the deceased appellant was concerned, it cannot have the effect of causing the appeal as a whole to abate.—*Ram Sewak* v *Lambar Pande*, 25 A. 27; (22 A. 222 *overruled*; 16 A. 211 *distinguished*) *See* also, *Chandar Sang* v. *Khimabai*, 27 A. 22; 22 B. 718; *Chintaman* v *Gangabai*, 27 B. 284; 5 Bom. L. R. 90; *Bai Full* v. *Adesang*, 26 B 203; and *Partap Chandra* v. *Durga Charan*, 9 C. W N 1061.

Where in an appeal by the defendant against a decree for arrears of rent passed jointly in favour of the plaintiffs, the heirs of one of the plaintiffs, who died after the delivery of the judgment against which the appeal is preferred, were not made parties.—*Held*, that the appeal could not proceed and must fail by reason of defect of parties.—*Bejoygopal* v. *Umesh Chundra*, 6 C. W. N. 196.

Where a preliminary decree had been passed in favour of two appellants jointly, in ignorance of the fact that one was dead, the Court allowed the heirs of the deceased appellant to be substituted as parties in the final decree.—*Apanna v Gavarappadu*, 18 M L J 601 87 I C 718 A I R 1925 Mad 910

See also the cases noted under Or XXII, r 11

Application for Execution by Non-appealing Parties and the Time from which Limitation Runs.—A suit brought against several defendants was dismissed with costs The plaintiffs appealed, and the case was remanded under s 526, C P Code, 1882 One of the defendants appealed to the High Court against the order of remand, and the High Court set aside the remand order and restored the decree of the first Court. *Held*, that the defendants who had not appealed were entitled to take out execution of that decree for the costs awarded to them, by the first Court, notwithstanding that they were not parties to the decree of the High Court —*Mulchand v Ram Ratan*, 20 A 493.

Where only some of several persons affected by a decree have appealed against it, the date of the appellate decree forms the basis from which the period of limitation should be computed, even in the case of those who have not appealed against the original decree.—*Shivaram v. Sakharam*, 33 B 39 · 10 Bom L R 939. But where a decree for possession was passed, not jointly but severally, as against all the defendants individually, and specifically stated the portions of which they were severally in possession, as also the costs separately payable by each of them; and where two only of the defendants appealed on pleas which did not assail the decree in respect of any right or ground common to the appellants and all or any of the non-appealing defendants, but referred merely to the specific property alleged to be in the appellant's hands. *Held*, by the Full Bench, that a first application for execution of the original decree against those defendants who had not appealed from it, and which was made five years after the date of the decree was barred by limitation.—*Mashiatunnissa v. Rani*, 13 A 1 (10 W R. 30, 6 C. 191: 6 C. L R 573 , and 8 A. 573, *approved and followed*).

A suit having been dismissed by the first Court, which ordered that the costs of all contending defendants were to be borne by the plaintiff, the plaintiff appealed to the High Court which reversed the decree. One of the defendants appealed to the Privy Council, which reversing the decree of the High Court restored that of the first Court. *Held*, that the decree of the first Court by being restored was re-affirmed in its integrity, and the defendants generally were entitled to execute it, though only one had appealed to the Privy Council.—*Luchmeeput Singh v. Khoobunnissa*, 14 W. R. 280.

A District Court gave the plaintiff a decree against all the defendants All the defendants except one, *B*, appealed to the High Court, which reversed the decree. The plaintiff appealed to the Privy Council, all the defendants except *B* being respondents. Her Majesty in Council reversed the decree of the High Court, and restored that of the District Court. *Held* that, notwithstanding that *B* was not a party to the appeals to the High Court and to the Privy Council, the decree was a valid decree,

could be executed against *B.*—*Kishen Sahai* v. *Collector of Allahabad*, 1 A. 137.

Where a decree for possession of certain property is made against three persons jointly, one of whom appeals against the decree only so far as it affects himself and not against the whole decree, and the decree does not relate to property in respect of which the defendants have a common interest and a common defence, so that an appeal by one would imperil the whole decree, then the fact of one defendant having appealed will not prevent limitation running in favour of the others, against the execution of the decree.—*Hur Proshad* v. *Enayet Hossein*, 2 C. L. R. 471.

See also the cases noted under Or XXII, *r.* 11.

STAY OF PROCEEDINGS AND OF EXECUTION.

Stay by appellate Court.

5. (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

Stay by Court which passed the decree.

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied—

(*a*) that substantial loss may result to the party applying for stay of execution unless the order is made;

(*b*) that the application has been made without unreasonable delay; and

(*c*) that security has been given by the applicant for the due *performance of such decree or order* as may ultimately be binding upon him.

(4) Notwithstanding anything contained in sub-rule (3), the Court may make an *ex parte* order for stay of execution pending the hearing of the application. [S. 515.]

COMMENTARY.

Alterations in the rule.—This rule corresponds to s. 545, C. P. Code, 1882, with some additions and alterations.

In sub-rule (1) the words "*an appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order,*" have been added, adopting the law as laid down in the Full Bench case reported in 31 C. 722: 8 C. W. N. 572. Before the Full Bench case was decided there was a diversity of judicial opinions as to whether an Appellate Court has power to stay proceedings under a decree or order. In 1 C. W. N. 264, it was held that there is no provision in the C. P. Code which authorizes a Court to which an appeal is preferred against a preliminary decree, to stay proceedings pending the hearing of the appeal, *s. 545 of the old Code (this rule), only authorizes* the Appellate Court to stay execution of decrees, but there is no provision in it to stay interlocutory order in a proceeding in the suit, previous to the passing of the final decree. In 5 C. W. N. 781, a contrary view was taken. Then the question was referred to a Full Bench, which (overruling 1 C. W. N. 264) held that apart from s. 545 (this rule), the Appellate Court has *inherent power to stay such proceedings.* Thus the above addition has been made adopting the law as laid down in the Full Bench case quoted above empowering the Appellate Court to stay proceedings after an appeal is preferred against a preliminary decree. The object of the amendment will be clearly understood from the following report of the Special Committee —

"The Committee have added words to s. 545 in order to make it clear that proceedings under a decree as well as execution can be stayed by an Appellate Court, the recognition of preliminary decrees makes it the more necessary to have an express power to this effect instead of resting on an inherent power —*Bal Kishen Sahu* v. *Khugnee*, 31 C. 722. The committee have introduced express words authorizing an *ex parte* stay, as the need for such order constantly arises in practice."

Sub-rule (4) is new and the object of its introduction has been explained in the above report of the Special Committee —It has been inserted to meet the case in 15 B. 536 where it was held that final order staying execution should not be made without giving notice to the decree-holder. But the application should be supported by an affidavit as pointed out in the Bombay case above referred to.

The other changes introduced in this rule are merely verbal changes.

" Shall not operate as a stay of proceedings."—Rule 5 (1) of Or. XLI, provides that an appeal shall not operate as a stay of execution; so that where a decree is under appeal, a Court may proceed with its execution and may, in the course of execution, do all such things as may be legal and just as it might do if no appeal had been preferred.—*Bala Krishna Chettiar* v. *Krishnamurthi Aiyar*, A. I. R. 1927 Mad. 416.

Stay of Execution by Appellant Court.—When an appeal is pending to the High Court against a preliminary order made in a subordinate Court in an account or partition suit, the High Court can make an order staying proceedings pending its hearing.—*Balkishen Sahu* v. *Khugnee*, 31 C. 722, F. B. : 8 C. W. N. 572, F. B. (1 C. W. N. 264 *overruled;* 5 C. W. N. 781 *approved*). *See* also, *Panchanan* v. *Dwarkanath*, 3 C. L. J. 29.

Order XLI, r. 5 provides in express terms under what conditions the proceedings under a decree can be stayed. The Privy Council which has

seisin of the appeal and not the High Court which passed the decree, has power to stay proceedings in a partition suit after a preliminary decree. Under Or. XLV, r. 13, the High Court which passed the decree may stay execution of the final decree on special cause being shown.—*Laliteswar* v. *Bhabeswar*, 9 C L. J. 591: 13 C. W. N. 690

Sections 545 and 546, C P. Code, 1882 (Or. XLI, rr. 5 and 6), clearly imply that an appeal incapacitates the inferior Court from dealing with the litigation since even the power of staying execution is, once an appeal is made, taken away from the Court and is exerciseable by the Appellate Court only.—*Ramanadhan* v. *Narayanan*, 27 M. 602, (606) *See*, however, 12 C. W N. 885, (on appeal, 13 C. W N. 846); *Firm Gobindram Ramchandar* v *Firm Ruliaram Nauta Ram*, 76 I. C. 174.

Section 545, C. P. Code, 1882 (Or. XLI, r. 5), has no application where no appeal has been preferred against the decree in the original suit An Appellate Court cannot stay proceedings in execution of a decree of a subordinate Court, merely by reason of an appeal having been preferred against an order of refusal of the Court below to set aside the decree under s. 108, C P. Code (Or IX, r. 13) —*Bragwat Raj Koer* v. *Sheo Golam*, 31 C. 1081: 9 C W. N. 123 (28 C. 734, 8 C. W. N. 572, and 5 C W. N. 781, *distinguished*).

An Appellate Court has no jurisdiction under Or. XLI, r 5, to grant a stay of execution of a decree of a subordinate Court unless it has seisin of an appeal against such decree. Where no appeal has been preferred; the Court which passed the decree alone has power to grant a stay, on sufficient cause being shown during the time provided by law for presenting an appeal.—*Parshotam Saran* v. *Hargoolal*, 43 A. 198: 18 A. L. J. 1121.

Where the defendants in an original suit applied to the Appellate Court for stay of execution of the decree pending the appeal. *Held*, that the applicant who asked for the indulgence must pay the costs of the application.—*Chuni Lal* v. *Anantram*, 25 C. 893.

An order of an Appellate Court under s. 545, C. P. Code, 1882 (Or. XLI, r 5), to stay execution of a decree pending appeal, is in the nature of a prohibitory order, and as such, would only take effect when communicated If a property is sold before such an order is communicated to the Court holding the sale, such sale is not void and cannot be treated as nullity —*Bissesswari* v. *Hurro Sundar*, 1 C. W. N. 226 (4 N. W. P. 398, 6 N. W. P. 354, and 2 A. 686, *distinguished*).

An Appellate Court has authority under this rule to take security from a decree-holder even after execution of the decree under appeal has been completed —*Hukum Chand* v. *Kamalanand*, 33 C. 927: 3 C. L J. 67.

A stay of execution cannot be directed where there is no application for execution pending before the executing Court.—*Nawab* v. *Hukam Din*, 63 I. C. 897.

Effect of Uncommunicated Order Staying Execution.—Where an order is made by an appellate Court staying execution of a decree, but before the order is communicated to the Court executing the decree, the

property of the judgment-debtor is sold in execution, the sale is invalid and cannot stand, the reason being that when an unconditional order for stay of execution is made, the order becomes operative the moment it is made and suspends the power of the lower Court to continue the proceedings in execution.—*Hukum Chand* v. *Kamalanand*, 33 C. 927; *Sati Nath* v. *Ratanmani*, 15 C. L. J. 335: 14 I. C. 808; *Sahu* v. *Shadi Ram*, 24 A. L. J. 519: A. I. R. 1926 All. 457. It has, however, been held by the Madras High Court in *Muthukumarasami* v. *Kuppusami*, 33 M 74, *Venkatachalapati* v. *Kameswaramma*, 41 M 151, that such sale is valid

All Proceedings by Executing Court After Communication of Stay Order by Appellate Court, Void.—When an appellate Court orders stay of execution pending an appeal, the Court before which the execution proceedings are pending has no power to proceed with the execution after the receipt of the order. It would be opposed to all principle to hold that, because the stay order was not perused by the Court executing the decree or that it had no time to pay any attention to it, the attachment and other proceedings subsequent to the receipt of the order are good. Anything done during the trial when the stay order is in force is not only irregular, but is altogether void, as the Court has no jurisdiction to do anything after it is prohibited from doing it.—*Venkatappayya* v *Venkatachalapathi Rao*, 99 I. C. 989: A I. R 27 Mad. 450

Rule 5, Clause 3 (a). Substantial Loss.—In order to obtain a stay of execution of decree directing payment of money, the applicant must satisfy the Court by affidavit that substantial loss may result to him unless execution is stayed —*H. H The Gaikwar Sirkar* v. *Ghandi*, 25 B. 248. See *Nazar Ali* v *Ojoodharam*, 1 Ind Jur. N. S 185. *Dhira Mal* v *Hadar Shat*, 2 Lah 61. 61 I C. 77; *Harnhar Prasad* v. *Maharaja Bahadur Kesho Prasad*, 61 I. C. 9; *Rajendra Singh* v. *Umrao Singh*, 61 I. C. 827; *Arjamana Khan* v. *Shankar Lal*, (1922) Lah. 364. What amounts to sufficient cause depends upon the facts of each particular case.—*Mahomed Hossein* v. *Looff Ali*, 20 W. R. 393, *In re Ahmed Reza*, 13 W. R 281

In cases relating to immoveable property where the decree is under appeal, the disturbance of *status quo ante* does result in substantial loss to the party in possession. In a suit for pre-emption, the defendant vendee is in possession of the property under a perfectly valid title obtained for consideration from the original owner. Such possession should not be disturbed till the plaintiff has finally established his title and the vendee has exhausted all his remedies for retaining such possession·—*Fateh Khan* v. *Daim*, 9 L. L J 130 A I R 1927 Lah 169 99 I. C. 767.

The Court declined to stay the execution of a decree (1) because the applicant has not shown, as he was bound to show, something beyond the mere fact of an appeal having been preferred against it; and (2) because there seemed to have been great delay on his part —*Leslie* v. *Land Mortgage Bank of India*, 17 W. R. 160

It is not open to the Court to refuse to execute a decree against which no appeal has been preferred, and the time for appealing against which has expired.—*Ishan Chunder* v. *Ashanoollah*, 10 C. 817.

If the proceedings are bound to be protracted and the expense involved in the taking of accounts is likely to be great, the Appellate Court will exercise a proper discretion in staying proceedings.—*Nena Ojha* v. *Sarbhoo Dutt*, 2 Pat. L. T. 70: 59 I C. 883.

Section 647, C. P. Code, 1882 (s 141), provides for the procedure to be followed in miscellaneous matters other than suits and appeals, and its provisions, read with ss. 515 and 546 give no power to the Court after the passing of final unappealable decree and before the granting of an application for review of judgment, to order a stay of execution of the decree.—*Amir Hasan* v *Ahmad Ali*, 9 A 36.

A decree directing the issue of a probate to the propounder of a will is one that is capable of execution and stay of execution of such decree can be granted under s 545, C P Code, 1882 (this rule) —*Luchminarain Bogla* v. *Brij Coomaree*, 5 C W. N 781, P C

The Court should not accept a security the validity of which is not free from reasonable doubt and the enforcement of which may lead to protracted litigation.—*Srinibash Prasad* v *Kesho Prasad*, 38 C 754 (775)

"That the application was made without unreasonable delay."—Applications for stay of execution in the original side of the *High Court* pending an intended appeal must ordinarily be made to the judge who tried the case and such an application must be made without unreasonable delay. —*Chaturbhuj* v. *Basdeo Lal*, 25 C W N. 98.

Where Decree has been Executed.—Execution completed by appointment of manager *Held* that, under this rule, the Court had power only to stay execution, and that the words " stay execution " could not be extended to a case in which execution was completed, as in the case before it —*Dharram Singh* v *Kishen Singh*, 12 C L R. 532.

Notice to Decree-holder.—A final order for staying the execution of a decree should not be made without giving the decree-holder notice of the judgment-debtor's application The application should be supported by an affidavit.—*Multanchand* v *Kharsedji*, 15 B 536 But see, *Mulchand* v *Tarni Prasad*, 4 Pat L J 642, in which a different view has been taken.

Obligation of Surety and his Right of Appeal.—The nature and extent of the liability of a surety under this rule depends on the words of the surety-bond —*In the matter of Ameer Ali*, 13 W R 403.

On the reversal of the decree, the liability of the surety ceases, and of surety-bond becomes a dead letter —*Ameer Ali* v. *Kassim Ali*, 13 W. R. 403

Where a judgment-debtor asks for stay of execution-proceedings pending appeal, and his request is granted on condition of his giving security, he is entitled to have a reasonable opportunity for showing that the sum demanded as security is considerably more than the amount awarded by the decree —*Bahoona Doohma* v *Lalla Jowahur Lall*, 23 W. R 52.

When immoveable property is given by a judgment-debtor as security for the due performance of a decree under Or. XLI, r. 5 (3) (c), it can be realised in execution without attachment. The provisions of Or. XXXIV, r. 14, do not apply to such a case, and, further, the matter being

one relating to execution within s. 47, a separate suit does not lie.—*Subramania* v. *Raja of Ramnad*, 41 M. 327; *Shyam Sundar* v. *Bajpai*, 30 C. 1060; *Mukta Prasad* v. *Mahadeo*, 38 A. 327.

Right of Sureties to Appeal—Extent of their Liability.—*Held* that, as soon as the decree of the Court of first instance was made, the liability of the sureties was fully incurred, and they were severally bound to place at the disposal of the said Court, when required, the property specified in their bond, or, in default, to pay such sum as the said Court should adjudge against the defendant. The liability having been incurred, was not extinguished by the fact that an appeal had been brought against the decree. If the amount adjudged by the decree was reduced in appeal, their liability would be diminished to a like extent, or, if the decree was reversed, their liability would be reduced to nothing, but their liability did not cease, because the decree of the first Court merged in that of the Appellate Court.—*Suleman* v. *Shivram*, 12 B. 71.

The sureties who would be considered parties to the suit with reference to it, are sureties who have rendered themselves liable for the amount of the decree whether during the course of the suit or an application under this rule for stay of execution.—*Bannamal* v. *Jamna Das*, 15 A. 183 (184).

When the bond was to perform all orders and decrees passed in appeal, it was held that the obligation of the sureties to fulfil the decree of the Appellate Court was not confined to the first decree of that Court, but extended to the final decree which it passed upon the case being remanded by the High Court in special appeal.—*Shivlal* v. *Appaji*, 2 B. 654 (on appeal, 3 B. 204).

A security bond executed in consideration of temporary stay is binding on the surety for the period during which it is allowed to operate for the benefit of the principal. It is binding pending the discharge of the rule and its operation during the period cannot be cancelled by the Court. —*Pandu Laxman* v. *Balu Mahadu*, 8 Bom. L. R. 557.

The holder of a decree affirmed on appeal by the District Court took out execution to recover costs awarded. Costs were deposited by the judgment-debtor and paid to the decree-holder, and a surety gave bond by which he undertook to refund the amount to the judgment-debtor in the event of the latter succeeding in appeal to the High Court and of the decree-holder failing to repay him. The judgment-debtor subsequently filed an appeal to the High Court, and was successful, and he then applied in the execution department to recover the amount from the surety. *Held*, that the Court executing the High Court's decree had no jurisdiction to execute it against the surety.—*Hardeo Das* v. *Zaman Khan*, 8 A. 639.

Mode of Enforcement of Security Bond.—*See* Notes under s. 145, and Or. IV, r. 6.

Form.—For form of Security Bond, *see* App. G. Form No. 2.

Costs.—The costs of the application to stay execution should as a rule, be paid by the applicant who prays for such stay even if the application is unsuccessful.—*Chunilal* v. *Anantaram*, 25 C. 893.

Appeal from Orders Staying or Refusing to Stay Execution.—An order refusing to stay execution of a decree under this rule is not appealable, as such an order is not "a decree," within the meaning of s. 2, cl. (2).—*Ram Chandra* v. *Balmukund*, 29 B. 71 *Malamal* v. *Kevalappara*, 27 M. L. J. 171. The Calcutta, Madras and Lahore High Courts have held that such an order is a "judgment" within the meaning of cl. 15 of the Letters Patent and therefore appealable as such.—*Brij Coomaree* v. *Ramrick Dass*, 5 C. W. N. 781; *Sona Chalam* v. *Kumaravelu*, 47 M. 316: A. I. R. 1924 Mad. 597; *Tuljaram* v. *Alagappa*, 35 M. 1 F. B.

Where the amount of security demanded under this rule is excessive, an appeal lies from the order.—*Udeyadeta Deo* v. *Gregson*, 12 C. 621.

Where an order for stay of execution is made on security being furnished by the judgment-debtor and such security is furnished, no appeal lies from the order at the instance of the decree-holder as such an order does not come within s. 47 and s. 2, cl. (2).—*Saraswati* v. *Golap Das*, 41 C. 160.

Review.—An order under this rule may be cancelled or varied at any time by the Court making such order.—*Amir Hasan* v. *Ahmad*, 9 A. 36.

Security in case of order for execution of decree appealed from.

6. (1) Where an order is made for the execution of a decree from which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performence of the decree or order of the Appellate Court, or the Appellate Court may for like cause direct the Court which passed the decree to take such security.

(2) Where an order has been made for the sale of immoveable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of. [S. 546.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s. 546, C. P. Code, 1882, with some additions and alterations.

Sub-rule (1) corresponds to paras. 1 and 2 of the old Code with the following modifications. The word "*where*" has been substituted for the word "if" in the beginning; the word "*from*" has been substituted for the word "against", and the words "*or has been taken*" have been added after the words "may be," to give effect to the case (33 C. 927: 3 C. L. J. 67), where it has been held that the Court has inherent power,

notwithstanding that the decree has been executed and the property has been taken in execution, to call upon the respondent to furnish security for due performance of any decree which may be made on such appeal. By the above addition, *Mansukhram* v. *Parshotam*, 7 Bom H. C. 122, and *Joynarain* v. *Russick Mohan*, 8 W. R. 144, have been overridden. In 33 C. 927: 3 C. L. J. 67, all the cases on the point have been referred to and fully discussed.

Sub-rule (2) corresponds to the last para. of s. 546, C. P Code, 1882, with some additions and alterations. The words "*for money*," which stood after the word " decree " in the old section, have been omitted, and effect of the omission is that the provisions of this sub-rule are no longer confined to money decrees only. The words " *to the court which made the order* " have been added after the word " judgment-debtor," in order to make it clear that the application under this sub-rule is to be made to the Court which made the order for the sale of immoveable property. It would appear from the Full Bench case reported in 34 C. 1037: 6 C. L. J. 298: 11 C. W. N. 1030, that there was a difference of opinion with regard to the terms of s. 546, para 3 of the Code, as to whether the power for staying the sale of immoveable property was exercisable by the Court which passed the decree, or that the Appellate Court had similar power, as the words of that clause were not very explicit and were somewhat vague. In the third clause no Court was specified as the Court which is empowered to pass the order under that clause. Hnce the words " *to the Court which made the order* " have been added, and by the above addition, an ambiguity which hitherto existed has been removed. The object of the addition will clearly appear from the Full Bench case above referred to

" The Committee have modified this rule in order to make it clear that security may be required though the property has previously been taken in execution (*Hukum Chand Baid* v. *Kamalanand Singh*, 33 C. 927) "—*See the Report of the Special Committee*

Security in Case of Execution of decree Appealed from.—The Appellate Court having seizin of the appeal, has an inherent power over the subject of litigation, and can, in the exercise of the power, and notwithstanding that the decree has been executed, call upon the respondent to furnish security for the due performance of any decree which may be made on such appeal (7 Bom H. C 122 8 W R. 144, *dissented from*) An order for stay is made on the day that it is pronounced, and not on the day on which it is drawn up or communicated —*Hukum Chand* v *Kamaland*, 33 C 927; 3 C L J 67

Before staying execution of a decree and preventing the decree-holder from receiving the fruits of his decree, or before requiring him, to give security for its restitution, probable cause must be shown of the judgment-debtor's liability to recover the money if the decree be reversed —*Sughee Monee* v. *Brojoraj*, 17 W R 69.

An Appellate Court cannot pass an order under this rule, for a stay of execution of a decree under appeal until an order has been made for the execution of the decree —*Janardan* v. *Nilkanth*, 25 B. 583

It is only the decree, against which an appeal is pending, of which execution may be stayed. A court has no power to restrain a decree-holder

from executing his decree merely on the possibility of the Appellate Court reversing its decision.—*Gossain Money Puree* v. *Guru Pershad*, 11 C. 146

An application, under this rule, to stay the sale of immoveable property, in execution of a decree for money against which an appeal has been filed, must be made to the Court which passed the decree, and not to the Appellate Court.—*In the matter of Muraduddissa*, 15 A. 196 (11 C. 146 *referred to*). Followed in *Kunj Lal* v. *Bahitram*, 8 C. W. N. 381. But see, *Tribeni Sahu* v. *Babu Bhagwat Bux*, 34 C. 1037, F. B.: 11 C. W N. 1030. 6 C. L J. 298, where it has been held that where an appeal has been preferred against a decree for money, the Appellate Court has jurisdiction, pending the disposal of the appeal to pass an order staying the sale of immoveable property of the judgment-debtor in execution of the decree (8 C. W. N. 381 *overruled*). *See* also, *Lakshmanan* v. *Palaniappa*, 41 M. 813: 34 M. L. J. 470, where the same view has been taken

A party appealing against a decree, which directs him to pay money may obtain stay of execution of the decree, so far as it directs payment, on his lodging the amount in Court, unless the other party gives security for the repayment of the money in the event of the decree being reversed If such security be given by the successful party, then stay of execution should not be granted —*Dhunjibhoy Cawasji* v. *Lisboa*, 13 B. 241.

Section 326, C. P. Code, 1882 (s. 72), does not apply to a decree which directs the sale of land or of a share in land in pursuance of a contract specifically affecting the same. The Court therefore, cannot authorize the Collector to stay the sale in such a case under that section.—*Bhagwan Prasad* v. *Sheo Sahai*, 2 A. 856

A decree for arrears of rent is a " decree for money " within the meaning of this rule.—*Banku Behary* v. *Syama Churn*, 25 C 322 By the omission of the words " *decree for money*," this ruling has been rendered obsolete.

See notes under rule 5.

Effect of Stay of Sale.—An order under this rule, directing stay of sale of immoveable property, does not bar the decree-holder from proceeding against the moveables of the judgment-debtor —*Sukhdayal Gopichand* v. *Jawahir Singh*, 93 I C. 897: A. I R. 1926 Lah. 463

Mode of Enforcement of Security Bond.—The mode of enforcing payment against a surety is by summary process in execution and not by separate suit.—*Jamsedji* v. *Bawabhai*, 25 B. 409, *Kusaji* v. *Vinayak*, 23 B 478; *Janki Kuar* v. *Sarup Rani*, 17 A. 99; *Thirumalai* v. *Ramayyar*, 13 M 1, *Venkapa* v. *Basilingapa*, 12 B. 411 But see, *Radha Pershad* v. *Phuljuri Koer*, 12 C 402; *Kali Charan* v. *Balgobind*, 15 C. 497; *Tokhan Singh* v. *Udwant Singh*, 22 C. 25; *Surjoo Das* v. *Balmakund*, 23 C 212; and *Aruna Chellam* v. *Aruna Chellam*, 15 M. 203, where it has been held that a surety bond cannot be enforced in execution, but a separate suit must be brought against the surety. But where the surety waives his right then the surety bond may be enforced in execution.—*Kazimuddi* v. *Fauzdar Khan*, 10 C. W. N. 830 (8 C. W. N. 672 *relied on*). These latter cases have been overridden by s. 145

The relationship between a decree-holder and a judgment-debtor who has executed a security bond under s. 545, cl. (*c*), C. P. Code, 1882 (Or.

XLI, r. 5), mortgaging certain properties for the due performance of the decree or order that may ultimately be passed by the Appellate Court, is not that of a mortgagee or mortgagor; and in the event of the appeal being dismissed the decree-holder is entitled to realize his decretal money by sale of the properties given in security without instituting a suit under s. 67 of the T. P. Act (IV of 1882).—*Shyam Sundar* v. *Bajpai Jainarain*, 30 C. 1060; 7 C. W. N. 914, and 17 A. 99 (101).

See also the cases noted under s. 145.

Registration and Attestation of Security Bond.—A security bond accepted by a Court does not dispense with the necessity for registration. —*Nagaruree* v. *Tanjatur*, 31 M. 330; 3 M. L. T. 317 (31 C. 404 *followed*). *See the cases noted under section* 145.

Appeal.—No appeal lies from an order made under this rule.

No security to be required from the Government or a public officer in certain cases

7. No such security as is mentioned in rules 5 and 6 shall be required from the Secretary of State for India in Council or, where the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity. [S. 547.]

COMMENTARY.

This rule exactly corresponds to s. 547, C. P. Code, 1882, with the substitution of the word "*rules*" for "sections," which occurred in the old Code.

Exercise of powers in appeal from order made in execution of decree.

8. The powers conferred by rules 5 and 6 shall be exerciseable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree. [New.]

COMMENTARY.

Scope and Object of the Rule.—This rule is new. It has been framed to give effect to the cases noted below.

"The Committee have added this clause to meet particularly the case where the litigant does not quarrel with the decree, but appeals from an order passed in execution of that decree."—*See the Report of the Special Committee.* In such a case this rule gives the appellant the power to apply for a stay of execution of the decree under r. 5 or for security for restitution under r. 6.

Pending the determination of the appeal against an order passed in execution of decree, the Appellate Court has power to stay execution.—*In the matter of Harshankar Parshad*, 1 A. 178; *Pasupati Nath* v. *Nanda Lall*, 28 C. 734.

PROCEDURE ON ADMISSION OF APPEAL.

Registry of memorandum of appeal.

9. (1) Where a memorandum of appeal is admitted, the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.

Register of Appeals.

(2) Such book shall be called the Register of Appeals. [S. 548.]

COMMENTARY.

This rule exactly corresponds to section 548, C. P. Code, 1882, with the substitution of the word "*where*" for "if" in the beginning.

Registry of Appeal.—The registration of a petition of appeal is a proceeding of a purely ministerial character.—*Jaffer Hossein* v. *Mahomed Amir*, 4 B. L. R. Ap. 103; 13 W. R. 351.

Held, by the majority of the Court, that an Appellate Court after admitting and registering an appeal and serving notice on the opposite party has no power at the hearing to reject the appeal upon the ground that it was not preferred within the prescribed period.—*Bharut Chunder* v. *Issur Chunder*, 8 W. R. 141.

Admission of Appeal by District Judge Ex Parte—Power of Sub-Judge to Dismiss it on the Ground of Limitation.—Where a District Judge, by an *ex parte* order, admitted an appeal filed after time and transferred it to the Sub-Judge for disposal. *Held*, that the Sub-Judge had power to dismiss the appeal on the ground of its presentation after time.—*Manick Dukhandar* v. *Naibulla Sircar*, 2 C. W. N. 461 (5 C. 1 not *followed*; 8 C. 251, and 14 B. 494 *approved*). *See* also, *Krishna Bhatta* v. *Subraya*, 21 M. 228, and *Sarat Chandra* v. *Saraswati*, 5 C. L. J. 380; 34 C. 216 (9 A. 11, and 13 W. R. 245 *referred to*).

An order, made *ex parte* under s. 5 of the Limitation Act, permitting an appeal to be registered although filed beyond time, may, on proper cause being shown, be set aside by the Court which made it; but such an order made by a District Judge cannot be afterwards cancelled by a Sub-Judge upon the appeal coming on for hearing before him.—*Jhotee Sahoo* v. *Omes Chunder*, 5 C. 1. *See also*, *Dubey Sahai* v. *Ganeshi Lal*, 1 A. 34; *Venkatrayudu* v. *Nagadu*, 9 M. 450; *Moshaulla* v. *Ahmedulla*, 13 C. 78; *Bishendut* v. *Nandan Pershad*, 12 C. W. N. 25. But see, *Mulna Amad* v. *Krishnaji*, 14 B. 594.

Appellate Court may require appellant to furnish security for costs.

10. (1) The Appellate Court may in its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal or of the original suit, or of both :

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immoveable property within British India other than the property (if any) to which the appeal relates.

Where appellant resides out of British India.

(2) Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal. [S. 549.]

COMMENTARY.

This rule corresponds to s. 549, C. P. Code, 1882, with some verbal changes only. The last para. of the old section which contained provisions regarding enforcement of the security bond, has been omitted in view of s. 145 of the Code, as that section, as amended, prescribes the mode of enforcing all surety bonds.

Application of the Rule.—The application of the rule is not confined only to appeals from substantive decrees, but also to appeals from interlocutory orders under s. 104 and to appeals from orders in execution under s. 47.—*Dagdu* v. *Chandrabhan*, 24 B. 301. It does not, however, apply to appeals preferred to the High Court under cl. 15 of the Letters Patent from the judgment of one of its own Judges.—*Sesha Ayyar* v. *Nagarathna*, 27 M. 121. The Privy Council have, however, recently decided that it applies also to appeals under cl. 15 of the Letters Patent.—*Sabitri* v. *Sabi*, 48 I. A. 76 : 48 C. 481 : 60 I. C. 274.

Neither this rule nor any other rule of this order has any application to a decree passed by a single Judge of a chartered High Court in the exercise of ordinary original civil jurisdiction, because " the Code makes no provision for an appeal from a single Judge of the High Court. This right of appeal depends on cl. 15 of the Charter."—*Per Jenkins, C. J.*, in *Debendra Nath* v. *Bibudhendra*, 43 C. 90, (93-94).

The mere fact that a plaintiff is a poor man, and has parted with a portion of his interest in the subject-matter of the suit for the purpose of obtaining funds to carry on the suit, is no sufficient ground to ask that security for the costs of the suit may be required of him, it is otherwise where he is not the real litigant but a mere puppet in the hands of others.—*Khajah Assenoolla Joo* v. *Solomon*, 14 C. 533; *Lakhmichand* v. *Gatto Bai*, 7 A. 542 (3 B. 241, 3 M. 66, and 18 W. R. 102, *referred to*). *See* also, *Jiwan Ali* v. *Basamal*, 8 A. 203, *Hewetson* v. *Deas*, 21 C. 526; *Mahanth Raghunath* v. *Sheokumar*, 1 Pat. L. T. 115; *Mahant Raghunath Das* v. *Sheo Kumar*, (1921) Pat. 359, *Konammal* v. *Annadana Jadaya*, (1922) M. W. N. 801.

Where a Court, acting under this rule orders an appellant to give security for costs, it is not necessary that any specific sum for which security is required should be named in the order for security.—*Lekha* v. *Bhanna*, 18 A. 101, F. B. (9 A. 164 *overruled on this point*).

As a general rule a Court is loth to prevent an appellant from pursuing the remedy allowed to him by law merely on the ground of property,

But each case must stand on its own facts and there may be cases in which a party should be directed to give security, at any rate for the costs of the appeal, before he is allowed to go further.—*Gulab Rao* v. *Vinayak*, 25 Bom L. R. 195: 72 I. C. 285.

An appellant (residing within the jurisdiction), who has been ordered to pay the costs of the original hearing, and has not done so, cannot be required to furnish security for such costs before he is allowed to prosecute his appeal, unless his conduct be shown to be vexatious, that is, such as indicates a wilful determination on his part not to obey the order of the Court. His not paying, if it be caused by inability to pay, is not vexatious.—*Ahmed Bin* v *Essa Bin*, 18 B 458; *Ramsing* v *Balubhai*, 5 Bom L R. 661.

Restoration of Appeal.—An appeal although it may have been rejected by the Appellate Court upon failure by the appellant to furnish security demanded under this rule, may be restored, on sufficient grounds at the Court's discretion —*Balwant* v *Deulat*, 8 A 315. But no appeal lies from an order refusing to restore it —*Firozi Begum* v. *Abdul Latif*, 30 A. 143

When should Application for Security be made.—An application for security for costs already incurred and estimated costs of appeal should be made promptly.—*Bhobonath* v *Radha Prasad*, 5 C. W N. 119; *Wise* v. *Jugbundoo*, 7 M. I. A 431; *Thakur Das* v. *Kishori Lal*, 9 A. 164.

" The Court shall reject the appeal."—Where security is not furnished within the time fixed by the Court, the appeal should be rejected.—*Parma Nand* v. *Ram Parkash*, 2 Lah. L. J. 391. *See* also, *Lekha* v. *Bhauna*, 18 A. 101. But if the order for security has been made without notice to the appellant, the appeal should not be rejected —*Timmu* v *Deva Rai*, 5 M 265; *Sirajul Huq* v *Khadim*, 5 A 380

When Appellant Resides Out of British India.—A plaintiff, who resided out of India, paid a sum of money into Court as security for costs. He subsequently obtained a decree against the defendant; and the defendant appealed against that decree *Held*, that the defendant was not entitled to an order detaining in Court, pending the appeal, the money which had been paid in.—*Fleming* v *Shearman*, 4 B L. R O. C. 92; *Dittia Hurruchman* v. *Modhoosoodun*, 3 B L R, F B, 45: 12 W. R., F. B., 16.

Quaere—Whether in a case in which the appellant is not residing out of the British territories in India, the High Court has authority to demand security for costs from the appellant after the issue of notice of the appeal. —*Hufazulloolah* v *Humeedhur Rohmru*, 6 W R Mis 123

Power of Court to Extend Time fixed for Furnishing Security.—The Court cannot lay down a hard and fast rule that in no case after the time for giving security has expired can an appellant be allowed further time In exceptional circumstances, the Court can extend the time for furnishing security.—*Jumanabai* v. *Vissondas*, 21 B. 576

Once an appeal has been dismissed for failure of the appellant to give security for costs within the time fixed, it is not thereafter open to the Court to extend the time for giving security.—*Srimati Hari Bhabini* v. *Narendra Nath*, 67 I. C. 883.

Where the Appellate Court dema ... ity for costs, the Court may extend the time ... but if no application is made for extension ... is not furnished within the time ordered, it is imperative on the Court to reject the appeal.—*Haidri Bai* v. *E. I. Ry.* Co., 1 A. 687. *See* also, *Badri Narain* v. *Sheo Koer*, 11 C. 716; and *Shrajudin* v. *Krishna*, 11 M. 190.

Where the High Court *under this rule has demanded security from* an appellant, it has power to extend the time for complying with this order on application made, as well after as before the time first fixed has expired; and may nevertheless reject the appeal if the security is not in the end furnished.—*Badri Narain* v. *Sheo Koer*, 17 C. 512, P. C. (1 A. 687 *overruled*).

An original Court rejected, as insufficient, security offered for the purpose of conforming to an order of the High Court under this rule; and refused to receive other security offered, in lieu, after the time fixed by the order had expired This was affirmed by the High Court. *Held*, that as the High Court had a discretion to enlarge the time allowed for finding security, and to accept other security in lieu of that rejected, or to refuse to do either, it had, under the circumstances, judicially exercised that discretion in refusing.—*Rajab Ali* v. *Amir Hossein*, 17 C. 1 (1 A. 687: 8 A: 315 *referred to*).

The security for the respondent's costs which the High Court had demanded *under this rule not having been furnished within the time fixed* and the Court, in the exercise of its discretion, having refused to extend the time, the appeal was rejected *Held*, that this was not a case for interference.—*Modhusudan* v. *Adhikari Propanna*, 17 C. 518.

See s. 148 of the Code, which expressly empowers Courts to extend time.

Applicability of this Rule to Appeals In Forma Pauperis.—The provisions of this rule, which make it discretionary for the Appellate Court to demand security for costs, are not applicable to appeals *in forma pauperis* —*Nuseeroodeen* v. *Ujjul Biswas*, 17 W. R. 68, *Nazim* v *Abdul Hamid*, 8 Lah. 30 67 I. C 256

The provision in Or XLI, r. 10, to reject an appeal where the security is not furnished, is mandatory, the Court could not after that stage grant permission to withdraw the appeal *in forma pauperis* —*Sabitri Thakurain* v. *Sabi*, 48 C 481 P C., 19 A. L J 281: 48 I. A. 76 P. C

A suitor *in forma pauperis* may be called on to give security for costs under this rule but every special ground must be shown to support such an application —*Seshayyanagar* v *Jamulavadin*, 3 M 66, *Maneckji* v *Goolbai*, 3 B. 241 (17 W R 68 *dissented from*) *See* also, *Seldanna* v. *Hart*, (1920) M. W N. 534; *Srinivasa* v *Subramania*, 17 M L. J 58 The High Court of Calcutta, in *Nasseeroodin* v *Ujjul*, 17 W R 68, and *Musammat Hafiza* v *Abdul Karim*, 12 C. W N 163, and the Bombay High Court, in *Khemraj* v *Kishanlal*, 42 B 5, have held that this rule does not apply to appeals *in forma pauperis*

Mode of Enforcement of Security Bond.—*See the cases noted under s. 145, where the overridden rulings have also been noted*

Appeal from Orders under this Rule.—An order rejecting an appeal under this rule is not appealable either as an order or as a decree.—*Lekha* v. *Bhauna*, 18 A. 101, F B. (5 A. 380 *overruled*). *Rames* v. *Manindra*, 49 C. 355: A. I. R. 1922 Cal. 246

No appeal lies against an order refusing to re-admit an appeal on the ground of the failure of the appellant to furnish security for the costs of the respondent under this rule.—*Firaz Begum* v. *Abdul Latif*, 30 A 143: 5 A. L. J. 100 (18 A. 315 *referred to*); *Sundar* v *Habib*, 42 A. 626: 18 A L. J. 838

As there is no provision in this rule similar to that contained in s. 381, C. P. Code, 1882 (Or. XXV, r. 2), permitting an appellant whose appeal has been rejected under this rule to apply for an order setting the dismissal aside, application for restoration of the appeal does not lie.—*Sankaralinga* v. *Annama Lal*, 4 M. L T. 416 (30 A. 143 *followed*, 18 A. 315 *considered*).

As regards Insolvency Appeals, the decisions of the High Courts are not unanimous. The Calcutta High Court, in *Lakhipriya* v. *Raikishori*, 43 C 243, has held that this rule applies to the case of an appeal from an order passed by a Judge in insolvency under the Presidency Towns Insolvency Act (III of 1908), but the Madras High Court, in *Sesha Ayyar* v. *Nagarathna*, Report Reference has held that it does not apply.

Although no appeal has been given by Or. XLIII against an order under this, yet s 145 gives appeal from any order passed against a surety, who shall be deemed a party within the meaning of s. 47.

Form.—For Form of security for costs of Appeal, *see* App G, Form No 4

Power to dismiss appeal without sending notice to Lower Court.

11. (1) The Appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.

[S. 551.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s. 551, C. P. Code, 1882 with some additions and alterations.

In sub-rule (1), the words "*after sending for the record*" and the words "*so to do*" have been added.

In sub-rule (2), the words "*does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed*" have been substituted for the words "does not attend in person or by his pleader, the appeal shall be dismissed for default," which occurred in the old section. The substitution of the word "*may*" for the words "shall" is material. The other changes are mere change of words and phrases

In sub-rule (3), the alterations are merely verbal.

This rule applies to appeals which have been admitted and registered.—*Rudra Prasad* v *Baijnath*, 15 A 367.

"May dismiss the appeal."—If a memorandum of appeal is drawn up in proper form, it cannot be rejected under Or. XLI, r 3 of the C. P. Code, but if the appeal is barred by limitation, it has to be dismissed under Or. XLI, r. 11. The rejection of an appeal on the ground of limitation, therefore, amounts to a dismissal thereof, and such order of rejection is appealable.—*Farzand Ali* v *Sheikh Abdul Hamid*, 60 I. C. 493.

Whether Court should Write Judgment on Dismissal of Appeal.—The dismissal of an appeal under sub-rule 1, by a Court whose decision may be the subject of an appeal, does not relieve the Court from the necessity of writing a judgment which, according to Or XLI, r 31, should show the points raised, and the reasons for deciding them.—*Ram Dela* v *Brojo Nath*, 65 C 97; *Mgsaw* v *Ma Bwin Byu*, 4 R 18 95 I. C. 521 A. I. R. 1926 Rang 129, *Hari Dasi* v. *Godadhar*, 43 C L J 409 96 I C 136 A. I. R 1926 Cal. 992; *Surendra Nath* v. *Raghu Nath*, 27 C W. N. 501; *Hanmant* v *Annaji*, 37 B 610 (F. B.). Approved in *Pachi Dassi* v. *Bala Das*, 13 C W. N 1031. Dissented from in *Samin Hasan* v *Piran*, 30 A. 319. 5 A L. J 300, where it has been held that the provisions of s. 574, C P Code, 1822 (r 31), are not applicable in their entirety to the case of an appeal dismissed under this rule.

The order of adjudication made under this rule is a decree, and the procedure authorized under that rule does not dispense with the necessity of drawing up a judgment.—*Royal Reddi* v *Linga Reddi*, 3 M 1. *See* also, *Puttappa* v. *Yellappa*, 5 Bom L R. 233; *Rakhal Chandra* v *Satindra Deb*, 5 C. L. J 348.

Dismissal of Appeal under this Rule is a Decree.—The dismissal of an appeal under this rule is a decree within the meaning of s 2 (2), and the expression of opinion dismissing the appeal is a judgment.—*Atap Ali* v. *Jamsur Ali*, 30 C. W. N 334 93 I C. 909 A I R. 1926 Cal 638; *Umasundari* v *Bindu Bashini*, 24 C 759, *Muniswami* v *Muniswami*, 22 M. 293, *Chandra Kanta* v *Lakshman*, 21 C W N 430 24 C L J. 517.

Amendment of the Decree on Dismissal of Appeal.—The dismissal of an appeal under this rule leaves the decree of the lower Court untouched, and it remains the decree of the lower Court, which can amend it under s 206, C. P Code, 1882 (s 152).—*Bapu* v *Vajee*, 21 B 548. But see, *Umasundari* v *Bindu Bashini*, 24 C 759, where it has been held that the

High Court can amend such a decree. *See* also, *Munisami Naidu* v. *Munisamy Reddi*, 22 M. 293 (18 M 214 *followed*). Followed in *Asma Bibi* v *Ahmed Husain*, 30 A. 290: 5 A. L J 584, where it has been held that the dismissal of an appeal under this rule is a decree and supersedes the decree of the Court below; and the Court which has taken action under this rule is the only Court which has jurisdiction to amend the decree (21 B. 548 *dissented from*).

Summary Dismissal of Appeal—Effect on Mortgage Decree.—Where an appeal from a mortgage decree is summarily dismissed under Or. XLI, r. 11, the time for payment of the mortgage money is not extended, as the decree appealed from cannot be taken to have been confirmed under Or. XLI, r. 32.—*Dattatraya Vithal* v. *Vasudeo*, 47 B. 956: 25 Bom. L. R. 990.

Reference.—The proceeding under this rule is a trial of an appeal, and any question arising in the course of such trial may be properly referred to the High Court.—*Thakur of Masuda* v *The Windows*, 2 A. 819

Sub-rule 2. Dismissal of Appeal for Default.—When an appeal is dismissed for default, it is only the decree of the Lower Court which can be enforced in execution.—*Shyam Mandal* v. *Satinath*, 44 C. 951.

Review.—Dismissal of an appeal under this rule bars a review of the judgment appealed against *See* Notes under Or XLVII, r. 1 The order under this rule dismissing the appeal, is itself subject to review, and the practice of the Calcutta High Court is to grant a review and order the rehearing of the appeal *ex parte*.—*Official Trustee* v. *Benode*, 51 C. 943: 84 I. C 147: A. I. R 1925 Cal 114. When a second appeal is dismissed under this rule, the High Court has no power to review its judgment on the ground of the discovery of new and important matter.—*Rajani* v. *Kali*, 41 C. 809: 26 I. C. 281; *Sailabala* v. *Gadadhar*, 36 C. L. J. 76: 70 I. C. 408: A. I R. 1922 Cal. 165.

Re-admission of Appeal Dismissed for Default under Sub-rule (2).—An appeal dismissed under sub-rule (2) may be re-admitted under r. 19.

Dismissal After Issue of Notice Whether Legal.—After issue of notice on respondent, an appeal cannot be dismissed under this rule. This rule empowers an Appellate Court to dismiss an appeal without and *before*, but not after, sending notice of the appeal to the Court against whose decree the appeal has been made and without service of notice on the respondent, the procedure of this rule was not applicable —*Hamid Husain* v. *Bholanath*, (1906), A. W. N. 186

Day for hearing appeal.

12. (1) Unless the appellate Court dismisses the appeal under r. 11, it shall fix a day for hearing the appeal.

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day. [S. 552.]

COMMENTARY.

This rule exactly corresponds to s. 552, C. P. Code, 1882.

13. (1) Where the appeal is not dismissed under r. 11, the appellate Court shall send notice of the appeal to the Court from whose decree the appeal is preferred.

Appellate Court to give notice to Court whose decree appealed from.

(2) Where the appeal is from the decree of a Court, the records of which are not deposited in the Appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the Appellate Court.

Transmission of papers to Appellate Court.

(3) Either party may apply in writing to the Court from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made; and copies of such papers shall be made at the expense of, and given to, the applicant. [S. 550.]

Copies of exhibits in Court whose decree appealed from.

COMMENTARY.

This rule corresponds to s 550, C P Code, 1882, with the change of some words and phrases. No alteration seems to have been made in the meaning.

If the appellant desires to bring before the Appellate Court any part of the record not sent up, it is his duty to ask the Court to send for it before the date fixed for trial.—*Buksh Ali* v *Joyanut Khan*, 11 W. R 248.

Form.—*See* Appendix, G, Form No. 5, for Form of intimation to lower Court of admission of appeal.

14. (1) Notice of the day fixed under rule 12 shall be affixed in the Appellate Court-house, and a like notice shall be sent by the Appellate Court to the Court from whose decree the appeal is preferred, and shall be served on the respondent or on his pleader in the Appellate Court in the manner provided for the service on a defendant of a summons to appear and answer; and all the provisions applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice.

Publication and service of notice of day for hearing appeal.

(2) Instead of sending the notice to the Court from whose decree the appeal is preferred, the Appellate Court may itself cause the notice to be served on the respondent or his pleader under the provisions above referred to. [S. 553.]

Appellate Court may itself cause notice to be served.

COMMENTARY.

This rule corresponds to s. 553, C P. Code, 1882, with some alterations of a verbal character Only some words have been changed and replaced by more appropriate words.

Service of Notice.—When a notice of appeal is transmitted by the High Court to a Court below, with instruction to make a return within a specified time, the appellant is entitled to the whole of the time allowed, and may deposit his *tulubana, and cause service of the notice* any time within the period limited.—*Rungo Debee* v. *Huree Naraın*, 11 W. R. 138.

Service upon a respondent's pleader is good service upon himself, so far as notice of the appeal is concerned.—*Issur Dutt* v. *Shib Pershad*, 15 W. R. 280.

In a case where there has been a guardian *ad litem* appointed by the Court on behalf of the minor, service of notice on the guardian *ad litem* is sufficient. The language of the Code does not admit that there should be service on both these persons, and therefore, notice to the minor need not be given.—*Rasik Mohan* v *Kumar Jyotish Kanta*, 30 C W. N. 949. 97 I. C. 614: A I. R. 1926 Cal. 1106.

Where a respondent resides in Chandernagore, *i e.*, out of British territory, the summons or notice of appeal should be forwarded to him by post, under a registered cover; and if he does not appear, a verified statement should be put in to show that he is at present, or has recently been, residing there.—*Sonatun Bukshee* v. *Gopal Chunder*, 15 W. R. 31.

Where an appellant to the High Court was unable to serve notice on the plaintiff (respondent), because of inability to trace the plaintiff in the place given as his place of residence, when he (plaintiff) commenced the suit, and sent in his petition of appeal to the Zillah Court. *Held*, that the case might be dealt with in analogy to the procedure in respect of summons under s. 57, C. P. Code, 1859.—*Dedhoo Koolanee* v. *Bonomalee*, 11 W. R. 496.

Where an appellant failed for twelve months to serve notice of appeal upon his respondent, the Court refused to allow him the opportunity to have a fresh summons issued and served Where the party serving a notice of appeal finds the respondent absent from home, and is told where he is, and yet affixes the notice to the door of his house, such service is void and of no effect.—*Doolee Chund* v. *Nirban Singh*, 20 W. R 62.

No appeal against an order made in the matter of the winding up of a company under the Indian Companies Act of 1882, shall be heard by an Appellate Court unless notice of the same is given within three weeks after any order complained of has been made.—*Prosanna Kumar* v. *Bani*

Kanta, 30 C. 758. *See also*, *Anand Sarup* v. *Sultan Singh*, 27 A. 509: 2 A. L. J. 311 and *Lalah Barromal* v. *Official Liquidator*, 4 C. 704.

Form.—*See* Appendix G, Form No. 6, for Form of notice to respondent.

15. The notice to the respondent shall declare that, if he does not appear in the Appellate Court on the day so fixed, the appeal will be heard *ex parte*. [S. 554.]

Contents of notice.

COMMENTARY.

This rule exactly corresponds to s. 554, C P Code, 1882

PROCEDURE ON HEARING.

16. (1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.

Right to begin.

(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply. [S. 555.]

COMMENTARY.

This rule exactly corresponds to s 555, C. P. Code, 1882

Right to Begin.—The respondent has no right to begin simply because he disputes the right of the appellant to appeal —*Rustomji* v *Kessowji*, 8 B. 287.

It is the duty of the appellant to satisfy the Court of appeal that the decision of the trial Court is erroneous —*Sec. of State* v *Bejoy Kumar*, 40 C. L. J. 303: 84 I. C. 732 A I R 1925 Cal 224. In every appeal it is incumbent upon the appellant to show some reason why the judgment appealed from should be disturbed There must be some balance in his favour to justify the alteration of the judgment as it stands.—*Musst Fakrunissa* v *Moulavi Lzarus*, 25 C. W. N. 866. A. I. R. 63 I C. 898 P C.

Hear the Respondent against the Appeal.—Though a respondent has not appeared on the date specified in the notice to him, he can appear on the date on which the appeal is notified for hearing on the Court's board —*Hanmantbhat* v. *Basappa*, 28 Bom L R. 738· 96 I. C. 326· A I. R 1926 Bom. 424

Procedure—Whether Counsel for One Party can be Heard in the Absence of Counsel for the Other Party.—A Court heard counsel for one of the parties after the case had been closed and in the absence of the counsel for the other party *Held*, that the Court acted illegally, and its judgment was not valid —*Keso Das* v. *Ram Narain*, 63 I C 945.

For the procedure to be adopted in hearing appeal of a case in which the records of the original Court had been almost wholly destroyed, *see Harakumar* v *Sheikh Asiatullah*, 3 C W. N xxiii (Notes).

Dismissal of appeal for appellant's default.

17. (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

Hearing appeal *ex parte*

(2) Where the appellant appears and the respondent does not appear, the appeal shall be heard *ex parte*. [S. 556.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to section 556, C. P. Code 1882, with some alterations The word "*where*" has been substituted for the word "if", the words "*appellant does not appear*" have been substituted, in sub-rule (1) for the words "if the appellant does not attend in person or by his pleader", the word "apear" has been substituted for the word "attend", and the words "*in his absence*," which stood after the word "*ex parte*" in the second para. of the old section, have been omitted The words "*the Court may make an order that the appeal be dismissed*" have been substituted for the words "the appeal shall be dismissed for default."

The words "*appear*" and "*appearance*" have been substituted for the words "attend in person or by pleader" in view of Or. III, r. 1, which provides that appearance may be in person, by recognized agent, or by pleader.

Dismissal of Appeal for Default.—Where neither the appellant nor his pleader was present, but the Appellate Court, instead of dismissing the appeal for default, disposed of the appeal on the merits and dismissed it *Held*, that the dismissal was for default, and the appellant's proper course was to apply under s. 558, C. P. Code, 1882 (r. 19), for re-admission of the appeal.—*Kanahai Lal* v. *Naubat Rai*, 3 A. 519; *Zainab Begam* v. *Manawar Husain*, 8 A. 277.

Where, when an appeal is called on, the pleader is not absent, but is unprepared to go on with the case, the dismissal is a dismissal for default within the meaning of this rule, and the appeal can therefore be re-admitted under s 558, C P. Code, 1882 (Or. XLI, r 19).—*Shibendra Narain* v. *Kinoo Ram*, 12 C. 605 (15 W. R. 143 *followed*). But see, *Ram Chandra* v. *Madhav*, 16 B. 23; *Chiranji Lal* v. *Kundan Lal*, 20 A. 294; and Robert Watson *& Co* v. *Ambica Dasi*, 27 C. 529: 4 C. W. N. 237.

An application by a counsel or pleader, who is instructed only to apply for an adjournment, which is refused, is not an appearance within the meaning of the C. P. Code. When in such circumstances an appeal is dismissed, the dismissal is one for default under this rule, entitling the appellant to apply for re-admission under this s. 558, C. P. Code, 1882

(Or. XLI, r. 19).—*Satish Chandra* v. *Apara Prasad*, 34 C. 403, F. B. 11 C. W. N. 329: 5 C. L. J. 247: 2 M. L. T. 123 (27 C. 529: 4 C W. N. 237 *overruled;* 8 C. W. N. 621 *approved*); *Nogendra Kumar* v *Nabin*, 36 C. 189. *Munsee Devjee & Co.* v. *Maung Than*, 62 I. C. 57; *Musaliarakath* v. *Maniavkrama*, 43 M. L. J. 317: 16 L. W. 484; *Firm of Jei Narain Ramjesh* v. *Sitaram Marwari*, (1923) Pat. 175; *Pazhaniandi* v. *Naku*, 51 M. L. J. 684. In the above Full Bench case, all the rulings regarding the meaning of the word " appearance," have been referred to, discussed and explained.

Appellant's pleader appeared and asked for adjournment. He did not withdraw from the case but merely urged that, as the records were in possession of his leader (counsel) who was absent, he was unable to argue the appeal. The Appellate Court refused to grant the adjournment and dismissed the appeal *Held*, that although it was open to the Judge to refuse the adjournment, he was bound to write a judgment and dispose of the appeal He could not dismiss the appeal for default —*Patinhare Tarakatt* v *Vellur Krishnan*, 26 M. 267 (16 B 27 *followed*).

Where a Judge on the non-appearance of the appellant in person or by pleader, instead of observing the discretion of the law, goes into the merits and gives a judgment against the appellant, the appeal must be considered as dismissed for default of the appellant in appearing; and an application for re-admission and rehearing cannot be treated as one for review, but must be entertained under this rule.—*Mohesh Chunder* v. *Thakoor Dass*, 20 W. R 425.

If an appellant is appearing through a pleader and on the day of hearing the pleader is absent but the appellant is present in Court and states that his pleader is engaged elsewhere, the mere presence of the appellant is not an appearance within the meaning of Or. XLI, r. 17 — *Ramdhan* v. *Bishun Pragash*, 5 Pat L J. 17. 1 Pat. L. T. 156 (30 M 274 *followed*).

Section 346, Act VIII of 1859 (providing for the dismissal of an appeal for default), even if it applies to miscellaneous cases, does not apply to a case in which it is not shown distinctly that the appellant had any notice that his appeal would be heard on the day to which the case was adjourned, and on which the Judge disposed of it.—*Shib Chunder* v *Allad Monee*, 5 W. R. Mis 22.

One of the pleaders for the appellant opened the case, and then he went to another Court The other pleader for the appellant refused to address the Court, and the Court dismissed the appeal under this rule *Held*, that the Court below had acted illegally in dismissing the appeal for default —*Jowahir Singh* v *Debi Singh*, 18 A 119

An Appellate Court has power in an appeal in which the appellant has failed to appear, to enter into the merits of the case and to decide the appeal upon the merits.—*Doulat Singh* v *Srinivas*, 57 I C 75· 2 Pat L. T 86

Where both parties make default in appearance at the hearing of an appeal, the Court must dismiss the appeal ,and not to go into the merits, and reverse the decree —*Manickram* v. *Roop Narain*, Marsh, 5: 1 Ind. Jur O. S 36.

Dismissal of Appeal for Default—Compromise Thereafter.—Where an appeal has been dismissed for default of appearance of both the parties and both the appellant and the respondent within a month of the dismissal file a petition of compromise settling their disputes, with an additional application for restoration of the appeal. *Held*, that in the circumstances of the case, the Court ought to have restored the appeal and passed a decree in terms of the compromise —*Aswini Kumar* v. *Sukhoda Sundari* 68 I. C. 448.

Non-appearance of Respondent.—The absence of the respondant on the day of hearing is no justification by itself for decreeing the appeal —*Mussammat Raj Rani* v. *Ram Kishore*, 56 I. C 386

For the meaning of the word "appearance," see the cases noted under Or. IX, r. 13.

Appeal from Order of Dismissal for Default.—No appeal lies from an order of dismissal for default —*Rukminimayi* v. *Paran Chandra*, 39 C. 841.

Where no date was fixed for the hearing of an appeal and the Court purported to dismiss the appeal for default, *held*, that the dismissal was without jurisdiction and that an application to set aside the dismissal was not governed by Art. 168 of the Limitation Act.—*Ata Mahomed* v. *Shankar Das*, 69 I. C. 618.

See notes under r 19 of the Order.

18. Where on the day fixed, or on any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice, the Court may make an order that the appeal be dismissed :

Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs.

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing. [S. 557.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s 557, C. P. Code, 1882, with some alterations.

In sub-rule (2), the words "*the respondent appears when the appeal is called on for hearing,*" have been substituted for the words " respondent appears in person, or by pleader, or by duly authorized agent." The alteration seems to have been made in view of the provisions of r. 1, Or III, in which the meaning of the word "*appearance*" is given.

Dismissal for Non-service of Notice.—The order of dismissal should not as indicated by the language of the rule, be made before the day fixed for the hearing of the appeal.—*Chandra Nath* v. *Kaliprasanna*, 35 C. 535.

Before dismissing a case under this rule the Court should fix a time within which process fees should be paid into Court.—*Lalla Prasadi Lal* v. *Lalla Ambika Prasad*, 11 W. R. 290: 3 B. L. R. App. 25.

Where an appeal is dismissed against one of three respondents for non-service of notice on him, the appellant cannot proceed with the appeal as against the two respondents, if the decree appealed against was a decree for *joint* possession.—*Baset* v. *Fazle*, 19 C W. N 290. 28 I. C. 703.

An appeal is liable to be dismissed for default in depositing costs for notice to respondent The fact of its having been committed by an ignorant *karparadaz* is no excuse.—*Pran Chunder* v. *Juggesur*, 11 W. R. 417.

An appeal cannot be dismissed under Or XLI, r. 18, C P. Code on account of the omission of the appellant to provide a person to identity the respondent.—*Nagendra Nath* v. *Shambhu Nath*, 3 Pat. L T 498; 65 I. C. 49.

Appeal.—No appeal lies from an order under this rule. The proper remedy is by an application for re-admission under r 19.—*Attar Singh* v *Karm Chana*, P. R (1919) p 418; but it does not take away any other remedy that might be available.—*Surajdeo* v. *Partap*, 2 Pat L. T. 405.

Re-admission of appeal dismissed for default.

19. Where an appeal is dismissed under r. 11, sub-rule (2), or r. 17 or r. 18, the appellant may apply to the Appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit. [S. 558.]

COMMENTARY.

This rule corresponds to s 558, C P. Code, 1882, with some alterations of a verbal character The words "to impose upon him," which stood after the words "thinks fit" in the old section, have been omitted, and the words "*shall re-admit the appeal*" have been substituted for the words "may readmit the appeal" in the old section

For the meaning of the words "*prevented by any sufficient cause,*" *see* notes under Or IX, rr 9 and 13, as the principles laid down in the rulings under those rules will also apply to the rule where the similar expression, "*prevented by any sufficient cause,*" occurs

Re-admission of Appeal Dismissed for Default.—The affirmative provisions in this rule, that an appellant may prove that he was "prevented by any sufficient cause" from attending when his appeal was callled on

and dismissed, do not imply the negative, namely, 'that an application for restoration cannot be granted unless sufficient cause is shown. The effect of the enactments is that, if sufficient cause is shown, restoration is made obligatory on the Courts, there being no discretion in the matter; whereas, in other cases the merits of the appellant's case will form an important element for consideration when the Court is asked to exercise its discretion.—*Sommayya* v. *Subbamma*, 26 M. 599.

Absence of knowledge of the date fixed for the hearing of the appeal, due to non-service of notice on the appellants, is a sufficient cause for failure to appear when the appeal is called on for hearing within r. 19—*Muhammad Sharif* v. *Din Muhammad*, 101 I. C 203: A. I. R. 1927 Lah. 365 Where the appellant did not know the date of hearing of the appeal and the Vakil with whom he had entrusted the case had died, and in these circumstances the subordinate Judge held there was sufficient reason to excuse appellant's absence. *Held*, that the restoration of the after-default was justified —*Ananthalakshmi* v. *Narasimha*, 97 I C. 687: A. I. R. 1926 Mad 1210.

Appeal dismissed for default—Prevented by sufficient cause from attending when appeal was called on for hearing—Judge's discretion to restore appeal.—*Dakshinamurthy* v. *Municipal Council of Trichinopoly*, 31 M. 157: 3 M. L. T. 336

A decree of a Division Bench of the High Court, dismissing an appeal for default in depositing the estimated costs of preparing paper-book, can only be set aside by an order under s. 626, C P. Code, 1882 (Or. XLVII, r. 4) and not by an order under this rule —*Fatimunnissa* v. *Deoki Persad*, 24 C. 350; F B.: 1 C. W. N. 21, F. B. (23 C. 339 *partly overruled*).

Where an appeal is dismissed on account of unpreparedness of the pleader, the dismissal is a dismissal for default under s. 556, C. P. Code, 1882 (Or. XLI, r. 17), and the appeal can therefore be re-admitted under this rule.—*Shibendra Narain* v. *Kinno Ram*, 12 C. 605 (15 W. R. 143 *followed*). *See*, however, *Ramchandra* v *Madhav*, 16 B. 23; *Chiranji Lal* v. *Kundan*, 20 A. 294; *Robert Watson & Co.* v. *Ambica Dasi*, 27 C. 529: 4 C. W. N. 237; and *Jawahir Singh*, v. *Devi Singh*, 18 A. 119. The Full Bench case of *Satish Chandra* v. *Apara Prasad*, 34 C. 403: 11 C. W. N. 329: 5 C. L. J. 247, noted under r. 17, has set at rest all the conflicting rulings on the point, and all rulings have been referred to, discussed, and explained there (overruling 27 C. 529: 4 C. W. N. 227, and following 8 C. W. N. 621) *See* notes under r. 17.

An appeal dismissed on account of failure to pay printing charges cannot be restored under Or. XLI, r 19.—*Chennarayappa* v. *Muniappa*, 1 Mys L. J. 44.

Where when an appeal was called on in the lower appellate Court, the pleader for the appellants was not present and the appeal was consequently dismissed for default, and subsequently the appellants put in a petition for restoration on the ground that the pleader was, at the time when the appeal was called on, engaged in another Court arguing another appeal, and the application was rejected '*Held*, in second appeal, that under these circumstances, the lower Court ought to have re-admitted the appeal as a matter of course, because there was no wilful default or

real carelessness, such as would justify the order refusing to restore the appeal, and that the High Court has ample powers to restore an appeal for sufficient cause.—*Mrigendra* v. *Dibakar*, 44 C. L. J. 165: 97 I. C. 573: A. I. R. 1926 Cal. 1231.

The fact that the counsel was engaged in another court when the appeal was called on and had sent word to the Reader of the Court for a short pass over, is not sufficient to set aside the dismissal for default and readmitting the appeal.—*Saif Ali* v. *Chirag Ali Shah*, 68 I. C. 785. But where the appellant's pleader appeared soon after the appeal was dismissed, it was restored on the ground that the failure to appear was unintentional.—*Balmokund* v. *Wazir*, 5 Lah. L. J. 89: 79 I. C. 279.

On an application under this rule for the re-admission of an appeal which had been decided *ex parte* against the applicant, it appeared that he had been misled by reason of the appeal having been transferred from the file of one Court to another, no notice of the transfer having been given to him by the pleaders in the case *Held* that, under the circumstances, the applicant was entitled to have the appeal re-admitted —*Narain Singh* v. *Bhairup Churn*, 8 C. L. R. 350

An application for re-admission of an appeal dismissed under this rule should be made to the Sub-Judge or to the Assistant Judge who disposed of it and not to the District Judge.—*Sakharam Lakshman* v *Govind Joti*, 15 B. 107

The carelessness of an advocate's clerk does not costitute " Sufficient cause."—*Maung Than* v *Zainat Bibi*, 3 R 488: 92 I C 208 A. I. R 1926 Rang. 50.

The excuse that it was raining and hence the appellant's pleader was a little late in coming to Court, is not a sufficient reason within this rule for restoration of appeal dismissed for default, *Kumar Satya Ram* v. *Mhd. Hamedulla*, 96 I. C. 377: A. I R 1926 Cal 1152.

Where a memorandum of appeal was insufficiently stamped and the deficiency not having been made up within the time allowed, the appeal was wrongly dismissed for default instead of being rejected; *held*, that it could not be restored under Or XLI, r 19, which has no application to such a case; *Surajpal* v *Utim Pandy*, 63 I. C 99; 6 Pat. L. J 625.

Where at the time of the hearing of a case transferred lower down in the list by the trying Judge without notice to the appellant, the appellant's counsel was not present in court and the appeal was consequently dismissed for default, *held*, that there was no cause for restoration of the appeal; *Nanak Chand* v. *Sajjid Hussain*, 71 I C 813

" Shall re-admit the appeal."—The word " *shall* " has been substituted for the word " may," which occurred in the old Code

Other Remedy.—The applicant, if he is still within the period of limitation, may file another appeal and is not bound to confine himself to the remedy of restoration —*Suraj Deo* v *Partab Rai*, 2 Pat 739 75 I C 284: A. I. R. 1923 Pat. 213

Appeal.—An appeal lies from an order of refusal to re admit an appeal under Or. XLIII, r 1, cl (*t*), but an order under this rule re-

admitting an appeal is not appealable.—*Gulab Kunwar* v. *Thakur Das*, 24 A. 464 (22 C. 981 *followed*).

An application for restoration of an appeal dismissed for default should not be rejected without giving the applicant an opportunity of substantiating the facts on which he relies.—*Hemanta Kumar* v. *Punchanan*, 57 I. C. 762.

Power to adjourn hearing and direct persons appearing interested to be made respondents.

20. Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent [S. 559.]

COMMENTARY.

This rule corresponds to s. 559, C. P. Code, 1882, with some verbal alterations only.

The word "*where*" has been substituted for the word "if" in the beginning, and the word "*preferred*" has been substituted for the word "made," which occurred in the old section

Two conditions are necessary to enable the Appellate Court to exercise the power conferred by this rule: (1) that the person was a party to the suit in the original Court, and (2) that he is interested in the result of the appeal

Applicability of the Rule.—This rule does not only apply to cases where there is any doubt as to a party being a necessary party but also applies to persons who are admittedly necessary parties; so also it not only applies to cases where the Court itself discovers the defect as to the non-joinder of parties but also to cases where the appellant applies for the addition of a party.—*Chiraj Din* v. *Samanda*, 8 Lah L. J. 473: 97 I. C. 223: A. I. R. 1926 Lah. 689.

Adding of Parties under this Rule.—It is a question for the Court in its discretion to determine in each case whether or not it will make an order for the addition of a party as contemplated by this rule.—*Amlook Chand* v. *Sarat Chunder*, 38 C. 913, (919).

A respondent is entitled to attack an adverse finding of the lower Court in support of the decree and the Appellate Court must consider the correctness of the finding and for that purpose has power to add a party respondent whose interests are effected by the finding. The powers of the Appellate Court to add parties in appeal are not confined to Or. XLI, r. 20, but are also governed by Or. XLI, r. 22.—*Baluswami Iyer* v. *Lakshmana Aiyer*, 44 M. 605: 41 M. L. J. 129; 29 M. L. T 386

The Court will not under this rule add representatives of a deceased party to save an appeal that has abated.—*Kali Dayal* v. *Nagendra*, 24 C.

W. N. 44: 54 I. C. 822; *Manindra* v. *Bhagabati;* 30 C. W. N. 45: 90 I. 986 A. I. R. 1926 Cal. 335.

"Is interested in the result of the appeal."—A person against whom a suit has been dismissed and who is not a party to the appeal, is not "interested in the appeal" for the purposes of Or. XLI, r. 20. That rule contemplates a person being made a party to the appeal at the time of the hearing of the appeal, because it contemplates that the Court must be in full possession of the facts so that it may be in a position to say whether or not any person is interested in the result of the appeal. The rule does not contemplate that a person should be made a party to the appeal simply in order to enable one of the respondents to prefer a cross-objection against him.—*Rajendra* v. *Moheshata*, 53 C 270: 91 I. C. 649: A. I. R. 1926 Cal 533.

It is not competent to an appellate Court to implead, under Or. XLI, r. 20, a person who had not been made a party to the decree though he had been a party to a suit, as the person is not "interested in the result of the appeal." To hold that an appellate Court can implead a person who has acquired an absolute right by the lapse of time or by the omission of the name from the decree, would amount to denying all finality to litigation.—*Maharajah Sahib, Faridkote* v. *Kanshi Ram*, 8 Lah. L. J. 333: 97 I. C. 338: A. I. R. 1926 Lah 499.

Joinder of Respondents in Appeal.—It is quite open to the Appellate Court, with reference to the terms of this rule to add a party as respondent to an appeal, when no appeal had been made against him.—*Hudson* v. *Basdeo Bajpye*, 26 C 109: 3 C. W. N. 76. *Bishun Churn* v. *Jagendra Nath*, 26 C 114. *See* also, *Upendra Lal* v. *Girindra Nath*, 25 C 565: 2 C. W. N. 425; *approved* in *Rup Jauni* v. *Abdul Kadir*, 31 C. 643, F B.: 8 C. W. N. 496 F. B., *Soiru Padmanabh* v. *Narayanrao Bin*, 18 B 520; and *Kanagappa* v. *Sokkalinga*, 15 M. 362. But See, *Atma Ram* v. *Balkishen*, 5 A. 266, *followed* in 31 M. 442: 18 M. L. J. 452, noted below. This Madras case has been commented on in 13 C. W. N., at page lxxviii (78).

Where through a mistake on the part of an appellant's legal adviser, the names of certain defendants who are interested in the result of the appeal are omitted from the memorandum of appeal, the Court has power to add them as parties under Or. XLI, r. 10.—*Deokaran* v. *Nathu*, 63 I. C. 352.

An Appellate Court has power to implead only such persons as parties to the appeal as were parties in the trial Court and were not made parties to the appeal but not those who are complete strangers to the suit.—*Musst. Haliman* v. *Nur Mahommed Khan*, 73 I. C. 136 (18 A. 133 *refd. to*).

Looking at the language of this rule apart from authority it would appear to have been inserted to protect parties to the suit who had not been made respondents in the appeal, from being prejudiced by modifications made behind their back in the decree under appeal. The party whom it is sought to bring on is required to be interested in the result of the appeal, that is to say, he must be shown to be interested in the result of the appeal before he is brought on for once he is brought, he may be said to acquire an interest as a result of being brought on. When

a defendant has been exonerated and there is no appeal against so much of the decree as exonerates him, no decree can be passed against him in an appeal by any of the party to a suit as he is no party to such appeal and he cannot be said to be interested in the result of such appeal by another party unless the decree sought to be obtained against the respondents in the appeal would have the effect of prejudicing him in some way or other. A decree having been made against a wrong party, it is not competent for the Appellate Court, in appeal by that party in which the decree-holder alone is made respondent, to bring on the record those persons against whom the Court of first instance should have made the decree —*Subramaniam* v. *Veerabhadram*, 31 M. 442: 18 M. L J. 452 4 M. L. T. 104 (5 A. 267 *followed;* 25 C. 569 *not followed;* 31 C 109 and 643 *referred to*).

In a rent suit one of the tenants had not been joined as a party, but he had received a copy of the summons and had been represented by a pleader after he had filed a written statement. In the appeal also the said defendant was not made a party but the District Judge after he had delivered judgment issued notice to him informing him that his name had been added as a party defendant *Held*, that no useful purpose could be served by adding in the appellate stage, a party defendant if he had not been made a party to the appeal and after judgment in the appeal had been delivered, he could not be bound by the insertion of his name on the record as a defendant —*Surendra Nath* v. *Aghore Nath*, 25 C W N. 525.

Joinder of Co-respondent.—The Appellate Court has jurisdiction under Or. XLI, r. 20 to add a defendant as co-respondent when the plaintiff, the sole respondent in the appeal, preferred a memo. of cross-objections against him —*Ponnuswami* v *Palaniandi*, 11 L W. 602 .

Order XLI, Rule 20 and order XXII.—Or. XLI, r. 20 is not intended to override the provisions of Or. XXII; the right obtained by a respondent when the appeal abates as against him, is a valuable right and should not be lightly treated. Or. XLI, r 20 will only apply where there is an appeal pending in the Court on which a decision may be given by the Court, and there is no power in a Court to revive a dead appeal or to give power to an appellant to present an appeal where there is none at all in the file of the Court —*Badri Narain* v. *E. I Ry Co*, 5 Pat. 735: A I. R. 1927 Pat. 23.

Adding of Parties in Second Appeal.—The Court in second appeal is competent to bring on the record persons who had been originally joined in the suit, but were not joined in the lower Appellate Court.—*Paya Matathil* v. *Koumel*, 19 M. 151, *Durgacharan* v. *Lakhi Narain*, 47 I. C 917; *Padarath* v *Hitan Singh*, 82 I. C. 600 But the Allahabad High Court has taken a contrary view in *Chunni* v. *Lala Ram*, 16 A. 5 and in *Pichhauri* v. *Ram Khilawan*, 37 A 57.

Power of Appellate Court to Add Respondent—Limitation.—The power of the Appellate Court to make a person respondent under this rule is not affected by the Limitation Act.—*Sohna* v. *Kalak Singh*, 13 A. 78; *Bindeshri Naik* v. *Ganga Saran*, 14 A. 154, F. B.; *Manickya Moyee* v. *Baroda Prosad*, 9 C 355; 11 C L R. 430; *Upendra Lal* v *Girindra Nath*, 25 C. 565; 2 C. W. N. 425. Approved in 31 C. 643, F

B.: 8 C. W. N. 496, F. B..Not followed in 31 M. 442: 18 M. L. J. 452. *See* also, *Maung An Gale* v. *Ma Min Dun*, 66 I. C. 305; *Municipal Committee Bhera* v. *Shivram*, 75 I. C. 90; *Amar Singh* v. *Kanshi*, 76 I. C. 285; *Wazir Singh* v. *Janki Das*, 97 I. C. 174: A. I. R. 1926 Lah. 679

The Limitation Act does not contract the power of the Court under this rule to allow persons, who were parties to the proceedings in the Court below but were not made respondents at the time when the appeal was presented, to be added as respondents, and it makes no difference whether an application is made by the appellant to bring in those persons as respondents or the Court considers it necessary for the ends of justice that they should be added as respondents.—*Girish Chandra* v. *Sasi Sekhareswar*, 33 C. 329 (9 C 355: 12 C. 612 *referred to*).

Inherent Power of Court to Add Parties.—Powers of a Court to implead parties under s. 151, C. P. Code, are circumscribed by Or. XLI, r. 20, and it is only in exceptional circumstances that the inherent powers under s 151 could be invoked —*Musst. Haliman* v. *Nur Mahommed Khan*, 73 I. C. 136: 1923 Lah. 490

Form.—For Form of notice to a party to a suit not made a party to the appeal, *see* Appendix G, Form No. 7.

Re-hearing on application of respondent against whom ex parte decree made.

21. Where an appeal is heard *ex parte* and judgment is pronounced against the respondent, he may apply to the Appellate Court to rehear the appeal; and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him. [S. 560.]

COMMENTARY.

This rule corresponds to s. 560, C P. Code, 1882, with some alterations.

The words "*in the absence of the respondent*," which stood after the word "*ex parte*" in the old section, have been omitted; and the word "*pronounced*" has been substituted for the words "is given," after the word "judgment" The other changes are merely verbal

"Sufficient cause."—For the meaning of the words "*he was prevented by sufficient cause*," *see*, notes under Or IX, rr. 9 and 13, as the principles laid down in the rulings under those rules, are equally applicable to this rule, in which the similar expression, "*prevented by sufficient cause*" occurs

Appeal Heard Ex Parte—Application for Re-hearing—Sufficient cause.—Where a respondent had received no intimation of the date of hearing of an appeal from his pleader's clerk who owing to his illness had been compelled to go home, the papers of the case being with him, and who

did not give information to the clients of the day fixed for hearing, and the appeal was heard *ex parte* on the date of hearing. *Held*, that it was a sufficient cause within the meaning of this rule for the re-hearing of the appeal.—*Kailash Chunder* v. *Rama Nath*, 2 C. W. N. 414.

Notice was given to the respondent's pleader of the day fixed for hearing, but he refused to accept service and did not inform his client that such notice was given. The appeal was heard *ex parte* no one appearing for the respondent; *held*, that the laches of the pleader is not a sufficient ground for restoration of the appeal.—*Har Prosad* v. *Abdul Rahman*, (1905) A. W. N. 44.

An applicant presenting a petition for the re-hearing of an appeal, decided *ex parte*, must, at the time of making such application, be prepared to satisfy the Court that the notice of appeal was not duly served upon him, or that he was prevented by sufficient cause from attending when the appeal was called on for hearing.—*Anunda Shaha* v. *Kima Bebee*, 6 C. 548.

Where an appeal has been heard *ex parte*, a re-hearing cannot be granted by the Court on an application under s. 560, C. P. Code, 1882, except upon legal evidence produced by the respondent of the facts necessary to entitle him to such re-hearing.—*Mahomed Kalun* v. *Dinomoyee*, 8 C. L. R. 112.

A respondent engaged two pleaders on the day of hearing; the senior pleader being ill, transferred his brief to another pleader, whom the judge declined to hear as his name did not appear in the vakalatnama. The junior not being instructed to argue applied for a day's postponement to get himself ready. This was refused and the appeal decreed *ex parte*. *Held*, that the Judge ought either to have allowed the pleader who appeared, to argue the case or allowed an adjournment, making if necessary an order for costs in favour of the appellant.—*Hari Krishna* v. *Bishnu Chandra*, 35 C. 799: 12 C. W. N. 888: 7 C. L. J. 426.

Where counsel for respondent was unable to appear at the hearing because the respondent's agent had taken away the papers, it was held that this was not "sufficient cause" for re-hearing the appeal.—*Baji Lal* v. *Nawal Singh*, 39 A. 388.

This rule applies to a case in which the respondent has been prevented by sufficient cause from attending when the appeal was called on, whether appearance has been entered for him or not.—*Esab* v. *Krishna Narain*, 11 C. L. R. 164.

Where pleaders were engaged on behalf of the respondent, but they were unavoidably prevented from appearing, *held* that although vakalatnamas had been filed by the defendant's pleaders, the defendant could not be said to have appeared in person or by pleader and the order made under this rule was correct.—*Sheo Churn* v. *Heera Lall*, 11 C. L. R. 537 (7 W. R. 81 *followed*).

Held by the Full Bench, that a respondent in whose absence the appeal has been heard *ex parte*, and against whom judgment has been given, may prefer a second appeal from the decree under the provisions of s. 584, C. P. Code, 1882, and his remedy is not limited to an application

under this rule to the Court which passed the decree to re-hear the appeal —*Ajudhia Prasad* v. *Balmukand*, 8 A 351, F. B. (1 A. 387, and 6 B. L. R. A. C. 161 *referred to*).

An appeal was heard *ex parte* in the absence of a respondent; he then applied for re-hearing, but his application was refused. *Held*, that he was not debarred, by reason that he had not appealed from the order refusing to rehear the appeal, from appealing from the decree of the Appellate Court.—*Ramjas* v. *Baijnath*, 2 A. 567.

A defendant who obtains a judgment in his favour in the Court of first instance and who, on appeal by the plaintiff, does not appear at the hearing of the appeal or present a petition for a re-hearing, may present a second appeal against the decree of the lower Appellate Court.—*Ex parte Modalatha*, 2 M 75

An application for re-hearing of an appeal presented originally within the period of limitation but returned for amendment, and presented after amendment, after the period of limitation, cannot be rejected as long out of time.—*Shama Prasad* v. *Tala Mulik*, 5 C W N 816

This rule applies to a case where the respondent is absent and not dead at the time of hearing.—*Soudamini* v. *Ganga Kumar*, 3 C. L. J. 35*n*.

Appeal.—An appeal lies from an order of refusal to re-hear an appeal under Or. XLIII, r 1, cl (*t*).

Upon hearing, respondent may object to decree as if he had preferred separate appeal.

22. (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the appellate Court may see fit to allow.

Form of objection and provisions applicable thereto

(2) Such cross-objection shall be in the form of a memorandum, and the provisions of r 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply therto.

(3) Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule. [S. 561.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s. 561 of the C. P. Code, 1882, with some additions and alterations.

The alterations made in sub-rule (1) and (2) are merely verbal, *viz.*, the word "*from*" has been substituted for the word "against," and the word "*cross-objection*" has been substituted for the word "objection"

In sub-rule (3), the words "*from the party who may be affected by such objection or his pleader,*" have been substituted for the words "from the appellant or pleader," which occurred in the old section.

Sub-rule (4) is new It has been inserted to set at rest the several conflicting rulings on the point. The question was the subject of discussion in several cases, as will appear from the ruling noted under the heading "WITHDRAWAL OR DISMISSAL OF APPEAL FOR DEFAULT—ITS EFFECT UPON CROSS-OBJECTION"

Sub-rule (5) corresponds to the last para of s. 561, C. P Code, 1882, with some verbal changes only.

Cross-objections by Respondents.—Where a decree is entirely in favour of a party, it is not necessary for him to file a notice of objection under this rule simply because an issue was decided by the lower Court against him.—*Lala Gauri Sanker* v. *Janki Pershad*, 17 C. 809, P. C., p. 813; *Bhagoji* v *Bapuji*, 13 B. 75.

It is not necessary to entitle a respondent to support a decree upon a particular ground under this rule that the ground should have been in express terms decided against him If it has not been decided in his favour it must be taken to have been decided against him within the meaning of this rule —*Shrish Chandra* v *Mungri Bewa*, 9 C. W. N. 14.

Though a person who has not appealed from a decree cannot question its correctness he can support the decree on reasons not given by the lower Court under Or. XLI, r. 22 (2), C. P. Code.—*Raj Kumar Jagannath Prasad* v. *Mirza Elkbal*, 5 Pat L J 239· 55 I C. 214.

An application to file a cross-appeal orally was rejected, (1) because a written memorandum of its grounds had not been filed previously; (2) because the objection, when taken, was not filed on the regulated stamp; and, lastly, (3) because the ground now urged had not been advanced as an objection in a regular appeal previously filed —*Hoolas Kooeree* v. *Sufeehun*, 8 W. R. 379.

If no cross-objections are filed at all by a respondent, the appellate Court has no power to grant any relief to him in a case where the granting of such relief is not necessarily incidental to the relief granted to the appellant.—*Kulai Kada* v *Viswanatha*, 28 M. 229, *Caspersz* v. *Kishorilal*, 23 C. 922 (929); nor has the Appellate Court the power, in the absence of cross-objections, to disturb so much of the original decree as is favourable to the appellant so as to place the appellant in a worse position — *Cheda Lal* v *Badullah*, 11 A 35, *Agilul* v. *Dino Nath*, 31 C 996; *Shailes* v. *Becchai*, 40 C L J. 67. 84 I C. 121· A. I. R 1925 Cal 94. In any case, the Court cannot record a finding which does not affect the point at issue.—*Sir Prodyat Kumar* v *Bal Gobinda*, 41 C L J 31: 86 I. C. 6: A. I. R. 1925 Cal: 518.

A respondent, in taking advantage of the provisions of s 348 of Act VIII of 1859 (this rule), can only take such objections as have reference to the party appealing. If he wishes to raise objections against parties, who do not appeal, he must do so by independent appeal —*Ganesh Pandurang* v *Gangadhar*, 6 Bom H C. 244.

If a decree is passed partly in favour of, and partly against, a plaintiff, and one of the defendants alone appeals as against the decree in favour of the plaintiff, making a co-defendant a respondent, there is no reason why the latter should appear or interest himself in the result, nor why the plaintiff should be allowed at the hearing to raise objections to his suit having been dismissed against the other defendant —*Goonomonee* v. *Parbutty*, 10 W R 326

Both parties appealed from the decree of the first Court, and both the appeals were dismissed The plaintiff preferred a second appeal against the decree dismissing his appeal, whereupon the defendant took objections to the decree of the lower Appellate Court dismissing his appeal *Held*, that such objections could not be entertained —*Ganga Prasad* v *Gajadhar Prasad*, 2 A 651.

When a plaintiff's suit is dismissed, and a defendant appeals, seeking no relief whatever, but acting in the same interest with the plaintiff, the latter is not entitled by way of cross appeal, to argue that his suit was wrongly dismissed —*Sadetoollah* v. *Rahim Dewan*, 9 W R 273

This rule in no way prevents an Appellate Court from upholding the decree of the lower Court on any ground which in law warrants such upholding, even though that ground may not have been referred to or disallowed, in the lower Court —*The Receiver* v *Vegasena*, 28 M 427, p. 435.

Objections under this rule can only be filed by a party who might have appealed from the decree of the Court below but has not done so It is not open to a party who has appealed, and where appeal has been dismissed, subsequently to such dismissal, to prefer objections under this rule to the appeal preferred by the opposite party —*Ramji Das* v *Ajudhia Prasad*, 25 A 628.

In an appeal against an award under the Land Acquisition Act (I of 1894), the respondent is entitled to file cross-objections under this rule. —*Raghunath Das* v *Secretary of State*, 29 B. 514; 7 Bom. L R. 509.

Cross-objections Against Co-respondents.—As a general rule the right of a respondent to urge cross-objections should be limited to his urging them against the appellant, and it is only by way of exception to this general rule that one respondent may urge a cross-objection against another respondent, the exception holding good, among other cases, in those in which the appeal of some of the parties opens out questions, which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents.—*Bishun Churn* v. *Jogendra Nath*, 26 C. 114 (7 W R. 39, and 15 W R 26 *referred to*); *Shabiuddin* v *Deomoorat*, 30 C. 655; *Abdul Gani* v. *Muhammad*, 28 A 95: 2 A L J 607; *Jagannath* v *Hanuman Singh*, 54 I. C. 332; *Nursey* v. *Harrison;* 37 B. 511; *Jadunandan* v *Deo Narain*, 16 C. W. N 612, 614; *Mathura* v. *Ram Kumar* 43 C. 780, (828) *Muslcha* v *Ramnarain* 40 A. 536; *Official Trustee of Bengal* v *Smith*, 5 Pat. L J. 328: 56 I. C 262; *Bhuban* v. *Co-operative Bank*, 29 C. W. N. 784: 88 I. C 866 A I. R. 1925 Cal. 973. According to the Madras and Lahore High Courts, a respondent may urge cross-objection against a co-respondent in any and every case.—*Kulaikada* v. *Viswanatha*, 28 M. 229; *Munisamy* v *Abbu*, 38 M. 705 F B.; *Alagappa* v. *Chockalingam*, 41 M. 904· 48 I. C. 203; *Chhaju* v. *Qutab Din*, 5 Lah L J. 92: 69 I C 330: A I. R. 1923 Lah 39.

As a general rule cross-objections can be urged only against the appellant and not against a co-respondent. No cross-objections can be filed against a defendant who has not filed any appeal from the decree passed against him.—*Santram* v *Kidarnath*, 56 I. C. 469; *Qara Mahomed Shaban* v. *Bazarara Begum*, 70 I. C. 79.

The objections allowed to be urged by a respondent under this rule are limited to the person who has appealed against him, and his (respondent's) rights are not enlarged by the mere addition to the list of such persons of other persons who should not have been put on the list at all — *Kallu* v. *Manni*, 23 A. 93 *See*, however, *Timmaya Mada* v *Lakshmana*, 7 M 217, where it has been held that a party who has been improperly made a respondent in appeal is entitled to take objections to the decree under this rule

In suit for dissolution of partnership and for accounts, it is open to any respondent to prefer cross-objections against a co-respondent on any item in dispute between them —*Balgobind* v. *Ramsarup*, 86 A. 505

Cross-objections Against Absent Co-respondents.—An objection by way of cross-appeal cannot be taken against a co-respondent who is not present in Court and so unable to answer the objection of the cross-appellant.—*Lall Chand* v. *Kudnoo Koonwar*, 7 W. R. 532. *See* also, *Maizunnissa* v. *Moraree Dhur*, 22 W. R. 314.

An objection by way of cross-appeal cannot be taken against a party who is not present in Court But if it be considered necessary to have the absent party present, the Court should direct that he should be made respondent.—*Pran Kishore* v. *Mahomed Ameer*, 21 W. R. 338.

Cross-objections Against Findings Embodied in the Judgment but Not in the Decree.—The findings in a judgment upon matters which subsequently turn out to be immaterial to the grounds upon which a suit

is finally disposed of as to the plaintiff's right to any portion of the relief sought by him as declared by the decree, amount to no more than *obiter dicta*, and do not constitute a final decision against a party so as to enable him to appeal or to prefer cross-appeal against it. Parties have no right to cross-appeal against findings embodied in judgment, but not in the decree.—*Jamaitunnissa* v *Latfunnissa*, 7 A 666; *Balak Tiwari* v *Kausil Miser*, 4 A. 491

Cross-objections by Pauper Respondent.—Objections by a respondent to a decree under this rule cannot be filed *in forma pauperis*—*Narayana* v. *Krishna*, 8 M. 214 (1 B 75 *followed*) *See* also, *Brojeshwari* v. *Guroo Churn*, 11 C. 735.

Applicability of this Rule to Letters Patent Appeal.—Or XLI, r. 22 is not applicable to an appeal under cl 15 of the Letters Patent, and a memorandum of cross-objection cannot be entertained in these appeals.—*Brojendra Chandra* v. *Prasanna Kumar*, 24 C W N 1016 · 32 C. L. J. 48; *Mangat Rai* v *Musst. Purna Kuar*, 70 I C 488. A I R 1922 All. 55 (21 A. 297 *folld.*) But see, *Venkatesam Chetty* v *Moti Chand*, 49 M 291 · 50 M. L. J 190 F B A I R 1926 Mad 316, in which it has been held (following 48 I A 76) that the provisions of Or. XLI, apply to original side appeals under the Letters Patent, and rule 22 of that order expressly provides for cross-objections being raised by respondents.

Court-fees on Cross-objections.—The effect of s 16 of Court Fees Act (VII of 1870) is to place the respondent in the position of a cross-appellant, in so far that he must, before the hearing specify his matter of objection, and must pay into Court the Court-fee attaching thereto A Court cannot give effect to the cross-objection of a respondent subject to his payment of the Court-fee stamp—*Sharada Soonduree* v *Gobindmonee*, 24 W. R 129 But see *Reference under Court Fees Act*, s. 5, 25 M. 24, where it has been held that stamp duty on a memorandum of objections filed under this rule need not, under s 16 of the Court Fees Act, be paid till the time for hearing

Where the memorandum of cross-appeal was not stamped before by mistake and it was acted upon, the subsequent filing of the stamp makes the memo. of the appeal as valid as if it were stamped at the first instance—*Jagabandhu* v *Choudhry Shama Charan*, 2 C L J 68-*n* 9 C. W. N cclxxx (280)

The Court has jurisdiction over a memorandum of objections presented under this rule although not stamped or moved by the respondent at the hearing of the appeal, and where it is not so stamped or moved the proper order is to dismiss it with or without costs—*Palani* v *Udayar*, 32 M 170.

Where the respondent in an appeal from a decree which totally dismissed the plaintiff's suit put in a petition stating the reasons on which they supported the decree, the respondent need not pay court-fee on the petition—*Ram Prasad* v *Musst Ajanasia*, 44 A 577 68 I C 861

Time for Filing Cross-objections.—The cross-objections referred to in this rule must be filed by the respondent within one month from the date of the service of notice of the appeal But the time may be extended if

sufficient cause is shown.—*Sullman* v. *Joosub*, 14 B. 411; *Kuksa* v. *Dajiba Bhau*, 5 N. L. J. 192: 66 I. C. 217.

Where the time for filing objection under this rule expired on a day when the Court was closed, the objections were allowed to be filed on the day when the Court re-opened.—*Baghelin* v. *Mothura*, 4 A. 430.

The withdrawal of the appeal by which the respondent loses his opportunity of having his cross-objections heard, affords no sufficient reasons for enlarging the time for the cross-appeal which he might have presented.—*Chudasama* v. *Ishwargar*, 16 B. 249. *See* also, *Surbhai Doyalji* v. *Raghunathji*, 10 Bom. H. C. 397 (2 B. L. R. A. C. 184: 10 W. R. 178 *followed*). But see, *Hurgovindas* v. *Judavahoo*, 23 B. 692, where the withdrawal of the appeal was considered "sufficient cause" within the meaning of s. 5 of the Limitation Act.

An appeal cannot definitely be posted until the Court has ascertained that notice has been served upon the respondent, and a date must then be fixed not less than one month from the date of service and a respondent can file a cross-objection within a month from the date of service of notice.—*Sundaram* v. *Annangar*, 13 M. 492.

Power of Appellate Court to Deal with the Whole Case after Return of Findings on Remand.—The first Court dismissed the suit as barred by limitation, but the decision was reversed in appeal, and the case was remanded for trial on the merits. The first Court then gave a decree, but on appeal the Appellate Court dismissed the suit on the merits. The plaintiff preferred a special appeal. *Held*, that the defendant was competent on such appeal to raise cross-objections that the suit was barred by limitation.—*In the matter of Himmat Bahadur*, B. L. R. Sup. Vol. 429: 5 W. R. 91. *See* also, *Ray Kishorce* v. *Bonomalee*, 10 W. R. 209, and *Kishen Chunder* v. *Sreeshtee Dhur*, 8 W. R. 208.

In a second appeal by the defendant, the plaintiff filed cross objections under this rule and the High Court remitted an issue under s. 566, C. P. Code, 1882 (Or. XLI, r. 25), with reference to plaintiff's objections expressing their views thereon. *Held*, that, upon the return of the findings on remand, the Court could not treat the appeal as already decided, and the objections as the sole matter for the consideration, but must consider both appeal and cross-objections and decide the whole case.—*Lachman Prasad* v. *Jamna Prasad*, 10 A. 162.

H sued B for arrears of rent at the rate of Rs. 212-1-0 per annum, and obtained a decree at the rate of Rs. 94. He appealed, and the Appellate Court gave him a decree at the rate of Rs. 128-12-0. B appealed to the High Court. H neither appealed nor filed any cross-appeal. The High Court remanded the case. The lower Appellate Court then found that the annual rent payable by B was Rs. 212-10. *Held*, that the second finding of the lower Appellate Court should be accepted, and H was entitled to the benefit of the finding in his favour, notwithstanding that he had not appealed or preferred objection under this rule.—*Bikramajit* v. *Husaini Begam*, 3 A. 643. Distinguished in *Agilul Hossain* v. *Dino Nath*, 34 C. 996.

Sub-rule (4). Withdrawal or Dismissal of Appeal for Default—Its Effect upon Cross-objections.—If an appeal in which cross-objections have

been filed under this rule is withdrawn, the cross-objections cannot be heard.—*Jaffar Hussain* v. *Ranjit Singh*, 17 A. 518. *See* also, *Bahadur Singh* v. *Bhagwan Dass*, 1 Agra 23; *Ram Pershad* v. *Bharosa Kunwar*, 9 W. R. 328; *Shama Churn* v. *Radha Kristo*, 14 W. R 210; *Poresh Narain* v. *Watson & Co.*, 23 W. R. 229; *Surbhai Dayalji* v. *Raghunathji*, 10 Bom. H. C 307. But after the hearing of the suit has commenced the appeal cannot be withdrawn so as to prevent the objections from being heard and determined. The appellant if he wishes to withdraw his appeal, must do so before hearing of the appeal has commenced.—*Kalyan Singh* v. *Rahmu*, 23 A. 130, *Dhondi Jagannath* v *The Collector of Salt Revenue*, 9 B 28 *But in the case of Venkataramnaiya* v *Kuppi*, 3 M. H. C. 302, the Madras High Court has held that where, in the course of the hearing of an appeal, the appellant desired to withdraw, in order to avoid the decision of a question raised by the respondent at the hearing, the respondent was entitled to have the case heard and determined. *See* also, the cases noted under Or XXIII, r 1

The entertainment of cross-objections under this rule is contingent and dependant upon the hearing of the appeal in which such objections are taken, and when that appeal itself fails, is rejected, or dismissed without being disposed of upon the merits, the objections cannot be entertained either.—*Rampiwan Mal* v *Chand Mal*, 10 A. 587. *See* also, *Baroda Kant* v. *Pearce Mohun*, 23 W. R. 57; *Maklab Beg* v. *Hasan Ali*, 8 A. 551; *Jaigopal Singh* v *Muna Lal*, 4 L 140, 5 Lah L J. 345

An appeal from an order dismissing a suit for want of jurisdiction is not such an appeal as is contemplated by this rule, and on such an appeal the respondent is not entitled to go into the merits.—*Kameckha Pershad* v. *Larmour*, W. R (F. B.) 86

Where an appeal is dismissed for want of necessary parties, it was held that the appeal was heard within the meaning of this rule and therefore the cross-objections of the respondent should be heard —*Kombi Achen* v. *Kochunni*, 21 M 352.

By Insertion of Sub-rule (4), the Above Rulings have been Rendered Obsolete.—It would appear from the above rulings that in some of the cases it was held that where cross-objections are filed by the respondent, the appellant, if he wishes to withdraw his appeal must do so before the *hearing* of the appeal has commenced In others it was held that where the appeal is withdrawn, by the appellant, the cross-objections cannot be heard. By insertion of sub-rule (4), it has now been definitely laid down that even if the appellant withdraws his appeal after receiving notice of cross-objection or if the appeal is dismissed for default, the cross-objection so filed may nevertheless be heard and determined, although the appeal may be withdrawn by the appellant or dismissed for his default This rule is advantageous to the respondent, as he will have the advantage of his cross-objections being heard, as if he has filed a separate appeal.

Under the old section cross-objections were entirely dependent upon the hearing of the appeal, but by insertion of sub-rule (4) it has been made clear that cross-objections are to be treated as independent and separate appeals; and the difference of opinion which hitherto existed with regard to the meaning of the term " *hearing* " has been set at rest.

Under the present rule, the withdrawal of an appeal is no bar to the hearing of cross-objections filed by a respondent, whether the appeal is withdrawn before or after the hearing. In the same way, the dismissal of an appeal *for default* is no bar to the hearing of cross-objections. The dismissal of an appeal upon the appellants' failure to give security for costs is a dismissal for *default* within the meaning of Or. XLI, r. 22, sub-rule (4).—*Mowar Sheobaksh* v. *Mowar Thakur Dayal*, 4 Pat L. J. 164: 56 I. C. 729.

Abatement of Appeal Owing to Death of Appellant—Effect upon Cross-objections.—Where owing to the death of the appellant, an appeal abates and is dismissed, the memorandum of cross-objection preferred by the respondent cannot also be heard.—*S. T. M. R. Murugappa Chettiar* v. *ponnuswami*, 44 M. 828: 41 M. L. J. 304: 13 L. W. 705.

Application of the Rule.—Under Or. XLII, cross-objections may also be filed in second appeals. They may also be filed in appeals from order as laid down in Or. XLIII, r. 2. But cross-objections cannot be filed in Letters Patent appeals unless the rules of the High Court allow it.—*Kausalia* v. *Gulab Kuar*, 21 A. 297.—*In the matter of Mirza Himmat*, (1866) B. L. R. (F. B.) 429.

A memorandum of cross-objections as to costs in the Courts below is not a matter which can be considered on second appeal.—*Madho Prasad* v. *Firm of Ashan Ilahi*, 5 Lah. L. J. 108.

Second Appeal.—A second appeal will lie from a decree of the first Appellate Court disallowing the cross-objections of a respondent.—*Ganapati* v. *Sitarama*, 10 M. 292.

Remand of case by Appellate Court.

23. Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand. [S. 562.]

COMMENTARY.

This rule corresponds to s. 562, C. P. Code, 1882, with some additions and alterations. The old section is reproduced below for comparison and for observing the changes introduced. "*If the Court against whose decree the appeal is made has disposed of the suit upon a preliminary point and the decree upon such preliminary point is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, together with a copy of the order in appeal to the Court against whose decree*

the appeal is made, with directions to re-admit the suit under its original number in the register, and proceed to "determine" the suit on the merits."

"The Appellate Court may, if it thinks fit, direct that issue or issues shall be tried in any case so remanded."

The following report of the Special Committee will explain the object of the addition of the words "*and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand,*" at the end of this rule:—

"After due consideration the committee have thought it safer not to give legislative sanction to the views enunciated in *Habib Buksh* v. *Baldeo Prasad* (23 A 167). The power of reversal and remand is liable to be abused, while the procedure under s 566 is free from this liability and at the same time furnishes an effectual remedy "

"The words at the end of the rule have been added to clear up a doubt which is stated by the Select Committee to exist as to whether evidence recorded at the original trial can be used on the trial after remand."—*See the Report of the Special Committee.*

Upon a comparison of the provisions of the present rule with the old section it would appear that the words "*upon such preliminary point,*" which stood after the words "and the decree," in the old section have been omitted

Section 564 of the old Code which ran as follows "The Appellate Court shall not remand a case for a second decision, except as provided in s. 562," has also been omitted The effect of these omissions is that the Legislature has withdrawn the restriction which existed under the old Code with regard to Court's power of remand under this rule, as will *appear from the following report of the Select Committee "We have* struck out this rule as in our opinion it is unduly restrictive "

Under the old Code it was held in several cases by all the High Courts that an Appellate Court has no power to remand a case under s 562 (now r 23), except when the lower Court has disposed of it on a preliminary point But it sometimes happens that a remand is necessary on account of an error, omission, or irregularity, for the proper trial and complete adjudication of the suit In the old Code there was no section strictly applicable to such cases and s 564 was rather restrictive, as will appear from 28 M 445, 30 M 54 16 M L J. 479 23 A 167 and 17 A 29, therefore the Legislature has omitted s 564 of the old Code, and also the words "upon such preliminary point," which occurred in the old section, and thereby has empowerd the Appellate Courts to remand a case under this rule where there has not been a proper trial in consequence of an error, omission or irregularity It is true that the Legislature has not given any legislative sanction to such a case apprehending that the power is liable to be abused But by the omissions above alluded to, it has impliedly sanctioned the power of remand in cases similar to those above referred to, where for the ends of justice, a remand would be necessary In the absence of any express provision for remand *where the case is not disposed of upon a preliminary point, but where* there are errors, omissions or irregularities in the trial, by which the

party complaining has been materially prejudiced, the Appellate Court may for the ends of justice remand the case under this rule, as the absolute prohibition contained in s. 564 has now been removed.

When the Legislature has declined to insert any express provision for remand in the cases above referred to on the ground that the power is liable to be abused, the proper course for the lower Appellate Courts would be strictly to follow the principles laid down in 23 M. 445 30 M 54. 17 A. 29 and 23 A 167, and in other cases which may hereafter be decided by the High Courts

Preliminary Point—Grounds for Remand.—The expression " preliminary point " is not confined to such legal points only as may be pleaded in bar of suit but comprehend all such points as may have prevented the Court disposing of the case on the merits, whether such points are pure questions of law or pure questions of fact There are many instances of such points such as, that a suit is barred by limitation; that the Court has no jurisdiction under some Act; that evidence tendered was not admissible, that on the plaintiff's evidence there is no evidence for the defendant to answer, in a libel suit that there is no proof of publication; *Malayath Veethil v Krishnan Nambudripad*, 43 M. L. J. 354: 31 M. L T 208 (1922) M W N 588 F B., *Mahammad Alladad* v *Muhammad*, 10 A. 289, *Rama Chandra v Hazi Kassim*, 16 M. 207.

" Preliminary point " in this rule means a matter preliminary to the general determination of the suit which the parties bring before the Court for decision In this case the preliminary point which the District Munsif had to decide was whether there was a valid award which decided the matter in dispute He found that there was such award, and that he could not, therefore, go into the merits of the dispute That finding by the District Munsif was a decision on a preliminary point within the meaning of this rule —*Krishnan Chetti v. Muthu Palandi*, 22 M. 172.

The only connotation of a preliminary point in this rule is, that it should suffice for the disposal of the suit. Any point the decision of which does not enable the Court to decide the suit is excluded from the category of a preliminary point.—*Abdul Gafar v. Muhammad Ziauddin*, 2 P R 1908, F B. 12 P W R. 1908 .96 P C. R. 1908

An Appellate Court has no power to remand a case except when the lower Court has disposed of it on a preliminary point, and thereby excluded essential evidence —*Mudun Mohan v. Bhaggomantp*, 8 C. 923 *See* also, *Deokishen v Bansi*, 8 A 172, *Abrahim Khan v. Faizunnessa Bibi*, 17 C 168, *Lall Chunilal v Mohip Singh*, 1 C. W. N. 340; *Ram Dao Mondul v Indromoni Dasi*, 3 C W N 325, *Subba Sastri v. Balachandra Sastri*, 18 M 421; *Kelu Mulacheri v. Chendu*, 19 M 157; *Seshan Pattar v Seshan Pattar*, 23 M. 447 (23 M. 445 *distinguished*); *Hafiz Abdul Rahim v Raja Hari Raj*, 22 A. 405; *Rameshur Singh v. Sheonundun*, 12 A 510 F. B ; *Mohesh Chandra v. Jamiruddin*, 29 C 324: 5 C. W. N. 509; *Muzhar Hossein v. Mussamat Bodha Bibi*, 17 A. 112, P. C ; *Bai Shri Majirajba v. Magan Lal*, 19 B 303; and *Mana Vikrama v. Gopalan*, 30 M. 203; *Brijmohun v. Deobhajan*, 5 Pat. L. J. 146 55 I. C. 484. But where the main point in a suit is decided by the Appellate Court it has no power to remand the case under this rule for disposal

on the remaining issues as its decision is not a preliminary point.—*Pouangi v. Sri Rajah Lakshmi*, 12 L. W. 667: 60 I. C. 609

Even if an Appellate Court be deemed competent to remit a case for re-hearing on an issue not raised in the pleadings nor even suggested in the trial Court, this ought only to be done in exceptional cases, for good cause shown, and on payment of all costs thrown away.—*Gopalkrishna v. Abdul Samad*, 34 C. L. J. 319 (*43 C 1101, P. C referred to*).

The award of arbitrators in a suit was set aside by the Court on the ground that it seemed so unreasonable and in appeal it was reversed and a remand ordered under Or. XLI, r 23. *Held*, it was not a decision on a preliminary point and they should have acted under Or XLI, r. 25.—*Chandan v. Mt Bibi*, 75 I. C. 198

On an appeal from the decision of a Munsif in favour of the plaintiff, in a suit for rent, the Appellate Court set aside the decree of the lower Court, ordered a new trial, and directed the amendment of the plaint by inserting *the exact boundaries of the land on which the plaintiffs claimed* the rent *Held* that, the order for amendment of the plaint was bad under this rule, since the original Court had not " disposed of the suit upon a preliminary point."—*Krishnaya Narada v. Panchu*, 17 M. 187

Where a Court of first instance decided a suit, not upon a preliminary point so as to exclude evidence of facts, but upon the merits, and upon all the evidence tendered and issues framed, the Appellate Court cannot remand the case under this rule.—*Rameshur Singh v Sheodin Singh*, 12 A 510 (2 B L. R S N 13 12 C 45 7 A 348 · 8 A. 519; 9 A 447 · 10 A 97 11 A 35, 333 and 488, *referred to*), *Hafiz Abdul Rahim v Raja Hari Raj*, 22 A 405, *Muzhar Hossein v Bodha Bibi*, 17 A 112, P. C ; *Mallikarjuna v Pathaneni*, 19 M 479, *Peri Chirla Suryanarayana v Ganapathy*, 30 M L T 314, *Narud Gani v Kazamani*, 66 I C 922, *Radha v Kamal*, 35 C L J 345 70 I C. 547 A. I R 1922 Cal. 456; *Injad Ali v Mohini*, 27 C W N 1025 80 I C 623 A I R 1924 Cal. 148; *Lekhan Singh v. Babu Ram*, 23 A L. J 880 88 I. C. 1021 A I R 1926 All 65 *Ganpat v Raj Kumar*, 1 Pat 639 67 I C. 494 A I R 1922 Pat 575, *Mayaram v Tulsi Ram* 91 I C 351: A I R 1926 Lah 184

In a suit by a tenant for ejectment and damages against a trespasser, the first Court dismissed the suit on the ground that the plaintiff had failed to establish his tenancy right, without deciding the issue as to damages The lower Appellate Court found in his favour as regards his title, and remanded the case under this rule *Held*, that the order of remand was wrong, as there was no occasion for remanding the whole case, inasmuch as it had not been decided upon a preliminary point *It ought to have referred an issue as to damages under s 566 C P Code*, 1882 (Or XLI, r 25).—*Hukum Singh v Raghubir*, 27 A 700 (1905), A W N 157

Where a Subordinate Court has not decided a case on a preliminary point, but has dealt with questions arising on the merits of the case, *no order of remand can be made by the Appellate Court under this rule*, but if the Appellate Court is of opinion that there should be a finding upon any particular issue, or further evidence should be taken on any

such issue, it may make an order of remand under Or. XLI, r. 25.—*Rakhit Mahanta* v. *Piddo Bauri*, 9 C. W. N. 54. *See* also, *Ambika Churn* v. *Kala Chand*, 10 C. W. N 422.

Where a District Munsif without entering into the merits of the case, dismissed a suit on the ground that the plaintiffs had no cause of action and on appeal the Appellate Court reversed his decree and remanded the case *Held*, that the suit had been disposed of upon a preliminary point within the meaning of this rule and that the remand was right.—*Kanakammal* v. *Rangachariar*, 20 M. 25.

Where several issues are raised in a suit one of which is that of undue influence, and the Court dismisses the suit on a finding that there was undue influence without a finding on the other issues, the decision amounts to a disposal of the suit upon a preliminary point within the meaning of this rule.—*Mahant Rachu* v. *Mahant Raghunath*, 2 Pat. L. J. 398

The defendant in a suit on the day fixed for hearing applied for an adjournment on the ground of illness. Her application was refused and the case decreed *ex parte*. The Appellate Court reversed the decree and remanded the case under s. 562, C. P. Code, 1882 On appeal to the High Court—*Held*, discharging the order of remand, that the suit having been tried on the merits, the lower Appellate Court could not remand the case under this rule, but ought to have proceeded under ss. 568 and 569, C P. Code, 1882 (Or. XLI, rr. 27, 28).—*Parvatishankar* v *Bai Naval*, 17 B 733.

The C. P. Code does not make any provision for an order of remand where all the issues have been settled and tried.—*Injad Ali* v. *Mohini*, 27 C. W N 1025

Where the first Court had framed all the necessary issues and decided all those issues, and the lower Appellate Court reversing the decision on one of the issues remanded the case for trial:—*Held*, that order of remand was not only irregular but illegal.—*Manager of the Court of Wards* v. *Ramasami Reddi*, 28 M 437; 15 M. L. J. 236. (19 M. 479, *referred to*) *See* also, *Sadak Ali* v. *Safar Ali*, 56 I C. 984; *Malayandi* v. *Bomman*, 17 L. W. 159 71 I C. 204; and *Munisami Naiker* v. *Muniswami Naiker*, 1923 M. W. N. 11.

Where a District Court reversed the District Munsif's decree, and remanded the case for revised finding on the merits: *Held*, that this procedure was *ultra vires* and illegal—*Mallikarjuna* v. *Pathaneni*, 19 M 479.

An order remanding a case is not legal where all the questions raised between the parties and on which they went to trial were decided and the questions so raised were purely questions of law.—*Arumugam Chetty* v. *Raja Jaganeera Rama*, 28 M. 444.

An Appellate Court cannot remand a case for making a person defendant in the suit, and to try the question of title between him and the plaintiff The right of framing new issues arises where the issues framed are insufficient to dispose of the matters raised in the plaint.—*Bhoobun Das* v *Bilash Money*, 1 C. L. R. 415 (9 B. L. R. 107. 12 W. R. 404 *distinguished*).

Where a lower Court rejected an application of an intervenor, the Appellate Court cannot remand the case with directions to make the intervenor a party.—*Khandakar Kafaetoollah* v. *Mahomed Kabel*, 9 W. R. 345 *See also*, *Bulaki Singh* v. *Jaikishen*, 7 N. W. P. 203.

An Appellate Court cannot remand a case under this rule for addition of necessary parties. In such case the proper course for the Appellate Court is to join the parties, and, if necessary, to refer issues to the Court of the first instance for trial under s. 566, C P Code, 1882 (Or. XLI, r. 25)—*Ganesh Bhikaji* v *Bhikaji Krishna*, 10 B 398 But see, *Mihin Lal* v. *Intiaz Ali*, 18 A. 332.

It is competent for an Appellate Court to remand a case when the Court of first instance records evidence on all the issues, and at the final hearing decides the suit erroneously on some particular point without expressing any opinion on the other issues —*Ramchandra Joshi* v *Hazi Kassim*, 16 M 207. Followed in *Matadin* v *Jamna Das*, 27 A 691 2 A L J 685, in *Meghan Dube* v *Pran Singh*, 30 A 63 5 A L J. 14; and in *Salim Sheikh* v. *Nazir Khan*, 8 C L J 159. 12 C. W N. 167-n *See also*, *Kamta* v. *Parbhu*, 39 A 165; *Perumbra Nagar* v *Subramanian*, 23 M. 445; *Habib Baksh* v. *Baldeo Prasad*, 23 A. 167; *Radha Kishen* v. *The Collector of Jaunpur*, 23 A. 220, P. C. 5 C W N 153, P. C. (affirming 20 A 195)

Where the first Court heard the entire suit, and found all issues in favour of the plaintiff except one, namely, whether the suit was maintainable having regard to the provisions of Or XXI, r 22, and dismissed the suit on the finding that the suit was not maintainable. *Held*, that the suit was disposed of on a preliminary point within the meaning of this rule —*Bhadai* v. *Shaikh Manowar*, 4 Pat L J 645

Where the first Court dismissed a suit on the issue of title without deciding the issue of limitation and the lower Appellate Court decreed the suit reversing the finding on the issue of title, without recording any finding on the issue of limitation. *Held*, that the case must be remanded to the lower Appellate Court for findings on the remaining issues —*Kailash Chandra* v *Kunja Behari*, 4 C L J. 86.

Where no preliminary point has been wrongly decided by the Court of first instance, and no evidence has been excluded, and the Appellate Court considers the issues nevertheless, to have been defective or insufficient, it is the duty of the latter not to remand the case, but to resettle the issues and to determine the case itself.—*Futtechoolah* v. *Oomdanissa*, 14 W. R 69. But see, *Guru Prasad* v. *Ras Mohun*, 1 C. L. R. 431. *See* also, *Habibullah* v *Lalta Prasad*, 34 A. 612

An application under s. 108, C P. Code, 1882 (Or. IX, r. 13), was rejected on the ground that there was neither fraud nor suppression of summons. The District Judge remanded the case for trial on the merits *Held*, that the case having been tried on the merits, the District Judge had no jurisdiction to remand the case.—*Sonaulla* v. *Beahul*, 7 C. L. J 379.

Where the finding of the lower Appellate Court on the existence of a custom or usage was mainly based upon irrelevant matters, the High Court in special appeal remanded the case for retrial, holding that the

appeal was not properly tried.—*Palakdhari Rai* v. *Manners*, 23 C 179. *See* also, *Womes Chunder* v. *Chundee Churn*, 7 C. 293.

The lower Appellate Court not having decided material issues and having based its decree on a document not recorded in the case, the decree was reversed and the case remanded for a fresh decision on the merits — *Nichhabhai Pragji* v. *Issee Khan*, 2 Bom. H. C. 313; *Dalpat Singh* v. *Nanabhai*, 2 Bom. H C. 323; *Bai Vijkar* v. *Fakirbhai*, 2 Bom. H. C. 335; *Chandrabhagabhai* v. *Kashi Nath*, 2 Bom H C 341; *Balaji Visvanath* v. *Dharma*, 2 Bom H. C 385; *Luchmee Ram* v. *Mahani Ram*, 1 Agra 10; *Gooljchar* v *Bunno*, 1 Agra 252; *Sajan* v. *Roopram*, 2 Agra 61; *Shiam Lall* v. *Narain Dass*, 2 Agra 106; *Shadee Ram* v. *Surma*, 2 Agra 110; *Lutchman* v. *Jogal Kishore*, 3 Agra 99; *Mahammad Valad* v. *Ibrahim Valad*, 3 Bom. H. C. 160; *Pravati* v. *Bhiku*, 4 Bom H. C. 25; *Ajuram Maniram* v *Kusaji*, 4 Bom H C. 43; *Goluck Chunder* v. *Anunt Kishore*, 25 W. R. 38

The lower Appellate Court has no power to remand a case, which has come before it on appeal, to the Court of first instance for a second trial, except where the first Court has decided the case upon a preliminary issue in such a way as to cause an absence of material evidence bearing upon issues on the merits between the parties —*Lala Shoobh Narain* v. *Nursingh Narain*, 20 W R 148

An Appellate Court is not justified in remanding a case, merely because the lower Court has disposed of it on a preliminary point, unless such point has been so disposed of as to exclude evidence of fact which appears to the Appellate Court essential to the rights of the parties — *Jook Maya* v. *Ram Chunder*, 10 W. R. 378 *See* also, *Muniapa* v. *Iyasamy*, 5 M. H. C. 313.

The Judge, after disposing of the case on the only point on which the Munsif had decided, *viz*, whether there was a cause of action, and having satisfied himself that there was not sufficient evidence on the record to enable him to pass a proper decision on the merits was held clearly right in remanding the case to the Munsif.—*Brommo Moyee* v. *Koomodinee Kant*, 17 W. R 466.

When the decision of a lower Court is not on a preliminary point, the lower Appellate Court cannot remand a suit to that Court, with directions to take further evidence and to retry the case, but the appeal must be kept pending on the file, and the record must be sent to the lower Court, with orders to take the necessary evidence —*Kalee Sunkar* v. *Kishto Doolal*, W. R. (1864) 296

Where a suit instituted in the Revenue Court is dismissed by the Court of first instance, on the ground that it should have been instituted in the Civil Court, and the Appellate Court affirms the decisions of the first Court, the Appellate Court should, under s. 208 of the N. W. P Rent Act, 1881, remand the case to the Civil Court competent to entertain it for disposal on the merits.—*Ahmaddin* v. *Majlis Rai*, 5 A. 438 But see, *Girwar Singh* v *Sita Ram*, 10 A. 31.

Held, that an Appellate Court is not empowered by the Civil Procedure Code to order or allow a plaint to be amended, or to remand a case

under this rule for the purpose of such amendment —*Farzand Ali* v. *Yusuf Ali*, 2 A. 669. But see, *Lingammal* v. *Chinna*, 6 M. 230, where it has been held that when a plea of misjoinder has been allowed and the suit decided and an appeal brought, the Appellate Court should dispose of the suit in the mode in which the lower Court ought to have disposed of it, by returning the plaint for amendment

Where the evidence is accepted by an Appellate Court as sufficient to warrant a decree, and the case is only remanded for a defect of parties, it is justified, when the case is returned by the first Court, in respecting the former judgment and looking upon the evidence as *prima facie* good and sufficient.—*Wise* v. *Ishan Chunder*, 14 W R. 380.

This rule authorizes a remand only where the entire suit, and not merely a portion of it, has been disposed of by the Court below upon a preliminary point —*Banwari Lal* v. *Samman Lal*, 11 A. 488. Followed in *Mahesh Prasad* v *Ranjar Singh*, 27 A 163 (165) *See* also, *Vemi* v. *Nallappa*, 11 L W 611; *Jauahor* v *Fateh Mapton*, 97 I C 1: A I. R. 1926 Pat. 514.

A case ought not, as a rule, to be remanded upon a point which has been framed as an issue by the Court below, and brought to the attention of the parties, and where they have failed at the trial to give any evidence upon it —*Ram Prasad* v. *Abdul Karim*, 9 A 513

A Sub-Judge decided a case on the grounds of *res judicata* and limitation. On appeal the Judge upheld the decision on the point of *res judicata* without deciding the point of limitation On second appeal, the High Court reversed the Judge's decision on the point of *res judicata*, and remanded the case for trial on the merits On receipt of the order of the High Court the Judge reversed the decision of the Sub-Judge without giving any decision on the point of limitation, and remanded the case. On appeal to the High Court, *held* that the Judge's order of remand was unauthorized under this rule —*Raisangji* v *Balvant Rao*, 11 B 663.

Where the lower Court had decided a case on the merits, and the Appellate Court did not find that there had been any omission to try any issue or determine any question essential to the decision of the case on the merits, or that further evidence was necessary to enable it to determine any such issue or question *Held*, the Appellate Court was in error in remanding the case for a fresh trial —*Mahesh Chandra* v *Madhav Chandra*, 2 B L. R S N 13 10 W R. 388.

Inherent Power of Remand—Remand on the Grounds of Error, Defect or Irregularity.—Under Or XLI, r 23, no order of remand can be made except when the suit has been disposed of on a *preliminary point* But it sometimes happens that a remand is necessary in cases where the lower Court has committed any error, omission or irregularity, by reason of which there has not been a proper trial or an effectual or complete adjudication of the suit and the party complaining of such error, omission or irregularity has been materially prejudiced thereby. S 564 of the old Code, which prohibited the Appellate Court from remanding a case except as provided by s. 562 (Or XLI, r 23), having now been omitted as unduly restrictive in its provisions, the Appellate Court is free under s 151 to make an order of remand though the case may not fall either under this

rule or rule 25 —*Narottam* v. *Mohanlal*, 37 B. 289, 293; *Jambulayya* v. *Rajamma*, 36 M. 492: *Zohra Bibi* v. *Zobeda*, 12 C. L. J. 268; *Ghuznavi* v. *The Allahabad Bank*, 41 C. 929; *Raghunandan* v *Jadunandan*, 3 Pat. L. J. 253-E.; *Brij Indar* v. *Kanshi Ram*, 44 I. A. 218, 220: 45 C 94, 107; *Bhairab* v. *Kali*, 37 C. L J. 491: 74 I. C. 1038: A. I. R 1923 Cal. 606; *Anthappa Chetty* v. *Ramanathan*, 37 M. L. J. 536: 53 I. C 401; *Subba* v. *Krishnama Chari*, 45 M. 449. 68 I. C. 869. A. I. R 1922 Mad. 112; *Umri* v. *Shah Mohammed*, 5 Lah. L J. 269: 74 A I. R. 1924 Lah. 36; *Bhup Sing* v. *Prem Singh*, 5 Lah. L. J. 384: 76 I. C. 496: A. I. R. 1924 Lah. 362. The Allahabad High Court treats the question as unsettled but puts a wide construction on r. 23 —*Gopal Prasad* v *Ram Kumar*, 44 A 176: 64 I. C. 878: A I. R. 1922 All. 254.

Ex parte decision in Court of first instance after hearing plaintiff's evidence—Order by Appellate Court reversing decree and remanding suit for decision after taking further evidence as the parties might produce *Held* that, notwithstanding sections 562 and 564, C. P. Code, 1882, an Appellate Court has inherent power, in such a case, not only to reverse the decree passed on evidence given by the plaintiff only, the defendant being *ex parte* but also to direct a retrial of the case —*Perumbra Nayar* v *Subrahmania*, 23 M. 445.

When a suit is decided *ex parte*, an Appellate Court to which an appeal is preferred under s. 540, C. P. Code, 1882 (s 96), has jurisdiction to reverse the decree of the lower Court on the ground that such Court was wrong in proceeding to decide the suit *ex parte* and remand the suit for re-hearing.—*Sadhukrishna* v. *Kuppan*, 30 M. 54; 16 M. L J. 479 (23 M 445 *followed;* 23 C. 738, 17 B. 733, and 23 M. 260 *dissented from*)

It is competent to the Appellate Court on an appeal to reverse a decree and remand the suit to the trial Court quite apart from the provisions of Or. XLI, r. 23, if there has been a defective trial, *i.e.*, a refusal to grant an adjournment.—*Jethalal* v. *Varjlal*, 23 Bom. L R. 769: 63 I. C. 478 (30 M. 54 *followed*).

It is competent to an Appellate Court to remand a case under this rule where the Court of the first instance having framed issues and recorded all the evidence, has decided the suit with reference to its finding upon one or more of the issues framed by it, leaving other issues undecided.—*Matadin* v. *Jamna Das*, 27 A. 691. 2 A. L J. 658 (16 M. 207 *followed*) Followed in 30 A. 63: 5 A L J. 14, and in 8 C L J. 159.

Section 564, C. P. Code, 1882, must be read subject to the other provisions of the Code, for example, those contained in ss. 27, 32 and 53 of the C. P. Code, 1882. An Appellate Court has power to make an order under any of those sections and in order to give effect to the provisions of the section which is applicable, it is necessary that it should in certain cases send back the case to the Court of the first instance Under such circumstances s. 564, C. P. Code, 1882, will not preclude an Appellate Court from remitting a case to the Court of first instance.—*Habib Bakhsh* v. *Baldeo Prasad*, 23 A. 167 (12 A. 510; 17 A. 29; 18 A. 131, 332 and 390; 10 B. 398; and 19 M. 157 *referred to*).

The plaintiffs in a suit produced both oral and documentary evidence in support of their claim, but the Court being satisfied with the documentary evidence and without recording the evidence of the witnesses tendered by them passed a decree in their favour. On appeal by the defendants, the Appellate Court without taking any fresh evidence, reversed the decree. On appeal by the plaintiffs to the High Court, it was *held* that though there was no section of the Code of Civil Procedure strictly applicable to the circumstances of the case, the Court was, notwithstanding s. 564, C. P. Code, 1882, warranted *ex debito justitiæ* in setting aside all proceedings of both Courts below, and in directing the Court of first instance to retry the case admitting all admissible evidence which had been previously tendered to the first Court.—*Durga Dihal* v. *Anoraji*, 17 A. 29.

Held, that s 562 of the C. P. Code, 1882 (this rule), applied not only to cases where the first Court had expressly excluded evidence, but also to cases where the parties were or might have been misled by the act of the Court as to the issues or the evidence necessary, and where, in consequence of the Court erroneously considering one issue only, the parties did not tender or bring forward their evidence and that, as in the present case, evidence had been excluded in this broad sense, s. 562 (the operation of which in such cases should be rather expanded than limited) was applicable, and the case should be remanded for trial of the remaining issues —*Mahammad Allahdad* v. *Muhammad Ismail*, 10 A 289.

When, in second appeal, it appears that the lower Appellate Court does not substantially comply with the provisions of s 574, C. P Code, 1882 (r. 31 of Or XLI), the procedure is to make an order setting aside the decree and remanding the case to the lower Appellate Court to be disposed of according to law.—*Saravana Pillai* v *Sesha Reddi*, 31 M. 469, F B . 11 M. L. J 34 (20 M 496, 22 M 12, 25 C 97, 17 B. 428, 19 B 551, *referred to*). *See* also, *Santishwar* v *Lakhikanta*, 13 C W. N. 177

An Appellate Court can remand a case second time on account of error, defect, or irregularity of procedure in passing a decree or order, provided the error, defect or irregularity be such as to affect the merits of the case or the jurisdiction of the Court When a suit has been regularly heard and determined, and on appeal the decree is reversed, the Appellate Court has the discretionary power to remand the case only if the decree should have been upon a preliminary point, and have the effect of excluding the consideration of evidence essential to the rights of the parties.—*Muniappah Naidu* v *Iyasamy*, 5 M H C. 313.

When an Appellate Court is of opinion that a person, not a party to the suit, should be a party to the record, its proper course is to remand the case to the first Court with directions to bring on the particular person as a defendant or as a plaintiff, if he consents and give him opportunity to file his written statement and to produce his evidence —*Mihin Lal* v *Intiaz Ali*, 18 A 332 But see, *Ganesh Bikhaji* v *Bhikaji Krishna*, 10 B 298.

Where a case had been decided under the provisions of ss 10 and 11 of the Oaths Act (X of 1873) with reference to the depositions of a person appointed by agreement of parties as referee, and where, on appeal, it was

found that the said depositions did not fully cover the questions in issue between the parties: *Held*, that the case should be remanded to the lower Court for disposal according to the usual procedure.—*Mahabir Prasad* v. *Mahadeo Dat*, 13 A. 386.

Improper or Erroneous Order of Remand.—A decree in a suit having been passed on the merits by the Court of first instance, the Court of Appeal, being of opinion that an issue not tried by the former Court ought to have been tried, reversed the decree, and under this rule remanded the case for trial upon the issue. *Held*, that the order reversing the decree and remanding the case for trial of the issue was improper, and that the proper course for the Appellate Court should have been to follow the procedure as laid down by s 566 and 567 of the Code, 1882 (Or. XLI, rr 25 and 26). If a remand was ordered in a case in which it ought not to have so ordered, both the order of remand and all the proceedings subsequent thereto are void and illegal.—*Ramashur* v. *Sheodin*, 12 A. 510 *Mokund Lal* v *Hurballabh*, 12 C L. R. 136

Where a lower Appellate Court instead of remanding a suit under s 566, C. P. Code, 1882 (Or XLI, r. 25), as it ought to have done, remanded it under this rule after setting aside the decree of the first Court, and where no appeal was preferred against this erroneous remand order. *Held* that, having regard to the provisions of s. 99, the remand order and the subsequent proceedings were not null and void, as by the remand there was no error affecting the jurisdiction of the Court or the merits of the case —*Mohesh Chandra* v. *Jamiruddin*, 28 C 324: 5 C. W. N. 509 (12 A 510 *dissented from*) Followed in *Troylakya Mohini* v. *Kaliprasanna*, 11 C W N 380, in *Durgahinkar* v *Konchai Ranza*, 5 C L. J. 71, and in *Debendranath* v *Prasanna Kumar*, 5 C L. J. 328 But see, *Palani* v. *Rangia Dass*, 32 M. 83, where it has been held that an erroneous order of remand is not merely irregular but illegal and cannot be invalidated by s. 578, C P Code, 1882 (s. 99) *See* also, *Baikantanath* v. *Nawab Salimulla*, 12 C W N 590 6 C L J 547, where it has been further held that proceedings subsequent to an illegal order of remand might be valid under certain circumstances

Whether upon a remand order being wrongly made, the decree and all the proceedings taken under that order, are null and void, depends upon the circumstances in each case and on the nature of the invalidity of the remand order. If the remand order is finally set aside and is such an order as ought not to have been passed at all in any case, it may be that the proceedings in the Court below fall with it It would be turning the law into absurdity and would amount to a denial of justice if a proper trial which has taken place under a remand order made by the Appellate Court and in obedience to such remand order, now held to be invalid, whereas as the result of the High Courts' own decision that remand order turned out to have been prefectly justified.—*Raj Kali* v. *Gopi Nath*, 41 A. 211: 20 A L J 44

Where the order of remand was found to be invalid as made without jurisdiction, *held*, that all proceedings taken by the Court of first instance, after the remand and pending the hearing of the appeal against the remand order, were null and void, inasmuch as the jurisdiction of that Court to hear the case upon remand depended upon the validity of a remand

order. An appeal, therefore, lay from the order of remand notwithstanding that the Court of first instance had subsequently made what purported to be a final decree in the case.—*Jatinga Valley Tea Co.* v. *Chera Tea Co.*, 12 C. 45. But see, *Madhu Sudan* v. *Kamini Kanta*, 9 C. W. N. 895; 2 C. L. J. 35-n.: 32 C. 1023. Dissented from in 30 A. 479, F. B. (29 A. 659 *overruled*)

Where an order of remand is illegal no consent of parties can make it valid.—*The Manager of the Court of Wards* v. *Ramasami Reddi*, 28 M. 487; 15 M. L. J 235 (16 M. 479 *referred to*). *See* also, *Baikuntha Nath* v. *Nawab Salimulla*, 12 C. W. N. 590. But *see*, 12 C. W. N. 590: 6 C L. J. 517 In *Palani* v *Rangia Dass*, 32 M 83 4 M L. J. 479, it has been held that even if such illegal order might be validated by consent or waiver, neither the omission of the plaintiff to appeal nor his acquiescing in the trial on remand amounts to such consent or waiver

Inherent Powers of Court to Order a Remand.—An Appellate Court has inherent powers to order a remand in cases other than the case specified in Or. XLI, r. 23 if the justice of the case demands it —*Sashi Mukhi* v. *Abinash*, A. I. R. 1922 Cal 279; *Ghuznavi* v. *The Allahabad Bank Ld.*, 44 C. 929: 41 I C. 598; *Atul Chandra* v. *Sheikh Kobadali*, 64 I C. 436; *Bisai Nath* v *Tara Nath*, 72 I. C 588 1923 C. 385; *Bhup Singh* v *Prem Singh*, 5 Lah. L. J. 384; *Bhairab* v *Kali Kumar*, 37 C. L J 491: A I R 1923 Cal. 606. *Misrisahu* v. *Bishu*, 29 C. L J. 419 52 I C. 958; *Brij Indar Singh* v *Kanshi Ram*, 44 I. A 218 45 C 94, 107.

Power of High Court to Remand.—Where an issue has been raised and determined by the first Court and the appellate Court on the evidence adduced, it is not within the competence of the High Court in second appeal to remand the case for rehearing upon that very issue —*Gunput Rao* v. *Raj Kumar*, 67 I C 494

Where the plaintiff has not come into Court with a definite statement of facts necessary for him to succeed and with all his evidence, he cannot in second appeal ask for a remand so as to give him an opportunity to supplement his case in the Court below —*Jatindra Mohan* v *Bejoy Chand Mahatab*, 71 I C 284.

Power of the High Court to Go into the Merits on Appeal from a Remand Order.—The Court of first instance dismissed a suit as barred by limitation In appeal that decision was reversed, and the case was remanded under this rule Against the order of remand the defendant appealed to the High Court under Or. XLIII, r 1, cl (u) It was contended by the plaintiff that the High Court had no power to decide the point of limitation but could only consider whether the order of remand satisfied the requirements of this rule *Held* by the Full Bench, that in an appeal against such an order of remand, the power of the High Court is not confined to the question whether that order satisfies the requirements of this rule, but may also determine the correctness of the lower Appellate Court's decision on the preliminary point on which the Court of first instance disposed of the case —*Badam* v *Imrat*, 5 A 975, *Bhau Bala* v *Bapaji Bapuji*, 14 B 14 (12 B 589 *referred to*, 3 A 675 *followed*). *See* also, *Chinnasami* v *Karuppa*, 21 M 234, *Abrahim Khan* v *Faizunnissa Bibi*, 17 C 168, *Lohi Mahto* v *Aghoree Ajail Lall*, 5 C. 144 4 C L

R. 465; *Hasan Ali* v. *Siraj Husain*, 16 A. 252; *Sankaran* v. *Roman Kutti*, 20 M. 152. But see, *Sohan Lal* v. *Azizunnissa*, 7 A. 136; *Noimullah Paramanik* v. *Grish Narain*, 8 C. 674.

Decision on Question of Law Already Decided by Order of Remand Whether can be Reopened.—Where an appellate Court remands to the Court below, it is not open to the appellate Court to reopen a question of law already decided by the order of remand when the case again comes on appeal from the final decree after the remand.—*Vasted Mushkir Saib* v. *Karnam Chowdappa*, 40 M. L J. 528: 14 L. W. 236; *see* also, *Gopal Rao* v. *Nemi Chand*, 61 I. C. 575; *Janki Shah* v. *Mahomed Abbas*, 70 I. C. 983.

Where the High Court in second appeal differs from the lower Court on an issue of law and remands the case to the Court below, the order of the High Court is binding upon that Court and cannot be questioned in an appeal from the final decree passed after remand.—*Rai Brij Raj Krishna* v *Chathu Singh*, 4 Pat. L. T. 35.

Powers and Duties of Succeeding Judge with Regard to Remand Case.—Disposal of suit by lower Court on preliminary point.—*Reversal* by Appellate Court of such decree on such point and irregular remand of case under this rule for trial of certain issue. *Held*, that the succeeding Judge or the Appellate Court cannot retry and decide such preliminary point —*Suraj Din* v. *Chattar*, 3 A. 755.

Where a case is remanded to a particular Judge merely to record the reasons for his finding, his successor, if the deciding Judge has left the district, acts without jurisdiction when he reheats the whole appeal *de novo*.—*Bhyrub* v. *Khettur Mohan*, 5 W. R. 124; *Lalla Bhoyro Lall* v. *Lalla Mokoond Lal*, 2 W. R 175.

Where a case is remanded to the lower Court to record the reasons for its judgment, if the Judge who passed the decree is absent, the superior Court should be informed of it by his successor. Under such circumstances his successor has n [illegible] should be made to the Bench which granted t[illegible] the present Judge to retry the case *de* [illegible] *han*, 1 Ind Jur. N S. 101.

If the Judge of the Court to which the case is remanded for not complying with the requirements of s. 574, C P. Code, 1882 (Or. XLI, r. 31), is the Judge who heard the appeal in the first instance, he is not bound to rehear the appeal if he considers that the case might be properly disposed of without so doing In such a case, his writing of judgment satisfying the requirements of that rule will be a sufficient compliance with the order to dispose of the case according to law. But when the Judge of the Court to which the case is remanded is not the Judge who heard the appeal in the first instance as also in cases where the Judge, though the same, considers such a course necessary for a proper disposal of the case, a rehearing is necessary for a disposal of the case according to law.—*Sararana Pillai* v. *Sesha Reddi*, 31 M. 469, F. B.: 18 M. L. J. 34

Dismissal of suit by Munsif on preliminary point —Remand by Sub-Judge on appeal—Fresh appeal before Second Sub-Judge, who disagrees

with the finding of the former Subordinate Judge. Where there are two Sub-Judges in the same place, one of such Judges is not competent to overrule the decision of the other. The Court is one, thought there are separate presiding officers.—*Kharag Prasad* v. *Durdhari Raj*, 14 A. 348 (3 A. 755, and 6 A. 169 *referred to*).

Where a single Judge of the High Court hearing a second appeal remands it for fresh decision to the lower Court and the case then comes up on second appeal from the revised decision of the lower Court, it is not open to the High Court to question its own earlier judgment remanding the case to the lower Court.—*Munshi Lal* v. *Ramasis*, 3 Pat L T. 343: 65 I. C. 175.

An order of remand by a Subordinate Judge is final so far as the purpose of the remand goes, and cannot be set aside by his successor.—*Luleet Pandey* v. *Byjnath*, 14 W R 285.

A Sub-Judge on appeal, having framed an issue, remanded the case under this rule to the first Court for trial thereof, but instead of directing that the finding should be returned to his own Court, he directed the Munsif to give the plaintiff a decree in accordance with the finding at which he might arrive. The Munsif having decided the case accordingly, it went up on appeal to the Additional Judge *Held*, that the proper course for the Additional Judge was simply to confine himself to considering whether the decision of the Court below on the issue directed was correct or not; he had no power to go behind the order of the Sub-Judge on the previous occasion —*Bodun Buroοan* v *Abdool Gunny*, 19 W R. 281.

Whether Appellate Court has Power to Remand a Case for Trial to a Court Other than the Original Court.—Order, XLI, r 23, C P Code, contemplates that the remand should be to that Court from whose decree the appeal is preferred but if the appellate Court has power to transfer a case from one Court to another, there is nothing illegal in remanding the case to another Court —*Chhaju* v *Sham Lal*, (1922) Lah 239 66 I C 113.

Procedure After Remand.—When a case is remanded for trial some date should be fixed for the re-hearing, giving the parties opportunity to appear and take measures to carry on the suit.—*Haradhun* v *Protap Narain*, 14 W. R. 401.

After a case is remanded on appeal, reasonable time should be given to the parties to appear and conduct their case; and if they fail to appear before the lower Court, the case should be dismissed for default —*In re Kalee Mohun*, 17 W. R 70

This rule contemplates a remand back to the Court which first disposed of the suit, and to no other Court —*Bai Shri Majirajba* v. *Magan Lall*, 19 B. 303.

Where a District Judge, after transferring a case from the file of a Sub-Judge decided it himself, and on appeal the High Court remanded the suit under this rule to the District Court —*Held*, that after the remand order, the District Judge had no power to transfer the case to the Sub-Judge, but was bound to try it himself Section 25 of the C P. Code,

1882, has no application to a case remanded under this rule.—*Sita Ram* v. *Nauni Dulaiya*, 21 A. 230. But *see* the amended s. 24 of the present Code

Effect of Order of Remand.—An order to a lower Appellate Court implies a reversal of the first judgment of that Court.—*Kebul Kishen* v. *Ambala*, 7 W. R 326.

The effect of an order of remand for a new trial is entirely to nullify the first decision, and, to re-open the whole case.—*Tarinee Kant* v. *Koonj Beharee*, 12 W. R 112 *See* also, *Gudadhur* v *Sushee Moone*, 21 W R 7

When a decree is set aside in appeal and the case is remanded under this rule, the appellant is entitled to restitution of the property taken possession of in execution of the decree so set aside, although an appeal has been preferred against the order of remand.—*Saroda Prasad* v. *Saudamini*, 3 C L J. 181 (14 C 484, 21 C 989, *referred to*)

Where a case is sent back for trial on its merits, the order of remand shuts out objections regarding limitation or *res judicata*—*Sheo Sahoy* v *Ram Pershad*, 24 W R 333.

Where a case was remanded for reconsideration of the whole evidence with the exception of one specified point, and the Judge after consideration came to the conclusion that his finding on that point had been erroneous, it was held that he could not, without a miscarriage of justice, allow that finding to remain unchanged —*Huree Nath* v. *Issen Chander*, 21 W R. 316

When a case is remanded to the lower Appellate Court for decision of a question, *e g*, one of title, that Court has no authority to go beyond the order of remand, and re-open a matter already adjudicated upon between the parties —*Shaheb Tewaree* v *Kishoree Sahoy*, 24 W. R. 330

Under an order of remand in a boundary suit in which the Privy Council had made an order in a former appeal, *held* that the High Court had no power to go behind the order of the Privy Council, and that so much of the High Court's decision as re-opened on fresh evidence what had previously been decided, must be set aside, but that the evidence that had thus been brought to bear on the case was entitled to consideration so far as it bore on those portions of the suit in respect of which the former decision of the Privy Council was not conclusive.—*Court of Wards* v. *Leelanund*, 25 W R. P C 157

Where a Full Bench ruling is brought to the notice of a Judge retrying a case on remand, he is bound, whether the ruling has been published or not, either to ask the pleader to produce the decision relied on, or to take other means for satisfying himself as to the ruling of the High Court, so as to apply the correct law to the case —*Tumeezoodeen* v. *Mohin Chunder*, 18 W R. 227

Rights of Parties After Remand.—Where a case is remanded for the trial, of an issue which had not been laid down by the Court which tried the case, the parties are entitled to have the opportunity of giving evidence upon it although the order of remand contains no express direction to that effect.—*Kristo Churn* v. *Mugun Chuckerbutty*, 10 W. R 491.

When a suit has been dismissed upon a preliminary point, and the decision on that point has been reversed by the Appellate Court, and the case goes down with a view to trial on its merits, evidence may properly be received *even from defendants who had appeared and a fortiori from a* defendant who had not appeared.—*Koonj Behary* v. *Kalee Churn*, 8 W. R. 285.

Where a case has been remanded by an Appellate Court in an appeal against the decision given after the remand, fresh points which might and ought to have been urged before the remand, cannot be allowed to be taken. —*Anzar Ali* v. *C. E. Grey*, 2 C L. J. 403.

A defence of limitation cannot be raised for the first time after there has been a remand on special appeal from the decree of the Court which has heard the cause on remand —*Moru Bin* v. *Gopal Bin*, 2 B 120 (6 W. R. 178 *followed*; 9 Bom. H C 282, 11 Bom H. C. 283 *distinguished;* 2 Bom. H. C. 162, 4 Bom H. C 197 *referred to*) *See* also, *Dattu* v. *Kasai*, 8 B. 535.

Unless such objection is taken in memorandum of appeal, it is not open to an appellant at the hearing of the appeal to question the validity of an order of remand previously made in the case under this rule —*Tilak Raj Singh* v. *Chakardhari Singh*, 15 A 119.

Court-fee.—*Held* that, in an appeal under s 10 of the Letters Patent from an order of a single Judge of the Court remanding a case under this section, the proper Court-fee is Rs 2 —*Ballai Rai* v. *Mahabir Rai*, 21 A. 178.

Revision.—No revision lies against an order of remand —*Bisha nath* v. *Mt Ramsin*, 1923 A. 464.

Appeal from an Order of Remand under this Rule.—Under Or XLIII, r. 1 (*u*), an appeal lies from an order remanding a case, where an appeal would lie from the decree of the Appellate Court The period of limitation for an appeal from an order of remand is 90 days from the date of the order, under Art 156 of the Limitation Act But where a party submits to an order of remand and does not appeal against the order he cannot dispute its correctness at a latter stage of the appeal —*Musst Mashi-un-nissa* v *Musst. Kanib Sughra*, 19 A L. J 139; 60 I. C 975

An appeal lies from an order of remand under this rule, even though before the filing of the appeal, the suit has been decided by the first Court in compliance with the order of remand.—*Jatinga Valley Tea Co* v *Chera Tea Co*, 12 C 45 Followed in *Uman Kuari* v *Jarbandhan*, 30 A. 479, F B : 5 A. L J. 447 · 4 M L T 162 (29 A 659 *overruled*, 32 C 1023: 9 C. W. N 895 *dissented from*) *But* see, *Madhu Sudan* v *Kamini Kanta*, 9 C W N 895; 2 C L J 35-*n* · 32 C 1023, where it has been held that an appeal from an order of remand passed under this rule cannot be entertained if presented after the disposal of the suit Followed in 29 A 659, and in *Gulzari Mal* v. *Kalimunnissa*, 30 A. 191 5 A L J 270 But 29 A 659 has been overruled in 30 A 479, F B It would appear from the above rulings that there is a diversity of opinion on the above point

No appeal lies to the High Court from a general order of remand by the lower appellate Court on the ground of the mishandling of the trial in

the first Court.—*Firm Chajju Mal Munna Lal* v. *Firm Pyare Lal Jumma Prasad*, 63 I. C. 858.

Held, that an order under this rule is not ordinarily capable of being the subject of an appeal to His Majesty in Council, though it may possibly be so if the order in question has the effect of deciding finally the cardinal point in the suit —*Habibunissa* v *Munawarunissa*, 25 A 629 (17 A. 112, 8 B. 548, and 10 M I A 340 *referred to*).

Though an appeal lies under Or XLIII, r (1) (u) of the C. P Code from an order of remand, no appeal will lie from the order when the order itself is made in an appeal preferred under any other clause of that rule.—*Naubat Singh* v. *Baldeo Singh*, 33 A 479; *Mathura* v. *Nabin Chandra*, 24 C. 774, *Jhanday Lal* v. *Sarman Lal*, 21 A. 291.

An appeal lies from an order remanding a case under Or. XLI, r. 23, even if the suit has been decided on a preliminary point.—*Sashi Mukhi* v. *Abinash*, A I R 1922 Cal 279

Appeal from Remand Order Passed Otherwise than under Order XLI, Rule 23.—No appal lies against an oder passed by an Appellate Court remanding a case otherwise than under Or XLI, r. 23 of the Civil Procedure Code —*Mahendra* v *Ram Taran*, 23 C. W. N. 1049: 31 C. L J. 357 But the question is whether an appeal lies in cases where the order purports to be an order under Or XLI, r 23, although the order ought not to have been made under that rule The question was answered in the affirmative by the Calcutta High Court in *Basumati* v *Taritbasini*, 31 C. L J 354 · 44 I C 416, where Richardson, and Beachcroft, JJ , observed: " It may be that regard being had to terms of Or XLI, r. 23, this is not a case in which it was, strictly speaking, open to the learned Subordinate Judge to make an order under that rule But whether the order was regularly made or irregularly made, it appears to me, to be in form and substance an order under that rule That being so, the order must be treated as an order under r 23 from which an appeal lies." The same view was also taken in the following cases. *Prosanno* v. *Baidya*, 24 C. W. N 708 56 I C. 516, *Radha Krishna* v *Kama Kamini*, 35 C. L. J. 345. 70 I. C 547 A I R 1922 Cal 456, *Gokul Prasad* v. *Ram Kumar*, 44 A 176 A I R. 1922 All 254, *Bibi Kulsumanissa* v. *Ram Prasad*, 44 A 492, A I R 1922 All. 226, *Bhairab* v *Kali Kumar*, 37 C L J. 491; *Kayem Biswas* v *Bahadur Khan*, 30 C W N. 41: A. I. R 1925 Cal 1258 But where the order of remand has neither passed nor purported to have been passed under r 23 no appeal will lie.—*Jagathari* v. *Medini*, 31 C W N 878 A. I R. 1927 Cal 642

Appeal from Remand under the Inherent Power.—In several cases it has been held that when the order of remand is not made under Or XLI, r. 23, but by reason of a Court's inherent jurisdiction under s 151, the order is not appealable —*Radha Krishna* v. *Venkata*, 48 M. 713: A. I. R. 1925 Mad. 229 84 I C 965, *Raghunandan* v. *Jadunandan*, 3 Pat L. J. 253 · 43 I C 959, *Shaik Mahomed Maracayar* v. *Rangasami*, 41 M. L. J. 182; *Wasakhi Ram* v. *Hanal*, 6 Lah L J 153: A. I. R. 1924 Lah. 487 78 I. C. 408; *Ma Me* v. *Ma Min*, 3 R. 490; A. I. R. 1925 Rang 320: 92 I C. 368; D. *Jageshar Jha* v *Mahtap Singh*, 7 Pat. L. T 811: 96 I. C. 410: A. I. R. 1926 Pat. 516. *Chaudhuri Chandrika Prasad* v. *Mithu*, 6 Pat 380, A. I. R. 1927 Pat. 296.

Appeal from Order of Remand when such Order does Not Specify the Provision of Law under which it is Made.—Where an Appellate Court passes an order of remand without specifying the provision of law under which the order is made, it must be presumed to be made under Or. XLI, r 23, C. P. Code, and the order is appealable —*Bibi Kulsoomunnissa* v. *Ram Prasad*, 20 A. L. J. 321 '41 A. 492, *Firm of Gokul Prasad Har Prasad* v *Ram Kumar*, 44 A. 176; 19 A. L. J. 971

Letters Patent Appeal.—An order of a single Judge of High Court under this rule is a " judgment " within the meaning of s. 15 of the Letters Patent and is therefore appealable —*Gopinath* v. *Moheshwar*, 35 C 1096 But see, *Guru Prosanno* v *Ambicamoyi*, 13 C W N. cclii.

When evidence on record sufficient, Appellate Court may determine case finally.

24. Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court, may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds. [S. 565.]

COMMENTARY.

This rule corresponds to s 565, C. P Code, 1882, with some verbal changes only The word " *where* " has been substituted for " when "; the word " *suit* " has been substituted for the word " case "; the word " *from* " has been substituted for the word " against ", and the word " *Preferred* " has been substituted for the word " made," which occurred in the old section *The object and meaning* of this rule is clearly explained in 3 M 96 noted below

Where Evidence on Record Sufficient, Appellate Court may Determine Case Finally.—Where a Court of first instance after taking evidence, dismisses a suit upon a preliminary objection without giving a decision upon the merits of the case, and the decree is reserved on appeal, the Court of Appeal, if it considers the evidence on record sufficient, may decide the case, and is not bound to remand it for trial under r 23 —*Bandi Subbayya* v. *Madalapalli*, 3 M 96 *See* also, *Amma* v *Kunhunni*, 9 M 355.

This rule does not enable an Appellate Court to declare a right in favour of one of the parties, where no issue has been fixed on the point, and the right has not been set up in the lower Court —*Official Trustee of Bengal* v *Krishna Chandra*, 12 C 239, L R 12 I A 166

Where a lower Appellate Court has before it all the evidence which the parties wish to adduce, and decides upon a preliminary point (*e.g* , the genuineness of a pottah), it has no authority to remand the case, but should itself try it —*Ram* v *Joy Nundo Moyce*, 10 W R 374

The Appellate Court will not remand a case for re-trial on a point not raised in the Court below if the evidence already recorded is sufficient to

enable the Appellate Court itself to decide the point.—*Haridas Purshotam* v. *Gamble*, 12 Bom H C. 23.

Where an objection was taken to the jurisdiction, and the objection was allowed, but the Court at the same time disposed of the case on the merits and dismissed the suit, and on appeal the Appellate Court affirmed the decree of the lower Court on the question of jurisdiction only. *Held*, that there were materials before the Appellate Court to dispose of the appeal on the merits —*Debi Saran* v. *Debi Saran*, 6 A. 378; *Sheo Prasad* v. *Anrudh Singh*, 6 A. 440

Where a Court of first appeal omits to determine a material issue of fact, the High Court as a Court of second appeal is not competent, under this rule to determine such issue itself, but should refer it for determination to the Court of first appeal —*Sheo Ratan* v. *Luppa Kuar*, 5 A. 14.

Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.

25. Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor [S. 566.]

COMMENTARY.

This rule corresponds to s 566, C. P. Code, with some alterations of a verbal character and with the addition of the words "*and the reasons therefor*" in the concluding part adopting 19 B 551.

Distinction between an Order under Order XLI, Rule 23 and an Order under Order XLI, Rule 25.—There is a distinction between an order under Or XLI, r. 23 and an order under Or. XLI, r. 25 C. P. Code which remands specific issues for decision An order of the former class in a final order which is subject to appeal and cannot be considered by the Court which passed it except on review, whereas an order under Or. XLI, r 25 is an interlocutory order which it is open to the Court to consider.—*Kuar Nageshar Sahai* v *Kuar Mata Prasad*, 25 O C. 189: 9 O. L J. 235.

Framing Issues and Remanding the Case.—The functions of the Appellate Courts under Or XLI, rr 24, 25 and 27 discussed and pointed out. In cases where the Court, acting under r. 25 has been obliged, in the absence of evidence on the record, to supplement the defect through the agency of the Court below, its jurisdiction in respect of such evidence does not become limited thereby or by reason only of the circumstance that the evidence is accompanied by a "finding" of the inferior Court, the term "finding" being used in s. 566 (this rule) in its restricted sense of an

answer to the proposition referred for enquiry, and not of an award or decision of the issue before the Court —*Balkishen* v. *Jasoda Kuar*, 7 A. 765. Not followed in *Beni Pershad Kuari* v *Nand Lal*, 24 C. 98.

Where a Subordinate Court has dealt with questions arising on the merits of the case, no order of remand can be made by Appellate Court under r. 23, but if the Appellate Court is of opinion that there should be a finding upon any particular issue or further evidence should be taken on any such issue, it may make an order of remand under this rule —*Rakhit Mahanta* v. *Puddo Bauri*, 9 C. W. N. 54 *See* also, *Hukam Singh* v. *Raghubir*, 27 A. 700 (1905), A. W. N. 157

Where the Court of first appeal remanded a case under r. 23, for addition of necessary parties *Held*, that the proper course for the lower Appellate Court would have been to join the necessary parties, and then to raise the proper issues and to refer the issues to the first Court for trial under this rule.—*Ganesh Bhikaji* v. *Bhikaji Krishna*, 10 B 398 *See* also, *Kelu Mulachen* v *Chendu*, 19 M. 157

If the Appellate Court is of opinion that the trial Court has failed to decide any issue or has failed to draw up any necessary issue, the proper course to follow was itself to frame the issue and to send it down, if necessary, *to the trial Court for taking evidence and to return the evidence*, together with its finding, to the lower Appellate Court. An order remanding the whole case is bad —*Krishna Das* v *Manindra Chandra*, 95 I C. 123; A. I. R. 1926 Cal. 954.

Where an Appellate Court finds it necessary that a particular issue should be framed and tried, it should proceed under the provisions of Or XLI, r 25, to frame the issue and refer it for trial to the lower Court. It is not *proper for the Appellate Court to set aside the judgment of the* trial Court and send back the case to that Court for deciding it by framing an issue which the Appellate Court considers necessary for the decision of the case.—*Mansur Ali* v *Jamiran Bewa*, 44 C. L J 101 95 I C 203 A I R 1926 Cal 976

Under this rule an Appellate Court can frame a new issue and refer it for trial although it has not been raised by the defendant's written answer.—*Chandi Din* v *Naraini Kuar*, 14 A 366 *See* 30 B. 173

A lower Appellate Court has power under this rule to send back a case for trial upon an issue not satisfactorily tried by the Court of first instance. —*Umbika Charan* v *Ramadhan*, 11 W R 35

A decree in a suit having been passed on the merits by the Court of first instance the Court of appeal, being of opinion that an issue not tried by the former Court, ought to have been tried, reversed the decree, and under r 23 *remanded the case for trial upon that issue*. *Held*, that the order reversing the decree and remanding the case for trial of the issue was improper, and that the proper course for the Appellate Court was to have taken that laid down by rr 25 and 26 —*Mokund Lal* v. *Hurbullubh*, 12 C L. R 136

Where there is no sufficient evidence before the Appellate Court for the disposal of an issue which is material to the determination of the suit, the proper course to be followed is to remand the case under this

rule.—*Ram Pershad* v. *Krishna*, 3 Agra 146. *See* also, *Shumbhoo Chunder* v. *Russick Chunder*, 15 W. R. 346.

Where the Appellate Court finds that the parties failed to grasp the essential questions arising in the case and to adduce evidence adequately, the appellate Court is entitled to frame new issues and remand them for trial.—*Shah Mahomed* v. *Ramzan*, 66 I. C. 833.

The District Court on appeal remanded the suit to the lower Court for finding on fresh issues. After return of the findings the District Judge transferred the appeal to the Sub-Judge, who heard and determined it. *Held*, that the District Judge had no power to transfer to a Sub-Judge an appeal which was part-heard and pending before him.—*Kumara Sami* v. *Subbarayya*, 23 M. 314.

When a Court of first instance has tried out a suit, the Appellate Court has no jurisdiction to make an order of remand under r. 23, but if a new issue has to be tried, it should proceed under r. 25.—*Ram Das Mondal* v. *Indra Moni*, 3 C. W. N. 325. *See* also, *Lalla Chunni Lal* v. *Mohipi Singh*, 1 C. W. N. 340.

Where, in a suit the plaintiff tendered three witnesses in support of his claim, but the Court having examined one of such witnesses and being satisfied with his evidence, declined to examine the others, and passed a decree in favour of the plaintiff and on appeal by the defendant, the lower Appellate Court reversed the decree, without allowing the plaintiff to produce fresh evidence. *Held*, that under the circumstances above described, it was competent to the High Court in special appeal to set aside all proceedings in both Courts below, and to remand the case under this rule with directions to the first Court to retry the case, admitting all admissible evidence which had been previously tendered.—*Ganga Prasad* v. *Lal Bahadur*, 17 A. 112 (11 A. 342 *referred to*). *See* also, *Durga Dihal* v. *Anoraji*, 17 A. 29.

Apart from rr. 23 and 25, no express power of remand is given by the Code to an Appellate Court.—*Habib Baksh* v. *Baldeo*, 23 A. 167 (171)

On an appeal from the decision of a Munsif in favour of the plaintiffs, in a suit for rent, the District Judge set aside the decree, ordered a new trial, and directed the amendment of the plaint by inserting the boundaries of the land. *Held*, that the order for amendment of the plaint was bad under r. 23, as the original Court had not disposed of the suit upon a preliminary point. If the information was necessary, the District Judge should send down an issue on the point for trial under this rule.—*Krishnaya Navada* v. *Panchu*, 17 M. 187.

When a Case should Not be Remanded.—Where no specific issue has been framed on the question of adoption, but the matter had been tried and determined without any objection on the part of the plaintiff, who had not been taken by surprise, but was fully informed by the defendant's lists of documents, and from the cross-examination of his witnesses that the defence would be taken, *held* that it was undesirable that the case should be remanded for re-trial on a special issue framed as to the adoption.—*Chandra Kunwar* v. *Narpat Singh*, 29 A. 184, P. C.: 11 C. W. N. 321: 5 C. L. J. 115: 17 M. L. J. 103: 9 Bom. L. R. 257: 4 A. L. J. 102: 2 M. L. T. 109.

Since a declaratory decree is a matter of discretion, a claim for a declaration ought not to be remanded by an Appellate Court for further enquiry which is likely to entail delay and expense.—*Doorga Pershad* v. *Doorga Kunwari*, 4 C. 190: 3 C. L. R. 31.

Where the lower Appellate Court framed a wrong issue for decision, but it appeared from its judgment that there was a finding on the point which would have been raised if the correct issue had been framed, the High Court in second appeal refused to remand the case for a new finding on that issue.—*Vishnu Ramchandra* v. *Ganesh*, 21 B. 325.

An Appellate Court is not justified in framing an issue which does not arise from the pleadings of the parties, and in remanding the case under this rule for fresh enquiry.—*Illika Parkamar* v. *Kutti Kunhamed*, 17 M. 69.

An Appellate Court cannot affirm some of the findings of the trial Court and set aside the decree and remand the case for a fresh trial. If the lower Court thinks it necessary that a fresh local investigation should be held, it should order it itself or it should direct the lower Court to direct a local investigation to be held and to send back to the Appellate Court the result of such local investigation.—*Mahendra* v. *Narayani*, 95 I. C. 170: A. I. R. 1926 Cal. 912.

Powers and Duties of the Court to which Issues are Remitted.—A Court of first instance to which issues have been remitted under this rule, by the Appellate Court has only jurisdiction to try the issues remitted, and is *functus officio* in other respects and cannot make a reference of the case to arbitration which is only within the jurisdiction of the Appellate Court.—*Nand Ram* v. *Fakir Chand*, 7 A. 523. *See* also, *Gossain Dowlat Geer* v. *Bissessur Geer*, 22 W. R. 207; *Habib* v. *Baldeo*, 23 A. 167, 171.

A Court to which a case is remanded for retrial on a particular issue amongst others, cannot, on remand allow that issue to be abandoned and proceed to try the case upon the other issues raised.—*Shib Chunder* v. *Joymala Dasi*, 7 C. L. R. 103.

Power of lower Court to take additional evidence on remand where order of remand does not so order. *Held*, that the lower Court had power to take additional evidence on the issue remanded, although not specially authorized to do so by the order of remand.—*Kamalakshi* v. *Ramasami*, 19 M. 127.

Held, that an Appellate Court is not bound to accept a finding returned to it by the first Court, under r. 25, merely because no objections to such findings are preferred, but is competent to examine and satisfy itself that the finding is correct and is fit to be accepted.—*Akbari Begam* v. *Wilayat Ali*, 2 A. 908 (1 Agra 50 *dissented from*; 1 A. 165 *followed*). Followed in *Umed Ali* v. *Salima Bibi*, 6 A. 383; *Mukhtara* v. *Sardara*, 71 I. C. 444.

Certain issues were admitted under Or. XLI, r. 25, C. P. Code for trial on additional evidence that might be tendered by the parties. On the date fixed for production of evidence, the plaintiff appeared but the defendants were absent. The Court took the evidence for the plaintiff and recorded its findings *ex parte*. On the application by the defendants

showing sufficient cause for the non-attendance, the Court, after notice to the plaintiffs set aside the *ex parte* finding, restored the suit and fixed a new date for parties to produce their evidence. *Held*, on revision from this order, that the Court had power to make and had acted properly in making the order inasmuch as a full compliance with the directions of the Appellate Court under Or. XLI, r. 25, C. P. Code required the taking of evidence for both parties.—*Ajodhia Prasad* v. *Ram Narain*, 19 A. L J. 79: 62 I C. 447.

Power of Appellate Court to deal with the whole appeal after return of findings. *Held*, that, upon the return of the finding on remand, the Court could not treat the appeal as already decided and the objections as the sole matter for consideration, but must consider both appeal and objections, and decide the whole case.—*Lachman Prasad* v. *Jamna Prasad*, 10 A. 162. *Gopal Nath* v *Sat Narain*, 74 I. C. 1014. *See* also, *Lala Prag Lal* v *Jai Narayan*, 22 C. 419, where it has been held that on the hearing of the appeal, the entire case, including the order of remand, was open to consideration, and that the High Court had power to determine whether that order or the order subsequently passed was correct on the merits.

A Court of Appeal framed certain issues, under this rule and remanded them for findings by the original Court. On the return of these findings as neither party filed any objections, the Appellate Court accepted these findings without giving any reasons for so doing, or even stating in its judgment whether it concurred in them or not, and confirmed the decree of the original Court. *Held*, that judgment of the Appellate Court was not a judgment according to law.—*Bhagwan* v. *Kesur Kuverji*, 17 B. 428.

New Issue Raised before High Court.—Where the lower Appellate Court has omitted to determine a question of fact which appears essential to the right decision of the suit on the merits, the High Court can frame the necessary issues and refer them for trial under Or. XLI, r. 25—*Sethee Ratnam* v. *Venkata Chala*, 38 M. L. J. 476 (P. C.): 18 A. L. J. 707 (P C) 22 Bom. L R. 574 (P. C.): 47 I. A. 76 (P. C.). But the finding of the lower Court upon the issues so remanded is conclusive and cannot be challenged.—*Ram Mehr* v *Pali Ram*, 6 Lah. L. J. 145.

Though the High Court is competent in second appeal to remit a case to the lower Court for re-hearing on an issue not raised in the pleadings nor even suggested in the Courts below, this ought to be done only in exceptional cases for good cause shown and on payment of costs—*Ram Chandra* v. *Secretary of State for India*, 43 C. 1104, 1118; *Chandu Lal* v. *Firm of Lakshmi Chand Jowaladat*, 5 Lah L. J. 40; *Brikabai* v. *Gaja Mhaku*, 28 Bom. L R. 1090: 98 I. C. 297: A. I. R. 1926 Bom. 577.

Issues Remitted are Triable by the Court which Originally Tried the Suit or Appeal.—When issues are remitted for trial under this rule such issues are triable only by the Court which originally tried the case—*Sabri* v. *Ganeshi*, 14 A. 23 Followed in *Ali Sher Khan* v. *Ahmadullah Khan*, 29 A. 660; 4 A. L J. 603. *See* also, *Lahore Bank Ltd.* v. *Lakhiram*, 105 P. R. 1903; *Uttamchand* v. *Muhammad Baksh*, 71 I. C. 896.

Appeal.—An order referring issues for trial under this rule is not appealable.—*Kali Kristo* v. *Ram Chunder*, 8 C. 147: 9 C. L. R. 461.

(Followed in 12 C. W. N. ccliii (253). A suit to recover a sum of money having been decreed against one of the two defendants, he appealed. The lower Appellate Court held that the decree was *prima facie* correct, but as it was of opinion that the issue of limitation had not been sufficiently explored, the case was remanded to the Court of first instance for rehearing and disposal on that issue. Against that order of remand, an appeal was preferred to the High Court *Held*, that in making the order, the lower Appellate Court was purporting to act under Or. XLI, r. 25 and not under Or. XLI, r. 23 (although it had jurisdiction under neither), and no appeal lay —*Jagathari* v. *Medini Mohan*, 31 C. W. N. 878. Nor does an appeal lie under the Letters Patent.—*Bara Estate, Ltd.* v. *Anup Chandra*, 2 Pat. L. J. 663.

A partial order of remand under Or. XLI, r. 25 is not appealable.—*Maung Shwcon* v. *N. K. R. P Mudaliar*, 2 Bur. L. J. 216

26. (1) Such evidence and findings shall form part of the record in the suit; and either party may within a time to be fixed by the Appellate Court present a memorandum of objections to any finding.

Findings and evidence to be put on record. Objections to finding.

(2) After the expiration of the period so fixed for presenting such memorandum, the Appellate Court shall proceed to determine the appeal. [S. 567.]

Determination of appeal.

COMMENTARY.

This rule corresponds to s. 567, C. P. Code, 1882, with some alterations of a verbal character. In sub-rule (1) the word "*form*" has been substituted for the word "become," which stood after the word "shall", the word "*any*" has been substituted for the word "the" which stood after the words "objections to," and in sub-rule (2), the word "so" has been added before the word "fixed"

"Such evidence and findings shall form part of the record in the suit."—The evidence and findings become part of the record in the suit and when the Court proceeds to determine the appeal after remand under Or. XLI, r. 25, such determination must be based upon all the materials on the record; these include whatever was part of the record as it stood before the order under Or XLI, r 25 was made as also what has been added in the Court of appeal, namely, the order together with the evidence taken pursuant thereto and the reasoned findings thereon.—*Kamini Kumar* v *Durga Charan*, 37 C. L J 122.

Where No Memorandum of Objection is Filed.—If no memorandum of objection is filed by either party, the Court is not thereby absolved from its duty of hearing the appeal —*Subbaya* v *Rami*, 22 M 344 The Appellate Court, even if no objections are filed, is bound to examine the correctness of the findings and to state in its judgment the reason for which it either accepts or rejects the findings.—*Kunhi* v. *Kutti*, 20 M. 496.

An Appellate Court though not bound to entertain objections filed after the expiration of the prescribed period, should, nevertheless, upon the hearing of the remand, allow the party filing them to be heard with regard to them. Further, an Appellate Court, apart from any objection by the parties to the findings when returned, should examine and test them to see whether or not they ought to be accepted.—*Mumtaz Begam* v. *Fateh Husain*, 6 A. 391 (6 A. 383, 1 A. 165, and 2 A. 908 *referred to*).

Where no objections have been filed under Or. XLI, r. 26, C. P. Code the Court may in its discretion decline to hear objections at the hearing.—*Partab Singh* v. *Achar Singh*, 3 Lah. L. J. 230.

But the Appellate is not bound to accept any finding blindly, namely, because no objections to such finding are preferred, but is competent to examine the evidence on which such finding is founded, and to satisfy itself that it is correct and fit to be accepted.—*Akhari Begam* v. *Wilyat Ali*, 2 A. 908 (1 Agra 50 *dissented from;* 1 A. 165 *followed*). Followed in *Umed Ali* v. *Salima Bibi*, 6 A. 383. *See* also, *Woomesh Chunder* v. *Jonardun*, 15 W. R. 235; *Mumtaz Begam* v. *Fateh Husain*, 6 A. 391; *Bhagwan* v. *Kesur*, 17 B. 428; *Ram Chandra* v. *Sono*, 19 B. 551.

Time to File Objection to Finding.—The limitation of time in this rule is obviously meant to be a restriction upon the rights of the parties, and not upon the discretion of the Court.—*Damodar Das* v. *Gokul Chand*, 7 A. 79. (92).

After the expiry of the period fixed, the Appellate Court may, in its discretion, receive or decline to receive memorandum of objections to the finding on remand.—*Chotay Lall* v. *Chunoo Lall*, 3 C. L. R. 465 (468): 4 C. 744 (731): L. R. 6 I. A. 15.

" Shall proceed to determine the appeal."—When an Appellate Court has made an order referring issues for trial under r. 25, the return to such order must be made to the same Court, and such Court is not competent to transfer the appeal for disposal to another Court.—*Udit Narain* v. *Jhanda*, 15 A. 315; *Kumarasami* v. *Subbaraya*, 23 M. 314.

Second Appeal.—The provisions of this rule and of r. 25 apply, so far as may be by virtue of Or. XLII, to second appeals. The High Court may, in second appeal, therefore, refer issues of fact for trial to the lower Appellate Court, but when the finding and evidence upon such issues are returned to the High Court, the finding is conclusive, and it cannot be challenged upon the evidence before the High Court as in first appeal. The reason is that second appeal is not allowed on questions of fact.

Production of additional evidence in Appellate Court.

27. (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(*a*) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) The Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission. [S. 568.]

COMMENTARY.

This rule corresponds to s. 568, C. P. Code, with some alterations of a verbal character.

Sub-rule (1) exactly corresponds to para. 1 of the old section.

Clause (a) corresponds to cl. (a) of the old section with this modification that the word "*from*" has been substituted for the word "against"; the word "*preferred*" has been substituted for the word "made"; and the words "*has refused*" have been substituted for the word "refuses."

Clause (b) exactly corresponds to cl. (b) of the old section.

Sub-rule (2) corresponds to last para. of the old section with this alteration that the word "*wherever*" has been substituted for the word "whenever"; and the words "*allowed to be produced*" have been substituted for the words "is admitted," which occurred in the old section.

Scope of this Rule—Powers and Functions of Appellate Court.—The legitimate occasion for the admission of additional evidence under this rule arises only when, on examining the evidence as it stands, some inherent *lacuna* or defect becomes apparent, and not where a discovery is made outside the Court of fresh evidence and application is made to import it. *Such* evidence cannot be imported into the case on an application under Or. XLVII, r. 1.

Additional evidence under this rule should not be taken until the Appellate Court has examined the evidence on the record and has, after such examination, come to the conclusion that the evidence, as it stands, is inherently defective; as, for instance, when the lower Court has omitted to take the evidence of an attesting witness to mortgage deed.—*Bank of Bengal* v. *Lucas*, 51 C. 185: 81 I. C 471: A. I. R. 1924 Cal. 578.

The circumstance that evidence has been improperly excluded by the trial Court does not justify a reversal of the decree made by that Court. The Code of Civil Procedure provides in Or. XLI, rr. 27 (1) (a), 28 and 29, the method to be followed in a case of this description It is open to the Judge of the Appellate Court to take the evidence himself or to

direct the primary Court to take the evidence and to send it to the Appellate Court for consideration.—*Jyot Kumar* v. *Jadu Nath*, 34 C. L. J. 160.

The legitimate occasion for the admission of additional evidence by the Appellate Court under this rule arises only when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent. Where fresh evidence is discovered outside the Court, such evidence can be imported into the case on an application under Or. XLVII, r. 1.—*Krishna Chariar* v. *Narasimha*, 31 M. 114: 3 M. L. T. 308 (13 B. 381, P. C., *followed*); *Garden Reach Spg. and Wvg. Co.* v. *Secretary of State for India*, 42 C. 675; *Uchant Ahir* v. *Basawan Ahir*, 55 I. C. 226; *Firm of Ram Richpal Sham Lal* v. *Firm of Bansi Dhar Sons*, 66 I. C. 370 (31 B. 381 *P. C.* relied on; 31 M 114, and 42 C. 675 *followed*). *See* also, *Bhairon Singh* v *Hindu Singh*, (1922) Nag. 119: 67 I. C. 237; *Jai Krishna* v. *Bibi Saghra*, 4 Pat. L. T. 418: 71 I. C. 881; *Labh Singh* v. *Ahmad Shah*, 97 I C 369.

It is largely discretionary with an Appellate Court to admit additional evidence on appeal and a party cannot claim it as a matter of right.—*Syed Nayajan Ali* v. *Midnapore Zemindary Company*, 67 I. C. 770.

The Appellate Court should exercise its power of allowing additional evidence very cautiously and sparingly and only in the interests of justice.—*Raja Sri Nath Roy* v *Secy. of State for India*, 36 C. L. J. 315.

Or. XLI, r. 27 does not mean that in order to enable the Appellate Court to pronounce judgment in favour of a particular party additional evidence should be admitted in appeal. It only means that where there is a *lacuna* in the evidence which precludes the Appellate Court from pronouncing judgment on the evidence which is already in the record, additional evidence should be allowed to be adduced.—*Baijnath* v. *Diplal*, 57 I. C. 843.

On an appeal on the merits of the case being filed the Appellate Court without recording any reason as required by this rule allowed such further evidence to be taken, not after the appeal on the merits had been heard and the evidence as it stood had been examined by the Judges but on special and preliminary application. *Held*, that the Appellate Court had no jurisdiction to admit the additional evidence, that it was wrongly admitted and must be disregarded.—*Kessowji Issur* v. *G. I. P. Railway Company*, 31 B. 381, P. C.: 11 C. W. N. 751: 6 C. L J. 5, P. C.

Where additional evidence is taken by the High Court with the assent of both sides, it is not open to either party to complain of it.—*Jagarnath* v. *Hanuman*, 36 C 833 (P. C.): 36 I. A 221: 13 C. W. N. 830 P. C.

The test as to whether additional evidence should be received in an Appellate Court under this rule, depends *upon the question* whether or not the Appellate Court requires the evidence "to enable it to pronounce judgment or for any other substantial cause." As to this, the Appellate Court is to be the sole Judge. The rejection of an application under that section cannot be said to involve any "substantial question of law" within the meaning of s. 110, C. P. *Code*, *so as to give the right of* an appeal to the Privy Council.—*Upendra Mohan* v. *Gopal Chandra*, 21 C. 481; *Jhingur Jha* v. *Badni Sahu*, 51 I. C. 666.

The functions of the Appellate Courts under Or. XXI, rr. 24, 25 and 7, discussed and pointed out. In cases where the Court acting under . 25 has been obliged in the absence of evidence on the record, to upplement the defect through the agency of the Court below, its juris-iction in respect of such evidence does not become limited thereby r by reason only of the circumstances that the evidence is accompanied y a "finding" of the inferior Court, the term "finding" being used n r. 25 in its restricted sense of an answer to the proposition referred for nquiry, and not of an award or decision of the issue before the Court.—*Balkishen* v. *Jasoda Kuar*, 7 A. 765. Not followed in *Beni Pershad Kuari* v. *Nand Lal*, 24 C. 68.

In a second appeal, the High Court remanded a case to the Lower Appellate Court for proper decision of certain issues raised in the suit; and he Lower Appellate Court, taking evidence on the issues, came to findings of fact on that evidence. *Held*, that the lower Appellate Court tried the ase, not as an original case, but as an appeal. *Beni Preshad Kuari* v. *Nand Lal*, 24 C. 98

When Additional Evidence should be Allowed.—Under this rule the admissibility of additional evidence is made to depend, not upon the elevancy or materiality to the issue before the Court of the evidence ought to be admitted or upon the fact whether or not the applicants had an opportunity of adducing evidence at some earlier stage, but upon whe-her or not the Appellate Court requires the evidence to enable it to pronounce judgment or for any other substantial cause.—*In the goods of Prem Chand*, 21 C 484, 486.

The power given by this rule of taking of its own motion, additional evidence should be very sparingly exercised by the Courts and great caution should be exercised in this matter.—*Sreeman Chunder* v. *Gopal Chunder* 11 M. I. A. 28· 7 W. R 10; *Hurpershad* v *Sheo Dyal*, 26 W R. 55: L R. 3 I. A. 259

Where pending an appeal from a decree in a rent suit, a decree is passed in favour of the appellant in a title suit, the Appellate Court should receive the decree in evidence and act upon it—*Sashi Bhuson* v. *Prafulla* (64 I. C. 721, 31 B 481 P. C., 31 M. 114, 36 A 93 *referred to*).

When the first Court was satisfied with the evidence produced, and, therefore, did not allow the plaintiff to produce all his evidence, and the Appellate Court does not think the evidence, sufficient, it ought to allow the plaintiff on appeal to call the evidence excluded by the first Court.—*Brijo Soondar* v *Kamroonnisa*, 23 W R. 63

Where a Court of first instance, considering it unnecessary to examine certain witnesses for the defence, dismissed the suit, and the lower Appel-late Court, disbelieving the evidence of those witnesses for the defence who were examined, allowed the plaintiff's appeal, *held* that, before doing so, the Lower Appellate Court should have afforded the defendants an op-portunity of supplementing the evidence which they had given in the first Court by the testimony of those witnesses whom that Court had declared it unnecessary to hear, and that the case must be regarded as one in which the first Court had refused to examine the witnesses tendered by the defendants.—*Khuda Baksh* v. *Imam Ali*, 9 A. 330

It is within the discretion of the lower Appellate Court to allow the parties an opportunity to adduce fresh evidence if it is satisfied that the interests of justice require that course.—*Damodur Das* v. *Ritoo Singh*, 24 W. R. 325.

Where the evidence upon the record is not sufficient to enable the Appellate Court to pronounce a judgment upon regular appeal, it may require the Court against whose decree the appeal is made to take additional evidence, defining the points to which such evidence is to be confined, in order to enable the Appellate Court finally to determine the case.—*Narasimharav* v. *Antaji*, 2 Bom. H. C. 64 (2nd Ed. 61).

Where a lower Appellate Court admitted a review with the object of taking into consideration a material issue which it had omitted to consider at the trial, *held* that, having admitted the review on grounds independent of fresh evidence, it was competent for the Court, under this rule, to admit fresh evidence, if required to enable it to pronounce a satisfactory judgment, or for any substantial cause.—*Beharee Lal* v. *Troylukho*, 12 W. R. 223.

The true interpretation of this rule is that, when a Court sees that by some inadvertance or mistake, a party has not produced some evidence which he was capable of adducing, and that he is likely to be prejudiced by that omission or mistake, which was simply unintentional, undesigned, and accidental, the Court will allow such further evidence to be taken.—*Gowhur Ali* v. *Sakeena Khanum*, 15 W. R. 507.

When a lower Court disposes of a case upon the merits as proved by evidence not legally admissible against the defendants, and the Appellate Court considers it proper to allow the plaintiff to adduce further evidence, it may either take such further evidence itself, or send the case back to the lower Court to take such evidence.—*Ramjoy Surma* v. *Purankishen*, W. R. (F. B.) 124.

Where the first Court refused the plaintiff's application to summon five of his witnesses, notwithstanding that it postponed the case for ten days, although fifteen other of the witnesses were present, the High Court held that the first Court's omission to summon the witnesses was, under the circumstance, a sufficient reason, for the lower Appellate Court to send for them, and take their evidence.—*Abelagh Roy* v. *Guggun Bhuggut*, 22 W. R. 269.

When the lower Court is wrong in excluding evidence bearing on the question at issue, the Appellate Court is justified in admitting the evidence. Further, when a Court has doubt as to whether a certain evidence is admissible or not, and its decision is open to appeal, it is better to adimt than to exclude such doubtful evidence.—*Kali Kishore* v. *Bhusan Chunder*, 18 C. 201.

In a bond-suit the plaintiff relied in bar of limitation on endorsements of part-payments appearing on the bond. The first Court held that the endorsements were genuine. The Appellate Court remanded the suit to take further evidence with regard to the endorsements; and held upon the return of the evidence that the endorsements were forgeries and dismissed the suit. *Held*, that the additional evidence was legally taken and admissible under this rule.—*Srinivasa Chariar* v. *Rangammal*, 18 M. 94.

Where in a second appeal the High Court remanded a case for return of findings on an issue previously framed but not tried. *Held*, that the lower Court had power to take additional evidence on the issue remanded, although not specially authorised to do so by the order of remand.—*Kamalakshi* v. *Ramasami*, 19 M. 127.

A District Munsif after hearing evidence and deciding issues, passed a decree. On appeal the Sub-Judge reversed the decree, and remanded the case under Or. XLI, r. 23, on the ground that certain documentary evidence tendered by the defendant had been excluded, and the plaintiff's witnesses who had been cited in the list had not been wholly examined. *Held* that r. 23 was inapplicable to such a case; and that the proper course for the Sub-Judge would have been to act either under Or. XLI, r. 27 or r. 28.—*Seshan Pattar* v. *Seshan Pattar*, 23 M. 447 (23 M. 445 *distinguished*); *Rajani* v. *Khater Mahomed*, 94 I. C. 393: A. I. R. 1926 Cal. 897.

Where the lower Court after rejecting defendant's application for adjournment heard the case *ex parte*, and passed a decree in plaintiff's favour; and where on appeal by the defendant the Appellate Court reversed the decree and remanded the case. *Held*, on second appeal, that the suit having been tried on the merits, the lower Appellate Court could not remand the case under s 562, but ought to have proceeded under ss. 568, 569, C. P. Code, 1882.—*Parvati Shankar* v. *Bai Naval*, 17 B. 733.

When Additional Evidence should Not be Allowed.—An Appellate Court should not receive evidence, though alleged to be material and important, which has not been produced in the lower Court, without substantial reason for its non-production. The High Court, refused to reverse a decision on the ground of the improper admission of evidence.—*Jagadindra* v. *Bhobo Tarini*, 5 B. L. R. Ap. 54.

The mere fact that a litigant was not aware of the existence of documentary evidence in the case is no ground for the admission of such evidence for the first time on appeal.—*Srimati Manmohini* v. *Ram Kishore* 68 I. C. 334.

An unregistered document admitted to be all along in possession of a party, cannot be allowed in evidence in second appeal, merely because it is alleged that it is recently discovered.—*Prem Singh* v. *Md. Khurshid*, A. I. R 1926 Lah. 574 103 I. C. 215; *Kessowji Issue*, v. *G. I P. Ry. Co.*, 31 B. 381 P. C

An Appellate Court acts improperly in admitting additional evidence after the close of the arguments in the case.—*Isap Ali* v *Satiss*, 65 I. C. 504.

An appellant who had ample opportunity of giving evidence in the Court below elected not to do so, but to rest his case on the evidence as it stood, he ought not to be allowed at the stage of appeal to give evidence which he could have given below.—*Ram Das* v. *Official Liquidator*, 9 A. 366.

Circumstances under which an Appellate Court will not allow additional evidence to be produced at the hearing of an appeal under this rule.—*Nadai Chand* v. *Chunder Sikher*, 15 C 765.

The plaintiffs had applied, during the hearing of the case in the Court of first instance, for the production of certain books of account of the defendants. The defendants resisted the application, and the Court refused to order the books to be produced. The suit having been dismissed, the plaintiffs appealed; and in the Court of Appeal the defendants applied to be permitted to put in evidence the books which they had refused to produce. *Held*, that the evidence could not be admitted. *Manohar Ganesh* v. *Lakhmiram*, 12 B. 247.

The Appellate Court should not send for and admit fresh documentary evidence which has not been put in by either party in the lower Court.—*Dwarka Nath* v *Ram Lockan*, 10 W. R. 92; *Zahrah* v. *Bhagwan*, 16 W. R. 211; *Narendra Nath* v. *Radha Charan*, 46 C. 119, 128. Nor should it allow additional evidence to prove the genuineness of a document held by the lower Court to be a fabrication.—*Nadiar Chand* v. *Chunder* 15 C. 765.

Omission to call evidence in the lower Court, *held*, on appeal, that the plaintiff's case could not at this stage be supplemented by examining parties whom the plaintiffs did not think fit to call, or by books which they did not produce in the Court below.—*Valaet Ali* v. *Motadeen*, 10 W. R. 402.

Where, in the first Court, the defendant's pleader deposed on oath that the defendant had no documents whatever, and that all were burnt, *held*, that the lower Appellate Court was wrong in permitting the defendant to file a *Pottah*, which was alleged to have escaped the general destruction —*Serajool Huq* v. *Keramatoolah*, 19 W. R. 88.

The High Court decided a case irrespective of certain documents brought forward by a party at the hearing of the appeal, and afterwards rejected an application for a review of that judgment. In an application to the Privy Council for special leave to bring in those documents, *held*, that further evidence ought not to be admitted under this rule, that there was a great danger in the Court of ultimate appeal lightly introducing evidence which had not been under the consideration of the Court below and which the parties had no means of testing.—*Gobind Sundari* v. *Jagdamba*, 3 B. L. R. P. C ; 25. *See* also, *Ram Chandra* v. *Krishnaji*, 28 B 4.

Although the plea of *res judicata* may be taken at any stage of a suit, including first or second appeal, an Appellate Court is not bound to entertain the plea if by so doing further findings of fact will be rendered necessary, and if its consideration involves the reference of fresh issues for determination by the lower Court.—*Kanahai Lal* v. *Suraj Kunwar*, 21 A. 440.

The refusal by an Appellate Court to exercise the discretion vested in it by this section, with respect to the admission of additional evidence would be an error or defect in procedure within the meaning of s. 584, C. P. Code, 1882 (s. 100), because s. 568 (this rule) distinctly implies that discretion must be exercised. But a refusal in the exercise of discretion to admit additional evidence is undoubtedly not such an error or defect.—*Ram Piary* v. *Kallu*, 23 A. 121 (15 W. R. 429 *referred to*).

"If the Appellate Court Requires any Document to be Produced."— Unless a document is required by a lower Court to enable it to pronounce

judgment, it has no power under this rule to require it to be produced; where judgment could be pronounced without the document, the Appellate Court should not allow the production of the document.—*Kalika* v. *Tulsi*, 1 Pat. L. J. 435.—*Kessowji Issur* v. *G. I. P. Ry.*, 31 B. 381.

"Or any witness to be examined."—Additional evidence which has the effect of impeaching the testimony of a witness called in the Court below should not be allowed by the Appellate Court unless that witness is also called and is given an opportunity to contradict or explain the additional evidence so given.—*Jagrani* v. *Kuar Durga*, 36 A. 93-41 L. R. I. A. 76. *See* also, *Muhammad* v. *Mahmudunnissa*, 38 A. 191, 193, 194.

The High Court, in second appeal, cannot be said to require any document to be produced or any witness to be examined, to enable it to pronounce judgment on a question of fact.—*Shamsuddin* v. *Molannessa Bibi*, 95 I. C. 300: A. I. R. 1926 Cal. 941.

"Or for any other substantial cause."—The words "any other substantial cause" confer a wide discretion on the Appellate Court to admit additional evidence when the ends of justice require it.—*Ambuja* v. *Appadurai*, 38 M. 414. It has accordingly been held that the discovery, after the filing of the appeal, of fresh evidence not known to nor available to the appellant after due diligence during the pendency of the proceedings in the first Court, is a "substantial cause" within the meaning of this rule, justifying the admission of such evidence in appeal.—*Venkata Chella* v. *Ranga*, 28 M. L. J. 334. 28 I. C. 694, *Indrajit* v. *Amar Singh*, 50 I. A. 183: 2 Pat. 671. A. I. R. 1923 P. C. 128. The "cause" referred to here need not be *ejusdem generis* with the causes stated in the earlier part of this rule.—*Andiappa* v. *Muthukumara*, 36 M. 477. *Badri Prasad* v. *Makandi*, 26 O. C. 66. 75 I. C. 331, *Parbhu Lal* v. *Gulzari Lal*, 1923, Lah. 584; *Naraindas* v. *Tek Chand*, 1923 S. 42.

Even where a party satisfies the Court that since the filing of the appeal he has discovered further evidence that was not known or available to him and could not have been discovered with due diligence during the pendency of the appeal even up to the date of judgment, that is no sufficient cause for an Appellate Court to admit that evidence under Or. XLI, r. 27. It is a ground for review under Or. XLVII, r. 1, C. P. Code.—*The Bombay Sizing and Stores Supplying Co.* v. *Kusumgar & Co.*, 47 B. 674. 25 B. L. R. 310.

Inability to understand the legal issues involved is not a substantial cause.—*Rameshra* v. *Kalpa*, 46 A. 264. A. I. R. 1924 All. 538; nor the slackness of the party or his legal advises.—*Wali Muhammad* v. *Muhammad Buksh*, 5 L. 84. 80 I. C. 998. A. I. R. 1924 Lah. 444.

"Court shall record reasons for admission."—The power given by this rule of taking, of its own motion, original evidence anew, should be exercised very sparingly by the Courts and, when exercised, it is desirable that the reasons for exercising it should always be recorded or minuted by the Court in the proceedings.—*Sreeman Chunder* v. *Gopal Chunder*, 7 W. R. 10 P. C., 11 M. I. A. 28; *Ambica Prosad* v. *Gopal Buksh*, 1 C. L. J. 550, *Ganga Gobinda* v. *Collector of 24-perganahs*, 7 W. R. 21, P. C.: 11 M. I. A. 345; *Hurpershad* v. *Sheo Dyal* L. R. 3 I. A. 259; 26 W. R. 55, *Juggobundhoo* v. *Goluck Chunder*, 10 W. R. 228, *Joog*

Maya v. *Ram Chunder*, 10 W. R. 378; *Lowa Jha* v. *Bisseshur*, 11 W. R. 6; *Benee Pershad* v. *Lalla Joggessur*, 11 W. R. 47; *Chardon* v. *Ajeet Singh*, 12 W. R. 52; *Shib Chunder* v. *Kasheenath*, 12 W. R. 245; *Juggut Indur* v. *Bhubo Tarinee*, 14 W. R. 19; *Snadden* v. *Todd, Finely & Co.*, 7 W. R. 313. See, *Kessanji Issur* v. *G. I. P. Ry. Co.*, 31 B. 381, P. C.: 11 C. W. N. 721: 6 C. L. J. 5, P. C.: *Ambica Charan* v. *Gins Chandra*, 68 I. C. 719.

The provision in this rule as to an Appellate Court recording its reasons for admitting additional evidence is directory merely, and not imperative.—*Gopal Singh* v. *Jahri Rai*, 12 C. 37; *followed* in *Barha Mandari* v. *Megh Nath*, 2 C L. J 4-n. *See* also, *Beni Pershad Kuari* v. *Nado Lal*, 24 C. 98; *Rahimuddin Kazi* v. *Radha Govinda*, 64 I. C. 238.

Where the evidence of a defendant has been taken by the Court of first instance so imperfectly that the lower Appellate Court cannot pass a satisfactory judgment between the parties, it is competent to the Judge of that Court under the provisions of s. 355, C. P. Code, 1859, to have the defendant fully examined before himself, but not to remand the case for re-hearing and re-trial. If he examines the defendant he is bound to record his reasons for so doing, in order that the High Court may be enabled on appeal to decide whether or not the new evidence has been rightly admitted —*Mohesh Chunder* v. *Madhub Chunder*, 13 W. R. 85.

Where a Judge sends for a map or other document, he is bound to record his reasons for doing so, according to the provisions of the C. P. Code, and the evidence so obtained must be taken and received by him in the presence of the parties in open Court, and afterwards kept on the record. It is not competent to him under s. 355, C. P. Code, 1882, merely of his own discretion to send for a document for personal inspection irrespective of the parties to the suit.—*Ganpat Roy* v. *Ramdeour Roy*, 21 W. R. 416 *See* also, *Sookrah Sheikh* v. *Nund Coomar*, 25 W. R 246.

Where the lower Appellate Court allows additional evidence to be taken though it is not satisfied that the evidence is necessary under clause (*a*) or clause (*b*) of s 568 of the C P. Code, 1882, (this rule) the High Court will interfere; but where this does not appear to be the case, and there is simply an omission on the part of the Appellate Court to record its reasons for allowing additional evidence to be taken, the High Court will not interfere —*Hafiz Abdul Kurrim* v. *Srikissen*, 11 C. 139: *See*, however, *Juggernath* v. *Kanai Das*, 6 C. W N. 31.

The provision of this rule as to an Appellate Court recording its reasons, for admitting additional evidence is complied with if the Court records " that it considers necessary, for the proper decision of the case, to take additional evidence."—*Radha Nath* v. *Ramgovind*, 3 B. L. R. 218: 12 W. R. 224. *See also*, *Hafiza* v. *Hosein*, 13 W. R. 328.

An Appellate Court is not justified in taking additional evidence after a case has been argued before it and a date fixed for judgment, without recording reasons for admitting such evidence. Or XLI, r. 27 has no application to a case in which the judge records no reasons for admitting additional evidence.—*Hansraj* v. *Shiam Sundar*, 19 A. L. J. 407: 63 I. C. 423; *followed* in *Ali Ahmed* v. *Kishan Prasad*, 71 I. C. 289.

Where evidence has been taken by an Appellate Court in the presence of parties or their agents, it should not be rejected on appeal merely because the Court omitted to record its reasons for admitting it.—*Bhugwan Chunder* v. *Raj Coomar*, 13 W. R. 303.

Right of Opposite Party to Rebut Additional Evidence.—When the appellate Court admits additional evidence under Or. XLI, r. 27, the other side must have an opportunity of rebutting it.—*Hirday Krishna* v. *Rajanikanta*, 1923 Cal. 800 (31 B. 381, 24 C. L. J. 457 *referred to*); *Man Singh* v. *Newlakhbati*, 72 I. C. 239; *Ramzan* v. *Nabi Bux*, 6 Lah. L. J. 234: 80 I. C. 530: A. I. R. 1924 Lah. 638. Where additional evidence was recorded and no reason stated for its admission, the suit was remanded with a direction to allow the opposite party to adduce rebuting evidence.—*Kebal* v. *Rajani*, 39 C. L. J. 261: 81 I. C. 999: A. I. R. 1925 Cal. 98.

Second Appeal.—Where the Court of first appeal has admitted additional evidence under this rule, the hearing in the Court of second appeal will not for that reason be treated as a first appeal so as to entitle the parties to go into questions of fact —*Beni Pershad* v. *Nand Lal*, 24 C. 98; *Gopal* v. *Jhakri*, 12 C. 37. The reason being that by virtue of the provisions of the s 100, the High Court is precluded from entering into questions of fact except as provided by s. 103. A refusal by the lower Appellate Court to admit fresh evidence is not appealable.—*In the goods of Prem Chand*, 21 C. 484; *Ram Piari* v. *Kallu*, 23 A. 121; *Durga Prasad* v. *Jai Narain*, 33 A. 379 *See* also, *Vaithi Natha* v. *Kupper*, 42 M. 737 (F. B.).

Appeal to Privy Council.—Where an application is rejected under this rule, such rejection does not give a right of appeal to the Privy Council.—*In the goods of Prem Chand*, 21 C. 484

Power of Appellate Court to Take Notice of Facts which have Happened Since the Date of Judgment of the Lower Court.—Public documents coming into existence subsequent to the filing of second appeals may be admitted in evidence in the High Court. A Court cannot shut its eyes to the events that came into existence during the pendency of any suit or proceeding —*James Henry George Hill* v. *Satan Singh*, (1920) Pat. 4 (20 C. W N. 109 *referred to*).

See 11 C. W N 732· 6 C. L J 74, and 6 C L. J. 92, 102, 662, noted under r. 33 of this Order.

Mode of taking additional evidence.

28. Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or another subordinate Court, to take such evidence and to send it when taken to the Appellate Court. [S. 569.]

COMMENTARY.

This rule corresponds to s 569, C P Code, 1882, with some verbal changes only. The word "*wherever*" has been substituted for "when-

ever"; the word "*produced*" has been substituted for the word "received"; the word "*from*" has been substituted for the word "against" and the word "*preferred*" has been substituted for the word "made" which occurred in the old section.

A lower Court in taking evidence ordered under this rule acts in a ministerial capacity.—*Ram Joy* v. *Prankishen*, 2 W. R. 80.

If the case is remanded for the attendance and examination of the plaintiff, the lower Court may dispense with his attendance, and accept the evidence of his agent instead, if the plaintiff be ill and unable to attend.—*Syud Rezza* v *Enaet Hossein*, 1 W. R. 330.

If a case is remanded for the examination of one of the plaintiffs, the defendants cannot insist upon, nor the Court can examine, the other plaintiffs also.—*Bolakee Lall* v *Radha Singh*, 1 W R. 357.

Where the additional evidence consists of documents, they should be made exhibits in the case —*Daji* v. *Sakharam*, 38 B. 665.

Points to be defined and recorded.

29. Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified. [S. 570.]

COMMENTARY.

This rule corresponds to s 570, C. P Code, 1882, with the omission of the words "*in all cases*" which occurred in the beginning of the old section.

JUDGMENT IN APPEAL.

Judgment when and where pronounced.

30. The Appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future, day, of which notice shall be given to the parties or their pleaders. [S. 571.]

COMMENTARY.

This rule corresponds to s 571, C P Code, 1882, with the substitutions of the words "*from*" for the word "against," and "*preferred*" for the word "made," which occurred in the old section.

A Judge may, at the close of the hearing of a suit, state at once orally the judgment which he intends to record and deliver.—*Anonymous*, 5 Mad. H. C. Ap. 8.

"After hearing the parties or their pleaders."—This rule only authorizes the Court to pronounce judgment after hearing the parties, and judgment pronounced without hearing them is unauthorized by the Code. Thus where an Appellate Court heard and decided an appeal without being aware of the death of the appellant, the decree was held to be a nullity.—*Janardhan* v. *Ram Chandra*, 26 B. 317; *Narain* v. *Kalu*, 2 Lah. L. J. 144.

As to amendment of clerical or arithmetical mistakes in judgments, decrees or orders, see s. 152 and the notes thereunder.

Language of Judgment.—A Judge whose vernacular language is English ought to write his decision in his own language, though to do otherwise does not affect its validity.—*Huro Soondury* v. *Sreedhur*, 17 W. R. 352.

Section 572 and 573 of the old Code, which contained provisions relating to the language and translation of the judgment, have been omitted. The reasons for the omission is, that sub-rule (3) of s. 137 of the present Code provides that " where this Code requires or allows anything other than the recording of evidence, to be done in writing in any such Court, such writing may be in English." In r. 31, the words " *shall be in writing* " have been added, hence s. 572 of the old Code has been omitted as unnecessary Section 573 of the old Code has also been omitted because s. 137 (3) makes provision for supplying translation.

Effect of Delivery of Judgment after Death of Respondent.—Where argument in an appeal was heard before but judgment was delivered after the death of the respondent *Held*, that the judgment should be treated as operating as if it had been delivered on the day when the argument was heard —*Narna* v. *Anant*, I. L. R. 19 B. 307 and *Chitanchaan* v. *Balbhadra Das*, 21 A. 314 *See*, however, *Janardhan* v. *Ram Chandra*, 26 B. 317: 4 Bom. L R. 23, where it was held that the decree is a nullity when the appeal is heard and decided by the Appellate Court without being aware of the death of the appellant

See Or XXII, r. 6 and the cases noted thereunder.

Contents, date and signature of Judgment.

31. The judgment of the Appellate Court shall be in writing and shall state—

(*a*) the points for determination;

(*b*) the decision thereon;

(*c*) the reasons for the decision; and

(*d*) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein. [S. 574.]

COMMENTARY.

This rule corresponds to s 574, C. P. Code, 1882, with some additions and alterations.

The words "*shall in writing*" have been added before the words "shall state." The other changes are merely verbal. The object of the above addition will clearly appear on referring to sub-rule (3) of s. 137 of the present Code, which supplies the omission of s. 572 and 573 of the old Code. Section 137 (3) lays down, that where this Code requires or allows anything, other than the recording of evidence, to be done in writing in any such Court, such writing may be in English. Thus the words "*shall be in writing*," read with s. 137 (3), make it incumbent upon Courts to write judgments in English.

Contents of the Judgment of the Appellate Court.—Where it is found that the judgment of the lower Appellate Court does not fulfil the requirements of this rule, the proper order is to set aside the decree and to remand the case to the lower Appellate Court to dispose of the appeal according to law. Duty of Appellate Court in case of change of officer, pointed out.—*Saravana Pilli* v. *Sisha Reddi*, 31 M. 469, F. B.: 18 M. L. J. 34: 3 M L. T. 71: 20 M. 496 (25 C. 97; 17 B. 551 *referred to*).

Where the judgment of the lower Appellate Court dismissing an appeal was merely as follows "The appeal is dismissed with costs," the High Court set aside the decree on the ground that the Court *had not* complied with the provisions of this rule.—*Srikant Deya* v. *Hari Das*, 11 C. L. R 131. The same course was adopted where the judgment was "appeal rejected" under s. 551 (Or. XLI, r. 11) of the Civil Procedure Code.—*Rami Deka* v. *Brojo Nath*, 25 C. 97.

The judgment of a lower Appellate Court, after setting forth the claim, the defence, the nature of the decree of the first Court, and the effect of the pleas in appeal, concluded, with general observations, as follows: "The point to be determined on appeal is whether or not the decision is consistent with the merits of the case. The Court, having considered the evidence on the record and the judgment of the Munsif, which is explicit enough, concurs with the lower Court. The finding arrived at by the Munsif, that the plaintiff's claim is established, is correct and consistent with the evidence The pleas urged in appeal are *therefore* undeserving of consideration." *Held*, that this was in law no *judgment* at all inasmuch as it did not satisfy the requirements of s. 574, C. P. Code, 1882 (this rule)—*Sohawan* v. *Babu Nand*, 9 A. 26. *But see* *Sundar Bibi* v. *Bisheshurnath*, 9 A. 93, F. B. (9 A. 29 and 30-*note*, *referred to*). *See* also, *Bahau Singh* v. *Jaimangal*, (1906) A. W. N. 86

An Appellate Court is bound to write judgment, when an appeal is dismissed after rejecting an application for adjournment on the ground of absence of counsel.—*Patinhare* v. *Vellur Krishnan*, 26 M. 267.

Or. XLI, r. 31 controls Or. XLI, r. 11, and an appellate Court dismissing a second appeal under the latter provision must state the points for decision and the decision thereon with reasons.—*Bipin Behari* v. *Jogendra Nath*, 65 I. C. 479.

The judgment of the Appellate Court dismissing an appeal was as follows: "The point in dispute is a question of fact and I see no reason to differ from the finding of the lower Court." *Held*, that the judgment did not comply with the provisions of this rule as the reasons for the decision were not stated; that the defect was not cured by s. 578, C. P. Code, 1882 (s. 99); and that the defect in the appellate judgment is a ground of special appeal.—*Shaharulla Mondul* v *Bangoo Mandul*, 13 C W. N. 143 (12 C. 199 *distinguished*) But see, *Rakhal Chandra* v. *Satindra Deb*, 5 C. L. J. 348 (25 C. 97 *distinguished*), and *Pachi Dasi* v. *Bala Das*, 13 C. W. N. 1931

The omission in a judgment to make any special reference to the oral evidence by the parties to a case is not in itself sufficient to show that as a matter of fact the Court did not consider the evidence of the witnesses who were examined in the case.—*Motiwor Rasuk* v. *Dhanu Molla*, 59 I. C. 963.

A judgment of a lower Court setting out no part of the evidence which leads the judge to the conclusion at which he has arrived, is insufficient to enable a Court of second appeal to say whether the arguments of the trial Court on the evidence have been appreciated correctly and is a judgment in accordance with law.—*Upendra Nath* v. *Adhanchandra*, 63 I. C. 436.

Points for Determination.—The object of the Legislature in making it incumbent on an Appellate Court to raise points for determination, is to clear up *the pleadings and focus the attention of the Court and of the* parties on the specific and rival contentions of the latter —*Mahsu Bhujee* v. *Davala*, 7 B L R 174 The judge of the lower Appellate Court not having recorded his judgment as required by s 359 of Act VIII of 1859 (this rule), the case was sent back to the lower Court, for the judge to state the point for the decision and to give his decision upon those points consecutively —*Tatur Khwas* v. *Jagan Nath*, 7 B. L. R. Ap 14 15 W. R. 131 A judge's decision, not being in conformity with the provisions of s 359, Act VIII of 1859, was held to be illegal and defective.—*Rughobur* v *Chattrapat*, 1 Agra 73; *Imrit Singh* v. *Koylashoo*, 11 W. R. 558

Section 359, C P Code, 1859 (this rule), made it incumbent upon an Appellate Court to set down distinctly the point or points on which it has to decide the appeal, and record its reasons for the decision it arrives at in each and all of these points.—*Shurbessur* v. *Sadhoo Churn*, 15 W. R. 130: and *Raj Chunder* v *Rama Kant*, 15 W R. 324.

The judgment of Appellate Court should clearly and fully dispose of all the points in issue between the parties by a distinct finding on each of them —*Bhagbut Khan* v *Puddo Bewa*, 3 W R 192; *Dhun Rae* v. *Ramphul*, 2 N W P 109, *Sookh Raj* v *Tuffazool*, 2 W. R. 142

We wish to impress upon the lower Courts of Appeal, the necessity of always raising points for determination, as required by the provisions of the C. P Code, in every appeal, before it is argued, because they narrow the points in controversy and leave little or no room for complaint in second appeals —*Govind* v *Visuji Khandoji*, 10 B. L. R 492

The judgment of an Appellate Court must contain the points for determination, the decision thereupon and the reasons therefor. It need not contain a review or setting forth of the whole of the evidence. The propriety of giving an intelligent and clear account of the evidence in the judgment is laid down.—*Noor Mahomed* v *Zuhoor Ally*, 11 W. R 34

The judgment of an Appellate Court should show on the face of it that the points in dispute were clearly before the mind of the Judge, and that he exercised his own discrimination in deciding them —*Sitarama Sastrulu* v *Suryanarayana*, 22 M 12

An Appellate Court cannot make a declaration of right in favour of one of the parties, where no issue has been fixed on the point, and the right has not been set up in the lower Court —*Official Trustee of Bengal* v *Krishna Chandra*, 12 C 239, L R. 12 I. A 166

The Decision thereon.—This rule does not make it imperative on an appellate Court to record its finding or decision on every point where it is really unnecessary to do so —*Ismail Khan* v *Hari Charan*, 9 C. W. N. 60. *Contra* Rampini, J

The dismissal of an appeal under s. 551, C P. Code, 1882 (*Or.* XLI, r 11), by a Court whose decision may be the subject of an appeal does not relieve the Court from the necessity of writing a judgment which, according to the provisions of this rule should show the points raised, the decision upon these points and the reasons for deciding them —*Rami Deka* v *Brojo Nath*, 25 C 97 *See* also, *Rayal Reddi* v *Linga Reddi*, 3 M 1, and the cases under rule 11

The finding on an issue of a lower Appellate Court, which is based on a misconception of what the evidence is, cannot be accepted in second appeal as legal finding on it —*Govind* v *Vithal*, 20 B 753

A Court is not precluded from basing its decision upon a ground not specifically pleaded by either of the parties.—*Thakuri* v *Kundan*, 17 A. 280

Decision of Appellate Court on Other Grounds—*Effect* of Such Decision.—When the decision of a lower Court is taken on appeal to a superior tribunal and that tribunal for any reason, does not think fit to decide the matters it is left an open question (8 C 631 *referred to*). If the Appellate Court declines to decide an issue and disposes of the case on other grounds, the judgment of the first Court upon that issue is no more a bar to a further suit than it would be, if that judgment had been reversed by the Court of Appeal —*Ghurphekan* v *Purmushar Dayal*, 5 C L J 653 (6 B. 110, 7 C 381 *referred to*)

"To state reasons for the decision."—The judgment of an Appellate Court should state clearly the reasons of the conclusion therein contained.—*Chunder Kant* v *Hurrish Chunder*, 1 W. R. 214; *Goburdhun* v. *Sadhoo*, 1 W. R. 214, *Kartic Napit* v. *Prasonnomoyee*, 2 W. R. 77; *Dooler Chund* v *Oomda Begum*, 18 W. R 473; *Khettur Mohun* v. *Bhyrub Chunder*, 3 W R. 126; *Trilochun* v. *Ishen Chunder*, 3 W. R. 176. *Hossein Buksh* v. *Ameena Khatoon*, 16 W. R. 280; *Korban Ali* v. *Ashan Ali*, 4 W. R 4; *Sathak Paul* v. *Gudadhur Roy*, 4 W. R. 100;

Ganpatram v. *Jaichand*, 4 Bom. H. C. 109; *Bhagvat Singji* v. *Pratab Singji*, 4 Bom. H. C. 105; *Robert Wilson* v. *Radha Dulari*, 2 C. W. N. 63.

The reasons for the decision should be stated not only when the decree of the first Court is varied or set aside, but also when it is confirmed.—*Rami Deka* v. *Brojo Nath*, 25 C. 97, *Babu Madhav* v. *Venkatesh*, 16 B. 540. If this rule is not observed, the proper form of the order to be made by the High Court in second appeal is to set aside the decree of the lower Appellate Court and send back the case to that Court in order that the appeal may be disposed of according to law.—*Saravanna Pillai* v. *Sesha Reddi*, 31 M. 469.

Where the decision of a case involves issues of fact, and the first Court has gone fully into the evidence, and recorded its finding and decision, if the Appellate Court agrees with the conclusions of the Court below, the Appellate Court is not obliged by law to state in detail the reasons previously recited in which it concurs.—*Lala Juggeshur Sahoy* v. *Gopal Lall*, 15 W. R. 54. *See* also, *Imrit Lall* v. *Nuckshed*, 10 W. R. 100; *Kulumutee* v. *Jawahur Lall*, 11 W. R. 318. But see, *Pertab Narain* v. *Maigh Lall*, 13 C. W. N. 949, *Mahomed Hussain Choudhury* v. *Rabia Khatun*, 68 I. C. 467.

Where a lower Appellate Court took no notice in its decision of a large quantity of evidence of very considerable importance, which had been urged before it as of the highest possible character, and gave no reasons for agreeing with the Court of first instance that the evidence in question had very little connection with the case, its judgment was held to be not a legal decision.—*Adheen Misser* v. *Jograj Misser*, 11 W. R. 312.

A plaintiff is entitled to some opinion by the lower Appellate Court upon the oral testimony on his side. The mere affirmance of the decision of the first Court which considered the oral evidence in detail does not involve the adoption by the lower Appellate Court of the first Court's view of the oral testimony.—*Rajoo* v. *Rajkumar*, 7 W. R. 137.

Where the lower Appellate Court omits to give reasons for its decision, the High Court will retain the case in second appeal, and either require the Judge to state his reasons, or, in the event of his absence refer the case to his successor for fresh trial.—*Assanullah* v. *Hafiz Mahomed*, 10 C. 932.

The reasons for their decisions must in all cases be recorded by the Judges of the High Courts in India.—*Kachekalyana* v. *Kachiviga Jaya*, 2 B. L. R. P. C. 72. 11 W. R. P. C., 33.

Where the decree of the first Court is confirmed in appeal, the Judge of the Appellate Court should state his own reasons of the case, and should *not confine himself to approving of the reasons of the Court of* first instance.—*Rohimoni* v. *Zumirudin*, 10 C. L. R. 597, *Kurani* v. *Subahat*, 8 B. 28. The reason is that the judgment should show on the face of it that the points in dispute were clearly before the mind of the Judge and that he exercised his own discrimination in deciding them.—*Gupta* v. *Behari*, 21 A. L. J. 567. 74 I. C. 827: A. I. R. 1924 All. 100. But there is no objection whatever to the Judge's adopting the

lower Court's findings and reasoning as his own, without once more writing down the same reasons at length, if it is clear that the appellate Judge, in dealing with the appeal, has really applied his mind to the case and has come to his judgment independently of the findings and reasonings of the lower Court.—*Surja Kumar* v. *Kamakhya*, 97 I. C. 760.

An Appellate Court is not bound to discuss *seriatim* the arguments adduced by a lower Court in support of its judgment, but need only give its own reasons for its own judgment.—*Indrabati* v. *Mahadeo*, 1, B. L. R. S. N. 2; *Krishendro Roy* v. *Digumburee*, 16 W. R. 15; *Shumshurooddy* v. *Jan Mahomed*, 21 W. R. 260. *See* also, *Golam Hossein* v. *Ram Doyal*, 12 W. R. 152.

An Appellate Court is bound to state its reasons for reversing the decision of a lower Court.—*Mahadeo Ojha* v. *Parmeswar*, 2 B. L. R. Ap. 20; *Munsoob Bibee* v. *Ali Meah*, 17 W. R. 358; *Mahomed Selleh* v. *Nusseerooddeen*, 21 W. R. 284. *Rajmohan* v. *Harendra*, 56 I. C. 816.

Held, by Markby, J., that, in saying that the "reasons" for the decision of an Appellate Court must be stated, section 359, Act VIII of 1859 (this rule) meant not the reasons for coming to any conclusion of act but the reasons showing upon what points of fact or law the decision runs. The bare fact that a Judge had not given the reasons for his judgment is not itself a ground of special appeal.—*Ramessur* v. *Bhanoo*, 12 W. R. 272.

The finding of an Appellate Court not accompanied by reasons is not conclusive.—*Gopalrao Ganesh* v. *Kishor Kalidas*, 9 B. 527; *Krishnarao* v. *Vasudev*, 8 B. 371. *See* also, *Ningappa* v. *Shivappa*, 19 B. 323.

Order discharged under the circumstances, the District Judge having given no reasons for making the order.—*Raghunath Gopal* v. *Nilu Nathaji*, 9 B. 452.

An Appellate Court is bound to give reasons for deciding a specific point (in this case limitation) raised before it on appeal, even if it confirms generally the order of the Court below.—*Radha Gobindo* v. *Ram Kishore*, 8 W. R. 340. *See* also, *Haimavati* v. *Govinda Chandra*, 2 C. W. N. 695.

This rule is imperative, and under it the Appellate Court is bound to state the reasons for its decision.—*Bhagvan* v. *Keshur Banerji*, 17 B. 428 (6 A. 383, 391, *referred to*); *Guptanand* v. *Behari Lal*, 21 A. L. J. 567.—The judgment of the Appellate Court must state the reasons for the finding.—*Santiswar* v. *Lakhikanta*, 13 C. W. N. 177. A general and wholesale adoption of the judgment of the Court of the first instance cannot be regarded as a sufficient compliance with the law.—*Mt. Aisha Bibi* v. *Bhan Singh*, 70 I. C. 830: 1923 Lah. 30.

In certifying to the High Court the findings on issues sent back on remand, and found by the Court of first instance, it is the duty of the lower Appellate Court to form its own opinion on the evidence and record reasons for findings.—*Ram Chandra Govind* v. *Sono Sadashiv*, 19 B. 551.

A Judge having remanded a case for further evidence to be taken and fresh finding to be recorded on a question of fact, is bound to examine

the correctness of the finding, and to state in his judgment the reasons for which he either accepts or rejects it.—*Kunhi Marakkar* v. *Kutti Umma* 20 M. 496.

Failure to Comply with the Requirements of this Rule.—When the first Appellate Court has failed to comply with the requirements of this rule, the proper form of order to be made by the second Appellate Court is to set aside the decree and remand the case to the first Appellate Court for disposal according to law. If the Judge of the Court to which the case is remanded is the Judge who heard the appeal in the first instance, he need not re-hear the appeal unless he is of opinion that he cannot dispose of the remanded case without a re-hearing But where the Judge of the Court to which the case is remanded is not the Judge who heard the appeal in the first instance, a re-hearing is always necessary in order that there may be a compliance with the order of the second Appellate Court that the case be disposed of according to law.—*Saravana Pillai* v. *Sesha Reddi*, 31 M 469

The omission by an appellate Court to comply strictly with the provisions of Or. XLI, r 31 amounts to no more than an irregularity curable by s. 99 of the Code —*Musst. Lachambati* v. *Musst. Deubai* 59 I. C. 673; *Anandpal* v. *Mahabal*, 30 W. N. 352: 95 I. C. 925

Judgment Affirming the Decision of the Trial Court.—A judgment of an Appellate Court, affirming the decision of the trial Court, need not deal with the matter in dispute at the same length as would be necessary in a judgment of reversal —*Mahendra* v *Ashutosh*, 91 I. C. 478. A. I R. 1926 Cal. 545; *Kulumutee* v. *Jouahur*, 11 W R 318

Where decree is reversed or varied—Relief must be stated.—It is the duty of the Appellate Court when it reverses the decision of the first Court, and more especially when the judgment of the first Court is full and cogent, to point out the grounds on which it comes to a different conclusion Where a District Judge had omitted to do so and, having left the country, could not be required to supply the omission, the High Court, being unable to make the ordinary presumption that he had fully considered the evidence, set aside his judgment, and remanded the case to be heard in appeal *de novo* —*Kristo Chunder* v. *Ram Bromho*, 20 W. R 403.

When an Appellate Court upholds the decree of the first Court for reasons different from those given by the lower Court, it must specify in the decree the exact modifications necessary according to its conclusions. —*Lachho* v. *Har Sahai*, 12 A. 46

A decree of an Appellate Court, not specifying the relief granted, but merely repeating the judgment that the " appeal be decreed," is not a sufficient compliance with the requirements of the law —*Hursarun* v. *Pursun Singh*, 2 N W P 415, *Bell* v *Guru Das Roy*, 1 B. L R. A C. 50.

Appeal to Privy Council.—Non-compliance with the requirements of this rule is not a ground for appeal to the Privy Council —*Sundar Bibi* v *Bishesar Nath*, 9 A. 93.

As to the applicability of the provisions of this rule when an appeal is summarily dismissed under r. 11, see the cases noted under r. 11 of this Order.

What judgment may direct.

32. The judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, or, if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be made in appeal, the Appellate Court may pass a decree or make an order accordingly. [S. 577.]

COMMENTARY.

This rule corresponds to s. 577, C. P. Code, with the substitution of the word "*preferred*" for the word "made," which occurred in the old section. The use of the word "may" in this rule clearly indicates the discretionary power of the Appellate Court.

"If the parties agree as to form of decree in appeal, appellate Court may pass a decree accordingly."—Where an application purporting to contain terms of a compromise was presented to the High Court by one of the parties to an appeal before it, but on the so-called *solehnama* being sent down to the lower Court for verification, it was found that the attendance of the parties for that purpose could not be procured. *Held*, that the High Court was not justified in passing a decree under s. 577, C. P. Code, 1882, in accordance with the terms of the unverified *solehnama*.—*Bandhu Bhagal* v. *Muhammed Tequi*, 14 A. 350.

Power of Court of Appeal.

33. The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree any may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection. [New.]

Provided that the Appellate Court shall not make any order under s. 35 A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.

Illustration.

A claims a sum of money as due to him from *X* or *Y*, and in a suit against both obtains a decree against *X*. *X* appeals. *A* and *Y* are respondents. The Appellate Court decides in favour of *X*. It has power to pass a decree against *Y*.

COMMENTARY.

Object and scope of the Rule.—This rule is new. It has been taken for the most part from Or. 58, (4) of the Rules of the Supreme Court of Judicature in England It should be read with r 4 of this order. By the addition of this rule, the power of the Appellate Court has been enlarged

The object of introducing this rule in the present Code will appear from the following Report of the Special Committee —

"The Committee consider it most important that an Appellate Court should have the fullest power to do complete justice between the parties The illustration indicates a type of case for which provision is intended to be made."

This rule has virtually superseded 27 A 23, 28 M 229, and other cases in which similar view was taken and has adopted the principle laid down in 31 C 643, F B 8 C W N 496, F B. All those cases are noted under r 4 of this order under the hearing "DECREE AGAINST SOME OF THE DEFENDANTS—ALTERATION OF DECREE BY APPELLATE COURT"

The Proviso to this rule has been added by the C P Code Amendment Act (IX of 1922).

Cases to which the Rule Applies.—Although the terms of Or XLI, r. 33 are very wide and they do confer on an Appellate Court wide powers for the purpose of making such decree or order as the exigencies of the case or the ends of justice may require, still, ordinarily, the powers contained in r. 33 should be limited to those cases where, as a result of the Appellate Court's interference with a decree in favour of the appellant, a further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience —*Nandalal* v *Mukundalal*, A I R 1926 Cal. 57 89 I C 24 (44 C 759 P C ; 34 M. L J 361 P C *expld*, 22 C L J 390, 28 C L J 123 *folld*).

Under Or XLI r 33, the appellate Court may pass any order it thinks fit in appeal, though the appeal does not extend to the whole of the decree appealed against and though the power is exercised in favour of any respondent or any party who has not objected before it to the decree The section is to be given a liberal interpretation But the power must be exercised in the interest of and for the furtherance of justice, and not as a mode of evading other statutory rules and orders —*Bhutnath* v. *Sashimukhi*, 30 C W N 885 A I R 1926 Cal 1042; *Narain Singh* v *Kairan*, 3 O W N. 299· A I R 1926 Oudh 304.

This rule is applicable to all cases where an appeal is heard after this Code came into force —*Chandramurthy* v *Narayanaswamy*, 33 M 241 It is open to the Appellate Court to vary the decree appealed against either in points (if any) in which it is erroneous or in respect of supplemental matters which are admitted —*Sakharam Mahadev* v *Hari Krishna*, 6 B 113, 115 The Courts, in the exercise of the powers conferred by this rule should not lose sight of the other provisions of the Code, nor of the Court Fees Act, nor of the Limitation Act It should in particular bear in mind the case stated in the illustration —*Rangam Lal* v *Jhandu*, 34 A. 32, *distd* in *Govind* v *Jai Gopal*, 72 I C 96

Where an appellate Court is seized of the whole case on appeal, it can make such orders as are necessary to terminate the controversies and to do justice between the parties by making the necessary alterations in the decree of the lower Court.—*Govind Dass* v. *Ramcharan*, 4 U. P. L R. 25: 68 I. C. 307.

A decree was passed for varying amounts against three defendants, of whom two only appealed; the third being made it a party to the appeal. *Held*, that it was competent to the appellate Court to modify the decree in favour of the defendant who had not appealed by decreeing the whole sum due to the plaintiffs against the defendants who had.—*Jawahar Bano* v. *Shiyat Husain*, 43 A. 85 18 A. L. J 925; *Mohsham Ali* v. *Muloo*, 24 A. L. J. 586: 94 I. C. 347.

Where in a suit on a mortgage, a preliminary decree is passed specifying the separate liability of each property for a separate sum and only some of the defendants appeal in respect of a part of the decree, the Appellate Court could not by virtue of Or. XLI, r. 33, C. P. Code have dismissed the suit against those defendants who were not parties to the appeal and had in fact submitted to the decree.—*Gayan Singh* v. *Ala Husain*, 43 A. 320: 19 A. L. J. 83.

It is not competent to an appellate Court to interfere with the decree obtained by the appellant in so far as it has not been challenged by the respondent by way of appeal or cross-objections.—*Ram Lal Johari Lal* v. *Dip Chand*, 3 Lah. L. J. 231: 60 I. C. 705.

An appellate Court can grant relief to an appellant as against a defendant against whom there is no appeal. The power conferred by Or. XLI, r. 33 should be exercised in cases where, as the result of an Appellate Court's interference in favour of the appellant further interference is required to adjust the rights of the parties in accordance with justice, equity and good conscience.—*Bikram Kumar* v. *Mohit Krishna*, 61 I. C. 178.

"Such respondents or parties."—The use of the expression "respondents or parties" shows that the Appellate Court may pass an order in favour of the respondents who have not appealed, and it may similarly decide any question in favour of a party, by which is meant a party to the suit and who is not a respondent in the appeal. The illustration to the rule does not limit the rule and is not intended to illustrate its full scope.—*Bhutnath* v. *Sashimukhi*, 30 C. W. N. 885: 96 I. C. 474: A. I. R. 1926 Cal. 1042.

Appellate Court is Competent to Take Cognizance of Events Happened Since the Decreeor Order Challenged was passed.—It is not only competent to a Court of Appeal but it may be its duty to take notice of events which have happened subsequently to the passing of the decree or order appealed against, and such events when not appearing in the record may be proved by extrinsic evidence.—*Ram Ratna* v. *Mohant Sahu*, 11 C. W. N. 732: 6 C. L. J. 71 (6 B. 113, 16 M. 350, 1 Bom. L. R. 218, 25 B. 606, 11 A. 148 *referred to*); *Ahmadji* v. *Mahamadji*, 1 Bom. L. R. 289 *See* also, *Hazari Mull* v. *Janaki*, 6 C. L. J. 92; *Ramayad Sahu* v. *Bindeswari*, 6 C. L. J. 102, and *Udi Chobey* v. *Radhika Prasad*, 10 C. L J. 662.

Proviso.—The proviso was added by Act IX of 1922. It provided that where, in pursuance of any objection, the lower Court has omitted or refused to make any order as to compensatory costs under s. 35-A, the Appellate Court shall not make any order as to such omission or refusal.

Dissent to be recorded.

34. Where the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the Court shall state in writing the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same. [S. 576.]

COMMENTARY.

This rule corresponds to s. 576, C. P Code, 1882, with the substitution of the word "*where*" for "when" in the beginning

See notes under s. 98.

DECREE IN APPEAL.

Date and contents of decree.

35. (1) The decree of the appellate Court shall bear date the day on which the judgment was pronounced.

(2) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, and a clear specification of the relief granted or other adjudication made.

(3) The decree shall also state the amount of costs incurred in the appeal, and by whom, or out of what property, and in what proportions such costs and the costs in the suit are to be paid.

(4) The decree shall be signed and dated by the Judge or Judges who passed it:

Judge dissenting from judgment need not sign decree.

Provided that where there are more Judges than one and there is a difference of opinion among them, it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree. [S. 579.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s 579, C P Code, 1882 with some additions and alterations

Sub-rule (1) exactly corresponds to para 1 of the old section

Sub-rule (2) corresponds to para 2 of the old section, with some additions, alterations and omissions. The words "*and the memorandum of appeal*" which stood after the words "the number of the appeal" in the old section, have been omitted. The result of the omission seems to be that the appellate decree need not contain the memorandum of appeal. By the above omission the ministerial officers of the Civil Courts have been relieved of a great deal of clerical work. But Form No. 9 of Sch. I, App G which is the form of the decree in appeal, has not been amended in accordance with this omission. The forms are not intended to override the express provision of the law. *See* notes under Or. XLVIII, r. 3. The words "*and a clear specification of the relief granted or other adjudication made*" have been substituted for the words "and shall specify clearly the relief granted or other determination of the appeal," which occurred in the old section. This alteration is simply change of words and phrases.

Sub-rule (3) corresponds to para. 3 of the old section with some additions and alterations. The words "*by whom*" have been substituted for the words "by what parties" which occurred in the old section; and the words "*out of what property*" have been added after the words "by whom."

Sub-rule (4) exactly corresponds to para 4 of the old section.

The proviso also corresponds to the proviso of the old section with the substitution of the word "and" for the word "if."

Effect of Appellate Decree—Relief Granted.—Where the Appellate Court has modified the decree of the Court below, the decree of the Appellate Court supersedes entirely that of the lower Court, and is the only decree capable of execution.—*Shohrat Singh* v. *Bridgmann*, 4 A. 376, F. B.; *Muhammad Sulaiman* v. *Muhammad Yar Khan*, 11 A. 267; *Muhammad Sulaiman* v. *Fatima*, 11 A. 314; *Naurang Rai* v. *Latif Chaudhri*, 13 A. 394, *Shiv Lal* v. *Jumak Lal*, 18 B. 542; *Sakhal Chand* v. *Velchand*, 18 B. 203; *Nan Chand* v. *Vithu*, 19 B. 258; *Daulat* v. *Bhukan Das*, 11 B. 172; *Noor Ali* v. *Koni Meah*, 13 C. 13; *Kislo Kinkar* v. *Burroda Kant*, 10 B. L. R. 101, P. C.; *Manavikraman* v. *Unniappan*, 15 M. 170; *Jawahir Mal* v. *Kustur Chand*, 13 A. 343; *Pichuvayyangar* v. *Seshayyangar*, 18 M. 214, F. B.; *Mul Chand* v. *Ram Ratan*, 20 A. 498. *See* also, the case noted under Or. XXI, r. 11, under the heading "FINAL DECREE SUSCEPTIBLE OF EXECUTION."

Sections 579 and 587, C. P. Code, 1882 (Or. XLI, r. 85, s. 108), do not require the claim to be stated in the decree so as to make such statement a part of the decree itself.—*Saude Shrinivasapa* v. *Krishnapa*, 11 B. 177.

A decree takes priority over other decrees in respect of the date on which it was passed, and not in respect of the priority of the debt which it enforces.—*Gheran* v. *Kunj Behari*, 9 A. 413.

The date which the decree should bear is the date on which the judgment is pronounced.—*Parbati* v. *Bhola*, 12 A. 79.

Where the decree of the Appellate Court did not specify the sums that would be due to the appellant under that decree, except by reference to the judgment on which it was based, and to the decree of the first Court. *Held*

that, though the decree was informal, yet as the amount due to the decree-holder was ascertainable from the record, and the decree was capable of execution, execution should, as a matter of equity, be granted to the decree-holder.—*Jawahir Mal* v *Kistur Chand*, 13 A. 343.

Pending an appeal in a partition suit, one of the defendants died, and the plaintiff became entitled to a larger share on account of his death. *Held* that the Appellate Court had power to vary the decree by giving the plaintiff his larger share —*Sakharam Mahadev* v *Hari Krishna*, 6 B. 113

After the disposal of an appeal, and before preparation of decree, a Court has power to direct the plaintiff to correct the valuation and pay additional Court-fees on his memorandum of appeal —Mahmood, J , *contra in Mahadei* v *Ram Kishen*, 7 A 528

Costs.—When an Appellate Court decrees an appeal and gives costs of its own Court, the costs of the first Court should be included in the decree.—*Mahomed Busseerullah* v. *Ram Kant*, 16 W R. 266

Where a decree is confirmed in appeal upon grounds wholly different from those relied on in the lower Court, the proper course is to dismiss the appeal without costs.—*Fischer* v *Kamala Naicker*, 8 M. I A 170

Section 360, Act VIII of 1859 (this rule), only requires the Judge of an Appellate Court to state in his decision by what parties (and in what proportions if necessary) the costs of the original suit, which he must take for granted, are to be paid, but not to go into particulars, or append to his judgment a schedule setting forth the different items which make up the costs of the first Court —*Mothoora Mohun* v *Huree Kishore*, 18 W R 286 (*reversing on review*, 17 W *R. 415*)

Where a decree of the High Court awards costs, the order is not bad in law simply because it does not specify the exact amount to be paid as costs of the lower Court Such specification is not rendered incumbent by Act VIII of 1859, s 360 (this rule), which only requires a Court of Appeal to declare the proportions in which the costs are to be paid where more parties than one are made liable —*Raj Krishna* v *Pranoda Debee*, 21 W R. 74

An Appellate Court finally determining a suit is bound to decide by which of the parties before it the costs shall be borne, it is not at liberty to declare that the costs shall be borne by the unsuccessful party in a suit to be hereafter brought —*Kashee Chunder* v *Bungshee Buddun*, 23 W R 89

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their appellate jurisdiction (Or XLIX, r 3).

Form.—For Form of decree in appeal, *See* App G Form No 9.

Copies of judgment and decree to be furnished to parties.

36. Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the Appellate Court and at their expense [S. 580.]

COMMENTARY.

This rule corresponds to s 580 of the C. P. Code, 1882, with the addition of the word "*Appellate*" before the word "Court."

Certified copy of decree to be sent to Court whose decree appealed from.

37. A copy of the judgment and of the decree certified by the Appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed from and shall be filed with the original proceedings in the suit, and an entry of the judgment of the Appellate Court shall be made in the register of civil suits. [S. 581.]

COMMENTARY.

This rule corresponds to s 581, C. P. Code, 1882, with the substitution of the word "*from*" for the word "against."

This section simply specifies how appellate decrees are to be dealt with, and *inter alia*, it goes on to say that such decree shall be filed with the original proceedings in the suit, and an entry of the judgment of the Appellate Court shall be made in the register of civil suits.—*Kasa Mal* v *Gopi*, 10 A. 389, 392.

The reason for sending a certified copy of the appellate decree to the lower Court is, that the decree of the Appell [illegible] the decree of the lower Court, and is the onl [illegible] *Muhammad Sulaiman* v. *Muhammad Yar* [illegible] also, *Naurang Rai* v. *Latif Chaudri*, 13 A. [illegible]

ORDER XLII.

APPEALS FROM APPELLATE DECREES.

Procedure. **1.** The rules of Or. XLI shall apply so far as may be, to appeals from appellate decrees.

COMMENTARY.

This rule corresponds to first part of s 587, C. P. Code, 1882, and it should be read with s. 108 of the Code under which all the rulings have been noted

Second Appeals.—*See* notes under ss 100, 102, 103, 107 and 108, and the notes under the preceding Or XLI

Presentation of Second Appeal Without Copy of First Court's Judgment, If Valid.—A memorandum of second appeal must be accompanied not only by the copies specified in Or XLI, r. 1, C. P Code, but also by a copy of the judgment of the Court of first instance, and where the latter is filed after the expiry of the period of limitation, the appeal must be dismissed as time barred unless just cause is shown for extending the period —*Dyala* v. *Hiru*, 67 I. C. 670, *Bhairon* v. *Ram Autar*, 19 A. L J 598.

Inherent Power of High Court to Remand in Second Appeal.—When the Court of first instance declined to record oral evidence tendered by the plaintiff on the ground that the documentary evidence produced by him was quite sufficient to prove his case and the decree passed in his favour was reversed in appeal, but the lower Appellate Court declined to permit the plaintiff to produce oral evidence, it was held by the High Court that it had inherent power, *ex debito justitiæ*, to set aside the proceedings of both the Courts below and to direct the first Court to retry the case —*Durga* v *Anoraji*, 17 A 29, *Kebal* v *Rajani*, 39 C L. J 261 81 I. C. 999: A. I R 1925 Cal 98, *Jeshanker* v. *Bai Divali*, 22 Bom L. R. 771: 57 I. C 525

ORDER XLIII.

APPEALS FROM ORDERS.

Appeals from orders.

1. An appeal shall lie from the following orders under the provisions of s. 104, namely :—

(*a*) an order under r. 10 of Or. VII returning a plaint to be presented to the proper Court;

(*b*) an order under r. 10 of Or. VIII pronouncing judgment against a party ;

(*c*) an order under r. 9 of Or. IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit ;

(*d*) an order under r. 13 of Or. IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte* ;

(*e*) an order under r. 4 of Or. X pronouncing judgment against a party ;

(*f*) an order under r. 21 of Or. XI ;

(*g*) an order under r. 10 of Or. XVI for the attachment of property ;

(*h*) an order under r. 20 of Or. XVI pronouncing judgment against a party;

(*i*) an order under r. 34 of Or. XXI on an objection to the draft of a document or of an endorsement ;

(*j*) an order under r. 72 or r. 92 of Or. XXI setting aside or refusing to set aside a sale ;

(*k*) an order under r. 9 of Or. XXII refusing to set aside the abatement or dismissal of a suit ;

(*l*) an order under r. 10 of Or. XXII giving or refusing to give leave ;

(*m*) an order under r. 3 of Or. XXIII recording or refusing to record an agreement, compromise or satisfaction ;

(*n*) an *order under r. 2 of Or. XXV rejecting an application* (in a case open to appeal) for an order to set aside the dismissal of a suit ;

(*o*) an order under rule 3 or r. 8 of Or. XXXIV refusing to extend the time for the payment of mortgage money ;

(*p*) orders in interpleader-suits under r. 3, r. 4 or r. 6 of Or. XXXV ;

(*q*) an order under r. 2, r. 3 or r. 6 of Or. XXXVIII ;

(*r*) an order under r. 1, r. 2, r 4 or r. 10 of Or. XXXIX ;

(*s*) an order under r. 1 or r. 4 of Or. XL ;

(*t*) an order of refusal under r. 19 of Or. XLI to re-admit, or under r. 21 of Or. XLI to re-hear, an appeal ;

(*u*) an order under r. 23 of Or. XLI remanding a case, where an appeal would lie from the decree of the Appellate Court ;

(*v*) an order made by any Court other than a High Court refusing the grant of a certificate under r. 6 of Or. XLV.

(*w*) an order under r. 4 of Or. XLVII granting an application for review. [S. 588.]

COMMENTARY.

This rule corresponds to s 588, C P 1882, with additions, alterations and omissions.

" We suggest that there should be appeals from orders pronouncing judgment against a party under Or VIII, r. 10, Or X, r. 4, and Or. XVI, r. 20. These orders are under the present law appealable as decrees, but, having regard to the definition of a decree under the Code they would no longer be appealable in that way, and we think it necessary to make them appealable as orders We have also given an appeal against an order made under r. 21 of Or. XI."—*See the Report of the Select Committee*

Section 104.—This order read with s 104 (2), of which it is a part, makes it clear that *no appeal shall lie from any order passed in appeal under this order;* that is, no second appeal will lie from orders passed in appeals from this order See *Naubat Singh* v *Baldeo Singh*, 33 A 479,

ORDER XLIII.

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(*b*) an order under r. 10 of Or. VIII pronouncing judgment against a party ;

(*c*) an order under r. 9 of Or. IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit ;

(*d*) an order under r. 13 of Or. IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte* ;

(*e*) an order under r. 4 of Or. X pronouncing judgment against a party ;

(*f*) an order under r. 21 of Or. XI ;

(*g*) an order under r. 10 of Or. XVI for the attachment of property ;

(*h*) an order under r. 20 of Or. XVI pronouncing judgment against a party;

(*i*) an order under r. 34 of Or. XXI on an objection to the draft of a document or of an endorsement ;

(*j*) an order under r. 72 or r. 92 of Or. XXI setting aside or refusing to set aside a sale ;

(*k*) an order under r. 9 of Or. XXII refusing to set aside the abatement or dismissal of a suit ;

(*l*) an order under r. 10 of Or. XXII giving or refusing to give leave ;

(*m*) an order under r. 3 of Or. XXIII recording or refusing to record an agreement, compromise or satisfaction ;

s. 57 for presentation to the proper Court. This was not done. *Held*, that a second appeal would lie.—*Joynath* v. *Lall Bahadoor*, 8 C. 126: 10 C. L. R. 146.

After the suit had been admitted, and the parties called on to produce evidence, the Munsif ordered the plaint to be returned for presentation in the proper Court, on the ground that the suit should have been instituted in the Sub-Judge's Court *Held*, that the Munsif's order was appealable to the lower Appellate Court, and under Act X of 1877, the lower Appellate Court's order to the High Court—*Kalian Das* v. *Nawal Singh*, 1 A. 620.

Orders amending plaints then and there, are not made appealable under this section of the Code —*Rajendra Kishore* v *Radha Prasad*, 3 A. 854.

No appeal lies against the order of an Appellate Court returning a memorandum of appeal for presentation to the proper Court.—*Raghunath Charan* v. *Shamo Koeri*, 31 C. 344 (14 M 462 *dissented from*); *Nazar Husain* v. *Kesri Mal*, 12 A. 581 *Nuruddin* v. *Pran Kishan*, 40 A. 659; *Bankey Lal* v. *Mighraj*, 19 A L. J 868 63 I. C 951.

Clause (*b*)—an order under r. 10 of Or. VIII pronouncing judgment against a party;

This clause corresponds to part of cl. (10) of the old section.

Rule 10 of Or. VIII lays down the procedure when a party from whom a written statement is required by the Court fails to present the same within the time fixed by the Court. The Court may in such a case either pronounce judgment against the defaulting party or make such other order as the Court thinks proper. *See* notes under r. 10, Or VIII.

Clause (*c*)—an order under r. 9 of Or. XI rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit.

COMMENTARY.

This clause corresponds to cl. (8) of the old section with some verbal changes only. Rule 9 of Or. IX lays down the procedure for setting aside a decree passed against the plaintiff by default

When a decree is made against a plaintiff by default under r. 8 of Or. IX, the following courses are open to him *viz* , (1) he may apply to set aside the order of dismissal under r. 9 of Or IX, (2) he may apply for review; (3) *he may appeal from the decree dismissing the suit under s* 96 (*see*, 8 C W. N 313, noted below, and the cases therein referred to), or (4) he may appeal under this clause *See* notes under r 9, Or IX The words "*in a case open to appeal*" exclude Small Cause Court and such other cases not open to appeal.

When the plaintiff's application under Or. IX, r 9, C. P Code, is rejected on the ground that the previous order of dismissal was under Or. XVII, r. 3 and not under Or XVII, r. 2, the plaintiff is entitled to appeal against it under Or. XLIII, r. 1 —*Syed Bakar Husain* v. *Mirza Hussain Mirza*, 4 Pat L. T 46 73 I C 373.

An order under s. 102, C. P Code, 1882 (Or. IX, r. 8), dismissing a suit is as much a decree as an order under any other section deciding a suit. The order comes within the definition of a decree and is appealable as such. The mere fact that a further remedy is given under s. 588, C P. Code, 1882 (this rule), does not bar an appeal.—*Gosto Behary* v. *Hari Mohan*, 8 C W. N. 813 (9 A 427, and 30 C 660, F B.; 7 C. W. N 486 *referred to*)

No appeal lies from an order rejecting an application to restore to the file an application to set aside a sale under s. 311, C. P. Code 1882 (Or XXI, r 90), which has been dismissed for default under s 102, C P. Code, 1882 (Or IX, r 8) —*Sujaudhin* v *Reazuddin*, 27 C. 414; *Raja* v. *Srinivasa*, 11 M 319; *Ningappa* v *Gangaua*, 10 B. 433; and *Jaung Bahadur* v *Mahadeo Prosad*, 31 C 207, 8 C. W. N. 160 (19 W. R. 112 *followed*) Followed in principle in *Ghaseti Bibi* v. *Abdul Samad*, 29 A 626 (1907) A W N. 186 *See* also, *Hara Kumar* v. *Murari Mohon*, 36 C L J. 184 (19 C W. N. 25 *refd to*) When a suit is dismissed at an adjourned hearing for plaintiff's non-appearance the dismissal is one under Or XVII, r 2 and is appealable under this clause —*Shrimant Sagajirao* v *Smith*, 20 B 736

Where the Court dismissed an application for execution for want of prosecution and subsequently refused to restore the application there is no appeal from the order refusing to restore the application —*Bharat Indu* v. *Ashgar Ali Khan*, 45 A 148 21 A L J. 135

Clause (*d*)—an order under r. 13 of Or. IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte*;

This clause corresponds to cl (9) of the old section, with some additions and verbal alterations. *See* notes under r. 13, Or. IX The words "*in a case open to appeal*" have been added, to exclude Small Cause Court and other cases in which no appeal lies.

An appeal lies under s 581, C P. Code, 1882 (Or. XXXVII, r. 4), refusing to set aside an *ex parte* decree.—*Luckmidas Vithaldas* v. *Ebrahim*, 2 B 644

An appeal lies under Or XLIII, r 1 (*d*), against an order dismissing for default an application to set aside an *ex-parte* decree.—*Musst*, *Bodhia* v. *Ram Chandra*, 101 I. C. 753 · A I. R. 1927 Pat. 240.

This clause applies to *ex parte* orders passed in execution proceeding — *Krishna Chandra* v. *Protap Chandra*, 3 C. L J 276

There is no appeal from an order setting aside an *ex parte* decree — *Shama Dass* v *Hurbuns Narain*, 16 C 426; *Tasadduq Husain* v. *Hayatunnissa*, 25 A 280, *Beera Ram* v *Mitha Ram*, 103 P. R 1905 · 45 P. L R 1906

No appeal will lie from an order made under s. 157 (Or XVII, r. 2) read with s 108 (Or IX, r. 13) C. P. Code, 1882, setting aside a decree passed *ex parte* in default of appearance of the defendant on a day to which the hearing of the suit had been adjourned,—*Bhaguan* v. *Hira*, 19 A 355. (28 C. 738 *referred to.*)

An order refusing to set aside an *ex parte* order in execution proceedings was held appealable—*Krishna Chandra* v. *Pratab Chandra*, 3 C. L J. 276.

An appeal lies from an order rejecting the application for an order to set aside a decree passed *ex parte*, when the order is made because the conditions which were lawfully imposed on the defendants were not complied with.—*Naryan* v *Vaikunt*, 28 Bom. L. R. 124: A. I R 1927 Bom. 1 F. B. (*Fakirgowda* v *Vishundas*, 28 Bom L R 578 *overruled*).

Clause (*e*)—an order under r. 4 of Or. X pronouncing judgment against a party;

This clause corresponds to cl. (10) of the old section. Rule 4 of Or. X (s. 120 of the old Code) lays down that where a pleader refuses or is unable to answer any material question relating to the suit, the Court may direct the party to appear in person and in default pronounce judgment against him.—*See notes under r 4, Or X.*

Clause (*f*)—an order under r. 21 of Or. XI;

This clause is new An order under r 21 of Or. XI has been held to be a decree and hence the order has been made appealable *Vide* 19 B 307, 7 A. 159, and 6 C. L J 374, noted under r. 21 of Or. XI

Rule 21, Or XI, which corresponds to s 136 of the old Code, lays down that where a party fails to comply with an order to answer interrogatories, for discovery or inspection, then his suit (if plaintiff) is liable to be dismissed and if defendant, his defence shall be struck out

Clause (*g*)—an order under r 10 of Or. XVI for the attachment of property;

This clause corresponds to part of cl (14) of the old section

Rule 10 of Or XVI, which corresponds to s 168, C P Code, 1882, lays down the procedure for attachment of property of an absconding witness—*See notes under Or XVI, r 10*

Clause (*h*)—an order under r. 20 of Or. XVI pronouncing judgment against a party;

This clause corresponds to part of cl (10) of the old section Rule 20 of Or XVI, (s 177 of the old Code) empowers the Court to pronounce judgment against a party who being present in Court refuses, without lawful excuse, to give evidence or produce any document then and there in his possession—*See notes under r 20, Or XVI*

Clause (*i*)—an order under r 34 of Or. XXI on an objection to the draft of a document or of an endorsement;

This clause corresponds to cl (15) of the old section Rule 34 of Or XXI, (s 216 of the old Code) relates to decree for execution of document

Clause (*j*)—an order under r. 72 or r. 92 of Or. XXI setting aside or refusing to set aside a sale;

This clause corresponds to cl. (16) of the C. P. Code, 1882, with some modifications Rule 72 of Or XXI (s. 294 of the old Code) prohibits the decree-holder to bid for or buy property without permission; and rule 92 makes orders under rules 89, 90 and 91 (310-A, 311 and 313 of the old Code) appealable as orders

An order confirming a sale does not expressly come within this clause, it may, however be appealable under s 47.

An order under r 66 of Or XXI, setting the valuation to be published in the sale-proclamation is a decree and is appealable under s 47, C P. Code, 1908.—*Lakhpati Koer* v *Hurho Singh*, 13 C. W. N. (281-*n*)

In an application by the judgment-debtor under s 244, C. P. Code, 1882 (s 47), to set aside an execution-sale on the ground of fraud, a second appeal lies to the High Court The question of a right to a second appeal does not turn upon who may happen to be the appellant, but upon whether or not the case is one within s. 244, C. P. Code, 1882 (s. 47).—*Hira Lal* v *Chundra Kanto*, 26 C. 539.

Where, on the application of the judgment-debtor, the sale was set aside on the ground of fraud practised by the judgment-creditor on the judgment-debtor in connection with the sale: *Held* that the order, though not appealable under s 588 (16), was appealable as a decree under the provisions of ss 2 and 244, C P Code, 1882 (s. 47).—*Ballodeb Lall* v. *Anadi*, 10 C 410

No appeal lies from an order passed by a District Judge setting aside a sale in execution of an *ex parte* rent decree valued at less than Rs 100 —*Monmohini* v *Lukhinarain*, 28 C. 116 (27 C. 484 *followed*).

Where, after a judgment-debtor has applied, under s. 311, C. P. Code, 1882, to have a sale set aside, the auction-purchaser is made a party to the proceedings, and the sale is set aside, the auction-purchaser can appeal against the order setting aside the sale —*Gopal Singh* v. *Dular Kuar*, 2 A. 352; *Kanthi Ram* v *Banke Lal*, 2 A. 396.

An order passed under the first clause of s. 312, C. P. Code, 1882, after an objection made under the provisions of s. 311 has been disallowed, is appealable under clause (16) of s 588, C. P. Code, 1882.—*Tota Ram* v. *Kheub Chand*, 7 A 253 *See* also, *Dakshina Mohan* v. *Basumati Debi*, 4 C W. N 474 (479); and *Bejoy Singh* v *Hukum Chand*, 29 C. 518

No second appeal lies against an order under s. 312, C. P. Code, 1882, setting aside a sale —*Abhoya Dassi* v *Padmo Lochun*, 22 C 802 (18 C 422 *followed*)

There is no appeal to the High Court from an order refusing to set s made under ss. 294, 312 or 313 of the C. P v. *Gorinda Chandra*, 10 C. 368 *See* also, A 413.

No second appeal lies to the High Court from an order refusing to set aside a sale in execution of a decree —*Daivanayagam* v. *Rangasami*, 19 M. 29.

No appeal lies from an order passed under s. 294, C. P. Code, 1882, refusing permission to a decree-holder to bid at a sale in execution of his decree.—*Jadoo Nath* v *Brojo Mohun*, 13 C 174

An appeal does not lie from an order setting aside a sale, passed under s 312, para 2 of the C. P. Code, 1882.—*Sakharam* v *Bhiku*, 11 B, 603 But see, *Shib Singh* v *Mukat Singh*, 18 A 437, overruled by *Shiam Behari* v. *Rup Kishore*, 20 A. 379, F. B.

Where on the application of the judgment-debtors, a sale was set aside, but the order setting aside the sale saddled them with the costs of the other side, and they filed an appeal against that part of the order which directed them to pay the costs of the other side, *held*, that an appeal lay, *Shib Kumar* v. *Sheo Ghulam*, 44 A. 209; 20 A L J 11.

An application under s. 311, C P Code, 1882, on behalf of a judgment-debtor who was a minor, was rejected on the ground that the applicant did not legally represent the minor, and the Court thereupon confirmed the sale A second application to the same effect was then filed on behalf of the minor by his guardian, and was rejected on the ground that the Court had already confirmed the sale From this order the judgment-debtor appealed *Held*, that the appeal must be considered to be one from an order under the first para. of s 312, C. P. Code, 1882, confirming the sale after disallowing the appellant's objection, and that it would therefore lie.—*Baldeo Singh* v *Kishen Lal*, 9 A 411

No second appeal lies from an order made by a District Judge, on appeal setting aside a sale under s 294, C. P Code, 1882, notwithstanding that section 244 bars a separate suit in such a case, that section (s 244), whilst it precludes a right of suit, does not enlarge the right of appeal, which is limited strictly by s 588, C P Code, 1882 —*Bhagbat Lall* v *Narku Roy*, 21 C 789

Under the provisions of s 588, C P Code, 1882, no second appeal lies to the High Court from an order passed in appeal by a District Judge, on an application by judgment-debtor to have a sale in execution of a decree set aside on the ground of material irregularity —*Gopi Koeri* v *Gopi Lal*, 21 C. 799. *See* also, *Bansidhar* v *Golab Kuar*, 16 A 443

An order rejecting an application by a judgment-debtor, under section 293, C. P Code, 1882, to recover from the purchaser the loss occasioned by re-sale, is appealable under this section —*Baijnath* v *Moheep Narain*, 16 C. 535; *Kali Kishore* v *Guru Prasad*, 25 C 99 2 C W N. 408, *Rajendra Nath* v *Ramcharan*, 2 C W N. 411, *Amir Baksha* v *Venkatachala*, 18 M 439; *Vallabhau* v *Paugunni*, 12 M 454

Land having been sold in execution of a decree, one claiming that it had been held by the judgment-debtor *benami* for him, applied to set aside the sale under s 311, C. P Code, 1882, and his petition was rejected The Appellate Court remanded the case to be disposed of on the merits *Held*, that the order remanding the case was not appealable —*Thimmanna* v *Mahabala Bhatta*, 19 M 167.

Clause (*k*)—an order under r. 9 of Or. XXII refusing to set aside the abatement or dismissal of a suit;

This clause corresponds to cl. (20) of the old section

Rule 9 of Or XXII corresponds to ss 371 and 372-A of the old Code, and it prescribes the procedure for setting aside an order of abatement or dismissal of a suit An order under Or. XXII, r. 3 is not open to appeal *Trilochan Prasad* v *Bhagwati*, 9 O & A. L. R. 70: 73 I C 230

Clause(*l*)—an order under r. 10 of Or. XXII giving or refusing to give leave;

This clause corresponds to cl (21) of the old section Rule 10 of Or XXII (s. 372 of the old Code) lays down the procedure in other cases of an assignment, creation or devolution of interest during the pendency of a suit.

An appeal will lie from an order dismissing an application under s. 372 C P. Code, 1882, to be brought upon record as representative of a deceased party, such order being a decree within the meaning of section 2, C P. Code —*Indo Mati* v *Gaya Prasad*, 19 A. 142 Followed in *Moti Ram* v *Kundanlal*, 22 A 380 *See* also, *Sourindra Mohun* v. *Siromoni Debi*, 28 C 171. 5 C W. N. 307, where it has been held that an appeal lies from an order directing substitution of parties under s 372, C P. Code, 1882 But see, *Lalit Mohan* v. *Shebock Chand*, 4 C. W. N. 403. (19 A 142, *explained* and *distinguished*); *Tej Singh* v. *Chabeli Ram*, 24 A. 342, and *Jamna Bibi* v *Sheikh Jhan*, 24 A. 532, F B. (4 C W. N. 403 *followed*, 22 A. 380 *overruled*, 19 A 142 *explained and distinguished*).

An order passed on an application under s. 372, C P. Code, 1882 (Or. XXII, r 10), is appealable under s. 588, cl (21), C. P. Code, 1882, and is not open to revision by the High Court under s. 622 of the Code (s 115).—*Raynor* v *Mussorie Bank*, 7 A 681

Section 372, C P Code, 1882 (Or XXII, r. 10), has no application to proceedings in execution of decree, and a Court has no jurisdiction reading s 372, with s. 647, C. P Code, 1882, to bring in a party after decree, and make him a judgment-debtor for the purposes of execution. Where a Court had so acted, its order was held appealable under s. 588, C P. Code, 1882 —*Goddall* v. *Mussorie Bank* 10 A 97 (5 C. 726 *referred to*)

Clause (*m*)—an order under r. 3 of Or. XXIII recording or refusing to record an agreement, compromise or satisfaction ;

This clause is new Rule 3 of Or XXIII (s. 375, C. P. Code, 1882) relates to compromise of suits. In this connection, *see*, 23 M. 101 and other cases noted under Or. XXIII, r 3, under the heading "APPEAL"

Where the Court, holding that the compromise is not valid and binding on the parties, refuses to record the same, an appeal lies under Or. XLIII. r. 1 (m), assailing the grounds for refusal to record.—*Nandlal* v. *Ramsarup*. 103 I C. 80: A I. R. 1927 Lah. 546

The words used in Or. XLIII, r. 1 (*m*), C. P. Code, " an order under [illegible] XXIII [illegible] efusing to record an agreement, compromise [illegible] existence of an agreement, compromise or [illegible] that no compromise has been proved is not [illegible] *The Firm of Jahangir Mal Bansi Mal*, 73 I. C. 177.

Clause (*n*)—an order under r. 2 of Or. XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

This clause is new Rule 2 of Or XXV (s 381 of the old Code) relates to the effect of failure to furnish security for costs This clause gives legislative sanction to the law as laid down in 8 A 108 F. B , noted under Or. XXV, r. 2.

Clause (*o*)—an order under r. 3 or r. 8 of Or. XXXIV refusing to extend the time for the payment of mortgage-money;

This clause is new Rule 3 or r 8 of Or. XXXIV (ss 87 and 93 of the T P. Act IV of 1882), empowers Courts to enlarge time for payment of money due upon decrees in mortgage suits This clause has been inserted adopting the law as laid down in *Hulas Rai* v. *Prithi Rai*, 9 A 500, and in *Rahima* v *Nepal Rai*, 14 A 520, where it has been held that such an order is appealable as a decree *See* notes under those two rules

" The extension of time for the payment of mortgage money is obviously of much greater moment to the mortgagor than to the mortgagee. Therefore the Committee have provided for an appeal from an order refusing but not from an order granting, an extension of time "—*See the Report of the Special Committee.*

Clause (*p*)—orders in interpleader-suits under r. 3, r. 4 or r. 6 of Or. XXXV;

This clause corresponds to cl (23) of the old section Rules 3, 4 and 6 correspond respectively to ss 473 and 475 of the old Code

The adjudication upon the claims of the defendants in an interpleader suit is a decree and is appealable under s 540, C P Code, 1882 (s 96). The direction as to interpleading is an order and is appealable under s 588, cl. (23), C P Code, 1882 —*Maharaj Singh* v *Chittar Mal*, 30 A 22 4 A. L J. 633 (1907), A. W. N 270

Clause (*q*)—an order under 2, r 3 or r 6 of Or. XXXVIII;

This clause corresponds to part of cl (24) of the old section Rule 2 of Or XXXVIII (s 479, C P Code, 1882) relates to defendant's furnishing security for his appearance, (after arrest before judgment) to satisfy a decree that may be passed against him

Rule 3 (s 480, C P Code, 1882) relates to procedure in case of application, by the person who becomes surety, to be discharged

Rule 6 (s. 485, C. P. Code, 1882) relates to attachment before judgments of defendant's property when he fails to show cause.—*See notes under each of those rules.*

An order of attachment before judgment is appealable under s 588, cl (24), C. P Code, 1882 —*Mir Ali Mahomed* v. *Biharilal*, 21 B. 273.

Clause (*r*)—an order under r. 1, r. 2, r. 4, or r. 10 of Or. XXXIX ;

This clause is part of cl (24) of the old section. Rule 1 of Or. XXXIX (s 492) relates to cases in which temporary injunction may be granted.

Rule 2 (s. 493) relates to injunction to restrain repetition or continuance of breach of contract or injury, etc

Rule 4 (s 496) relates to interlocutory orders

Rule 10 (s. 502) relates to deposit of money, etc , in Court. *See notes under those rules*

An appeal will lie under s 588, cl (24), C P. Code, 1882, from an order under s. 496 of the Code, refusing to set aside an injunction —*Zabadajan* v. *Muhammad Taib*, 15 A. 8 (6 C 168 *referred to*)

A petition praying for a temporary injunction in a suit was presented by the plaintiff in a subordinate Court. The Judge refused to pass orders on it without hearing the defendants, and ordered a notice to issue to them. The plaintiff appealed to the District Judge, who granted the injunction. *Held*, that the order of the subordinate Court was not appealable to the District Judge.—*Luis* v. *Luis*, 12 M. 186.

An order of Court refusing to attach property for disobedience of an *interim* injunction falls within Or. XXXIX, r. 2 (3) C P. Code, and is open to appeal —*Diwan Anand* v *Jharia Coal Co* , (1922) Lah. 347: 66 I. C. 9

Clause (*s*)—an order under r. 1 or r. 4 of Or. XL ;

This clause is part of cl (24) of the old section.

Rule 1 of Or. XL (s 503, C. P Code, 1882) relates to appointment of receiver.

Rule 4 is new and relates to enforcement of receiver's liabilities *See notes under those rules.*

An order under Or XLIII, r 1 (*s*), declaring that a receiver should be appointed in the case or appointing anybody by name as Receiver is an order which is appealable —*Gobind Ram* v. *Ganesh Ram*, (1922) Pat. 250 (14 C. L J. 489 *folld* ; 13 C. L.J. 157, 17 Bom. L. R. 510, 18 A L J. 212 *not folld*)

An order refusing to remove a receiver appointed under s. 503, C. P. Code, 1882, is appealable.—*Mithibai* v. *Limji Nowroji*, 5 B. 45.

An order removing a receiver is appealable.—*Sripati* v. *Bibhuti*, 92 I. C. 910: A. I. R. 1926 Cal. 593.

An order authorizing a receiver appointed by the Court to remove any person in possession of the property is appealable under s 588, cl. (24), C. P. Code, 1882, at the instance of the person sought to be dispossessed.—Hudson v. Morgan, 13 C. W. N. 654; 9 C. L. J. 563 · 36 C. 718.

An order refusing to appoint a receiver under s. 503, C P. Code, 1882, is [illegible] *Stridavamma*, 10 M. 179 and 180-note (6 [illegible] *Boidya Nath* v. *Makhan Lal*, 17 C. 680. (6 [illegible] *ngappa* v. *Shivabasama*, 24 B. 38; and *Kh* [illegible] *Jha*, 31 C. 495 · 8 C W N 608. *Manindra* v. *Sumti Bala*, A. I. R. 1926 Cal. 100.

The directions which a Court gives in passing a receiver's accounts are not appealable under this clause.—*Rani Keshabati Kumari* v. *Mac Gregor* 12 C. W. N. 648: 35 C. 568.

Clause (*t*)—an order of refusal under r. 19 of Or. XLI to re-admit, or under r. 21 of Or. XLI to re-hear, an appeal ;

This clause corresponds to cl. (27) of the old section.

Rule 19 of Or. XLI (s. 558, C. P. Code, 1882) relates to re-admission of an appeal dismissed for default. Rule 21 of Or XLI (s. 560, C. P Code, 1882) relates to an application for re-hearing of an appeal heard *ex parte*

An appeal does not lie from an order dismissing an appeal for default—*Mansab Ali* v *Nihal Chand*, 15 A 359. See also, *Nund Ram* v. *Muhammad Baksh*, 2 A. 616; *Mukhi* v. *Fakir*, 3 A 382, *Dhan Singh* v. *Basant Singh*, 8 A. 519; *Chand Kuar* v. *Pratab Singh*, 16 C. 98; *Muhammad Naimullah* v *Irsanullah*, 14 A 266; *Jawahir Singh* v. *Debi Singh*, 18 A. 119. See also, *Amrita Lal* v *Ram Chandra*, 20 C 60 (23 C 115 and 827, and 22 M. 221, *referred to*). *Contra—Ram Chandra* v *Madhav Purushottam*, 16 B 23 Followed in *Radha Nath* v. *Chandi Charan*, 30 C. 660, F. B.. 7 C. W. N 486, F B (23 C. 115 and 827 *overruled*) Referred to in *Gosto Behary* v *Hari Mohan*, 8 C W N 313

Where an appeal has been dismissed under s 556, C. P. Code, 1882, for the appellant's default, he may apply for its re-admission under s 558, and if such re-admission is refused, he is entitled to an appeal under s 588, cl. (27), C P Code 1882 —*Elahi Buksh* v *Marachow*, 4 C 825. 3 C. L R. 593

Besides the above cases, see 36 *C.* 510. *noted under rules* 19 *and* 35 *C.* 799. 12 *C. W N* 888 7 *C. L J* 426, *noted under r.* 21 *of Or. XLI, and also the other cases collected under each of those two rules*

Clause (*u*)—an order under r. 23 of Or. XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;

This clause corresponds to cl (28) of the old section, with the addition of the words "*Where an appeal would lie from decree of the Appellate Court.*" The above addition has been made to give effect to 24 C. 774 and

21 A. 291, and it overrides 10 C 523, 19 M .391, 3 A. 18, 7 B. 292, 8 B 260, and 11 C. W. N. 862. In these latter cases it was held that where an Appellate Court passed an order remanding a case of Small Cause Court class, an appeal does lie to the High Court from the order of remand. In the former two cases it was held that an appeal does not lie. By the above addition, the conflicting cases have been reconciled adopting the law as laid down in *Mathura Nath* v *Nabin Chandra*, 24 C 774, and in *Jhandy Lal* v. *Sarman Lal*, 21 A 291.

Where the first Court rejected the plaint on the ground of misjoinder of causes of action and of defendants and the lower Appellate Court set aside the order and remanded the case for decision on the merits: *Held* that an appeal lies to the High Court under s. 588 (28), C P. Code, 1882, against that order.—*Ram Prasad* v *Sachi Dassi*, 6 C W N. 585.

The first Court made an order returning the plaint in a suit to be presented to the proper Court, on the ground that it was not competent to try such suit; but the Appellate Court holding that the first Court was competent to try the suit, made an order "decreeing the appeal" and directing that the case "should be returned for retrial" *Held*, that no second appeal would lie, as it was in reality one from an order returning a plaint, and not an appeal from an order remanding the case under s 562, C P Code, 1882.—*Krishna Ram* v *Narsing Sevak*, 3 A. 855

Where an order of remand was made without jurisdiction, *held* that an appeal lay from the order of remand, notwithstanding the Court of first instance had subsequently made what purported to be a final decree in the case.—*Jatinga Valley Tea Co*, v *Chera Tea Co.*, 12 C. 45 *See also*, *Narain Pal* v *Kali Kishore*, 1 C W N (S N.) xxix (29)

An appeal from an order of remand under s. 562, C. P. Code, 1882, cannot be entertained if presented after the final disposal of the suit The right of appeal given by s. 588 of the Code, from orders specified in that section ceases with the disposal of the suit.—*Madu Sudan* v. *Kamini Kanta*, 9 C. W. N 895 2 C L. J. 85-n: 32 C. 1023 (12 C. 45 *distinguished*. Followed in *Gulzari Mal* v *Kobirunnessa*, 30 A. 191. 5 A L. J. 270) *See* also, the cases noted under r. 23 Order XLI.

Where a Court of first instance decided a suit, not upon a preliminary point so as to exclude any evidence of facts, but upon the merits, and upon all the evidence tendered and issues framed. *Held*, by the Full Bench, that legality of the remand order and the subsequent proceedings could, under s 591, C P Code, 1882, be questioned in second appeal from the decree in the suit, though no appeal had been preferred against the order itself under s. 588 (28), C. P. Code, 1882—*Rameshar Singh* v. *Sheodin Singh*, 12 A. 510; followed in *Sheonath* v. *Ramdin*, 18 A. 19. *See* also, *Mohesh Chandra* v *Jamiruddin*, 28 C 324: 5 C. W. N. 500

A party aggrieved by an interlocutory order of remand may object to its validity in his appeal against the final decree though he might have appealed against the order under s 588, C P. Code, 1882, and has not done so.—*Savitri* v. *Ramji*, 14 B 232.

An appeal from an order in an appeal remanding a suit for retrial is not to be confined to the question whether the remand has been made contrary to the provisions of s 562, C. P. Code, 1882, or not, but the

question whether the decision of the Appellate Court on the preliminary point is correct or not may also be raised and determined in such an appeal.—*Badam* v. *Imrat*, 3 A 675,; *Loki Mahto* v *Aghoree Ajail*, 5 C. 144: 4 C. L. R. 465: *Bhau Bala* v. *Bapuji Bapuji*, 14 Bom. 14; *Abrahim Khan* v *Faizunissa*, 17 C. 168; *Hasan Ali* v *Siraj Husain*, 16 A. 252. *See* also, *Sankaran* v *Raman Kutti*, 20 M. 152

An order of remand under the inherent powers of an appellate Court and not falling within Or XLI, r. 23, C. P Code, is not appealable *Sheik Mahomed* v *Rangasami*, 31 M L. T. 182: 16 L. W. 515; *Wisakhi Ram* v. *Alawad*, 6 Lah L J, 153, *Permanand* v. *Bhon Lohar;* 7 Pat. L. T. 535. 97 I. C. 165.

An appeal does not lie from an order of remand passed by a special Judge under the Bengal Tenancy Act.—*Mothur Chandra* v. *Tara Sunkar*, 7 C. W. N. 440, *Debi Prasad* v. *Official Trustee, Bengal*, 37 C. L. J. 314.

Section 190 of the N. W. P. Rent Act (XII of 1881) makes s. 562, C P. Code, 1882, applicable to appeals from a Court of Revenue to a District Judge, and where in such a case a District Judge has made an order of remand under s. 562, C. P. Code, 1882, an appeal will lie from such order to the High Court under s 588, cl. (28), C. P Code, 1882.—*Partap Singh* v *Naram Das*, 16 A 375 *See* also, *Veeraswamy* v. *Manager of Pittapur Estate*, 26 M 518, which was a case under the Madras Rent Recovery Act (VIII of 1865).

A Judge of the High Court when hearing an appeal against an erroneous order of remand under s. 562, C. P. Code, 1882, (Or. XLI, r. 23), may pass a final decree in the suit, instead of remanding the suit to the lower Appellate Court No appeal lies against such decree under the Letters Patent clause 15.—*Sankaran* v. *Ramakutti*, 19 M. 152. *Followed* in *Vasudeva* v. *Visvaraja*, 20 M. 407.

Though orders under s 562 C. P. Code, 1882, (Or XLI, r. 23), are appealable under s 588, cl 28, C P Code, 1882, yet the provisions of the latter section are subject to its last para which says that orders passed under this section shall be final and therefore no second appeal lies from an order passed under s. 588, cl. (16), notwithstanding that it is an order passed by the lower Appellate Court remanding the case under s 562, C P. Code, 1882.—*Mathuranath* v. *Nabin Chandra*, 24 C. 774: *Followed* in *Jhandy Lal* v. *Sarman Lal*, 21 A. 291.

Where a lower Appellate Court instead of remanding a suit under s 566, C. P. Code, 1882, erroneously remands it under s. 562, C. P. Code, 1882, Or. XXI, r. 23, and the party aggrieved by its order appeal to the High Court under s 588, cl. (28), the High Court cannot deal with the case as if it were a first appeal from a decree. All that the High Court can do is to rectify the procedure of the Lower Appellate Court, and to direct that it decide the case itself on the merits.—*Sohan Lal* v. *Azizunnissa*, 7 A. 136 (3 A. 675 *distinguished*). *See* also, *Deokishen* v. *Bansi*, 8 A 172.

In an appeal from an order of an Appellate Court, the High Court is bound to accept, as in a second appeal from a decree, the findings of

21 A 291, and it overrides 10 C 523, 19 M .391, 3 A. 18, 7 B. 292, 8 B 260, and 11 C. W. N. 862. In these latter cases it was held that where an Appellate Court passed an order remanding a case of Small Cause Court class, an appeal does lie to the High Court from the order of remand In the former two cases it was held that an appeal does not lie. By the above addition, the conflicting cases have been reconciled adopting the law as laid down in *Mathura Nath* v *Nabin Chandra*, 24 C. 774, and in *Jhandy Lal* v *Sarman Lal*, 21 A 291

Where the first Court rejected the plaint on the ground of misjoinder of causes of action and of defendants and the lower Appellate Court set aside the order and remanded the case for decision on the merits. *Held* that an appeal lies to the High Court under s. 588 (28), C .P Code, 1882, against that order.—*Ram Prasad* v *Sachi Dassi*, 6 C. W N. 385

The first Court made an order returning the plaint in a suit to be presented to the proper Court, on the ground that it was not competent to try such suit, but the Appellate Court holding that the first Court was competent to try the suit, made an order "decreeing *the appeal*" and directing that the case 'should be returned for retrial.' *Held*, that no second appeal would lie, as it was in reality one from an order returning a plaint, and not an appeal from an order remanding the case under s 562, C. P. Code, 1882 —*Krishna Ram* v *Narsing Sevak*, 8 A 855.

Where an order of remand was made without jurisdiction, held that an appeal lay from the order of remand, notwithstanding the Court of first instance had subsequently made what purported to be a final decree in the case —*Jatinga Valley Tea Co*., v *Chera Tea Co.*, 12 C. 45 *See also*, *Narain Pal* v *Kali Kishore*, 1 C W N. (S N.) xxix (29)

An appeal from an order of remand under s. 562, C. P. Code, 1882, cannot be entertained if presented after the final disposal of the suit The right of appeal given by s 588 of the Code, from orders specified in that section ceases with the disposal of the suit.—*Madu Sudan* v *Kamini Kanta*, 9 C. W. N 895 2 C L J. 35-n· 32 C. 1023 (12 C 45 *distinguished*. Followed in *Gulzari Mal* v *Kobirunnessa*, 30 A. 101: 5 A L J. 270) *See* also, the cases noted under r. 23 Order XLI.

Where a Court of first instance decided a suit, not upon a preliminary point so as to exclude any evidence of facts, but upon the merits, and upon all the evidence tendered and issues framed. *Held*, by the Full Bench, that legality of the remand order and the subsequent proceedings could, under s 591, C P Code, 1882, be questioned in second appeal from the decree in the suit, though no appeal had been preferred against the order itself under s 588 (28), C. P Code, 1882—*Rameshar Singh* v. *Sheodin Singh*, 12 A 510; followed in *Sheonath* v. *Ramdin*, 18 A. 19 *See* also, *Mohesh Chandra* v. *Jamiruddin*, 28 C. 321· 5 C. W. N 509

A party aggrieved by an interlocutory order of remand may object to its validity in his appeal against the final decree though he might have appealed against the order under s 588, C P. Code, 1882, and has not done so.—*Savitri* v. *Ramji*, 14 B. 232

An appeal from an order in an appeal remanding a suit for retrial is not to be confined to the question whether the remand has been made contrary to the provisions of s 562, C. P. Code, 1882, or not, but the

therefore appealable.—*Kally Soondery* v. *Hurrish Chunder*, 6 C. 594: 7 C L. R. 543; on appeal, 9 C. 482: 12 C. L. R. 511.

In a suit for account, the High Court refused, under s. 601, C. P. Code, 1882 (Or. XLIV, r. 6), to grant the defendant a certificate on the ground that a decree directing the taking of accounts is not final within the meaning of s 595, C. P. Code, 1882 (s 109). On application for special leave to appeal to Her Majesty in Council, not by way of an appeal from the local Court's refusal, but asking for the exercise of the prerogative right of the Crown to admit an appeal, *held*, that the real question in this suit having been the liability of the defendant to account to the plaintiff upon several claims, the decree had decided this against the defendant in such a way that, although the account had not been taken, the decree was final within s. 595 (s. 109)—*Rohimbhoy* v. *Turner*, 15 B. 155: L. R. 18 I. A 6 Followed in *Muzhar Hossein* v *Bodha Bibi*, 17 A. 112 P. C.

Clause (*w*)—an order under r. 4 of Or. XLVII granting an application for review;

This clause is new, it gives general right of appeal from an order under r. 4 of Or. XLVII (s. 626 of Act XIV of 1882).

Sub-rule (2) of r. 4, Or. XLVII, provides that " where the Court is of opinion that the application for review should be granted, it shall grant the same." This clause (*w*) should be read with r. 7 of Or. XLVII, which also gives appeal from an order granting review on the grounds specifically mentioned therein.

Distinction between Rule 1 of Order XLIII (w) and Rule 7 of Order XLVII.—The language of cl. (*w*) is general, and it allows appeal when a review is granted on ar ... -rules (1) and (2) of r. 1, or when review is ... ions of r. 2, or r. 3, or in disregard of the ... nuch as, under sub-rule (2) of r. 4, a Court is quite competent to grant a review on any ground whatsoever which may appear to it sufficient. But r. 7 allows appeal only on the three grounds specified therein, *viz.*, (*a*) where the review is granted in contravention to the provisions of r. 2, that is, where the review is granted in violation of the latter part of r. 2, (*b*) in violation of clauses (*a*) and (*b*) of the proviso to r 4, or (*c*) where it is granted after the prescribed period of limitation Thus cl. (*w*) covers all the grounds for granting a review including the three grounds mentioned in r. 7. It may, however, be said, that when cl (*w*) covers the grounds mentioned in r 7 of Or. XLVII, that rule is therefore superfluous or unnecessary. " There is no real inconsistency between Or. XLIII, r 1 (*w*) and Or. XLVII, r 7, the former merely gives a party aggrieved by an order granting a review a right of appeal, but it does not deal with the grounds on which the order appealed against can be objected to That is a matter dealt with in Or XLVII, r 7. The two provisions of the Code are not mutually inconsistent, but are really complementary of each other. The one gives the right to appeal and the other defines the extent to which that right can be exercised."—*Sikhandar Khan* v. *Baland Khan*, A. I. R. 1927 Lah. 436. The provisions of Or. XLIII, r. 1 (*w*) are to be read subject to the provisions of Or. XLVII, r 7, and an order

granting a review can be appealed against only on one of the grounds set out in Or. XLVII, r. 7.—*Srinivasa* v. *Official Assignee, Madras*, 52 M L. J. 682: A. I. R 1926 Mad. 641.

An application for review was filed within one month of the date of the order sought to be reviewed and was allowed. An appeal was preferred against the order granting the review and the appellate Court set it aside on the ground that the order sought to be reviewed was really an earlier order *Held* that, although Or. XLIII, r 1 (w) allows an appeal against an order granting a review, that clause must be read with Or. XLVII, r. 7, by which the grounds on which an order granting a review can be set aside on appeal set aside the order granting the review.—*Surya Narain* v. *Kunja Behari*, 25 C. W. N. 884; *Kanshir Ram* v. *Karan, Narain*, 3 Lah L. J. 166: 60 I. C. 259.

There is no second appeal from an order granting a review.—*Barada Kishore* v. *Jagat Chandra*, 64 I. C. 568.

Procedure.

2. The rules of Or. XLI shall apply, so far as may be, to appeals from orders. [S. 590.]

This rule corresponds to s. 590, C. P. Code, 1882, with some modifications This rule is to be read with s. 108, and all the cases bearing upon this rule are collected under that section. *See the cases noted under* s. 108.

ORDER XLIV.

PAUPER APPEALS.

1. Any person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as a pauper, subject, in all matters including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable.

Who may appeal as pauper.

Provided that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust. [S. 592.]

Procedure on application for admission of appeal.

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s 592, C P Code, with some additions, alterations and omissions.

The words " under this Code or any other law," which stood after the words " any person entitled," have been omitted The words " *including the presentation of such application* " have been added, to give effect to 8 M 504 The addition of the above words overrides 26 M 369 The other changes introduced in this rule are change of words and phrases; that is, some words and phrases of the old section have been replaced by more appropriate words and phrases, but no change seems to have been made in the meaning.

" Words have been added to avoid the conclusion at which the Madras High Court has recently arrived in 26 M 369 "—*See the Report of the Special Committee*

A person who desires to appeal as a pauper, must present an application for permission to appeal as a pauper, together with a memorandum of appeal in a separate paper If his application for permission to appeal as a pauper is rejected, his memo of appeal stil remains in the record; and if he can subsequently procure funds and pay the necessary Court-fees, then his appeal shall proceed in the ordinary way But when a suit is brought *in forma pauperis* under Or XXXIII, and the application is rejected, the applicant is required to present a fresh plaint in the ordinary way, as the application for permission to sue *in forma pauperis*, is itself the plaint and the Court has no power to allow it to be stamped as plaint This is the distinction between an application for permission to sue *in forma pauperis* and an application for permission to appeal *in forma pauperis* As to *question of limitation see the cases noted below.*

The rules of this order are to be read with the rules of Or XXXIII, as the rules contained in this order are subject to the provisions of the rules of that order.—*See notes under those rules.*

" In all matters including the presentation of such application."—This rule provides that the provisions relating to suits by paupers shall apply, so far as may be, to appeals by paupers. Therefore the application referred to in this rule, for leave to appeal as a pauper, must be presented by the applicant in person just as an application for leave to sue as a pauper as provided by Or. XXXIII, r 3.

An application for leave to appeal *in forma pauperis* under this rule must be made by the party in person, subject to the exemption contained in Or. XXXIII, r. 3.—*In re Narisi*, 8 M. 504. (*Dissented from* in *Mallhi* v. *Somappa Banta*, 26 M. 369, where it has been held that the provisions of Or. XXXIII, r. 3 do not apply to an application under this rule, to be allowed to appeal as a pauper.) The addition of the words " in all matters including the presentation of such application " overrides this Madras Decision and it is no longer law.

An application for permission to appeal as a pauper was presented, not by the applicant personally, but by his pleader, and was on that ground rejected *Held*, that the order was not subject to revision by the High Court under s. 622, C. P. Code, 1882 (s. 115), as that section did not apply to a proceeding of so purely interlocutory a character as mentioned in s 592 of the Code (this rule) —*Harinarain Singh* v. *Muhammad*, 4 A. 91.

Subect to the Provisions relating to Suits by Paupers.—In deciding duty of the Court to have regard to the rules contained in Or. XXXIII, whether [illegible] *a pauperis*, it is the the right [illegible] that order When at the ti [illegible] ubsisting agreement falling within the terms of Or. XXXIII, r. 5 (*d*), no leave to appeal under this rule could be given to plaintiff.—*Hanifa Bai* v. *Haji Siddick*, 30 M 547: 17 M. L. J. 447: 3 M. L. T. 11.

An application for leave to appeal as a pauper contained no schedule of any property and was not verified in the manner provided by Or. XXXIII, r 2. *Held*, that the Court had no other alternative than to reject the application.—*Muhammad Salamatullah* v. *Ram Jiwah*, 11 Oudh Cases 19

Application and Memorandum of Appeal.—This rule contemplates the presentation of two separate documents, *viz*, a memorandum of appeal and an application for leave to appeal as a pauper. The disposal by the Judge of the pauper application does not therefore mean the disposal of the appeal The Judge may still treat it as an existing appeal if the appellant desires to continue it as an ordinary appeal by paying the full court fees. The Judge is under no obligation to dismiss the appeal when he refuses leave to the appellant to appeal as a pauper.—*Bai Ful* v. *Desai Manorbhai*, 22 B. 849; *Muhammad* v *Rahat Ali*, 40 A. 381.

The dismissal of the application for leave to appeal as a pauper does not involve the dismissal of the appeal —*Mahant Diyal Das* v. *Sundar Das*, 3 L. 35: 65 I. C. 741: A. I. R. 1922 Lah. 225.

The Court should Carefully See that the Proviso is Satisfied.—In granting leave to appeal as a pauper the Court should be careful to see that the proviso to this rule is satisfied. The Judge admitting a pauper appeal should express and record very briefly the reasons for granting leave, so that the bench before whom the appeal ultimately comes may have an assurance that the leave was properly given.—*Sakubai* v. *Ganpat*, 28 B. 451. The proviso is mandatory and is a necessary safeguard introduced by the Legislature for the benefit of litigants who find themselves opposed by paupers —*Rajendra* v. *Gopal*, 4 Pat. 67: A. I R 1925 Pat. 442; *Vidyvanti* v. *Jai Dayal*, 7 Lah. L J 214: 89 I C. 292: A I. R 1925 Lah. 391 Under the proviso to Or. XLIV, r. 1, the Court is to proceed upon a perusal of the application and the judgment appealed from If it decides thereafter that the decision sought to be appealed from, is correct, the High Court will not interfere, in revision, with an order rejecting the application for leave to appeal as a pauper —*Shamsuddin* v *Gur Bakhsh*, 91 I. C 96: A. I. R 1926 Oudh 204

Limitation in Pauper Appeals.—The period of limitation for leave to appeal as a pauper is 30 days from the date of the decree appealed from. *See*, *Mahadev* v. *Lakshman*, 19 B 48, and Art 170 of the Limitation Act.

Appeal.—*No appeal lies from an order refusing leave to appeal as a* pauper.

No appeal lies, under clause 15 of the Letters Patent, from an order of a single Judge of the High Court refusing an application for leave to appeal *in forma pauperis.*—*Banno Bibi* v *Mehdi Husain*, 11 A. 375 (9 M. 253 *followed*; 9 C. 482 *distinguished*) *See* also, *In re Rajagopal*, 9 M 447; and *Appasami Pillai* v *Somasundra*, 26 M 437 (22 M. 109, 23 M. 169 and 24 M 358 *followed*) *See* also, *Toolsee Money* v *Sudevi*, 26 C. 361; *Chappan* v *Moidin*, 22 M 68, and *Shabhapathi* v. *Narayanasami*, 25 M. 555 But see, *Tuljaram* v *Alagappa*, 35 M. 1, 9, 17 in which a contrary view has been taken.

Pauper Respondent.—A *pauper-respondent* is *not entitled to present* objections under s. 561 of the C. P. Code, 1882 (Or. XLI, r 22), at the trial of an appeal without payment of stamp-duty —*Babaji Hari* v *Rajaram Dallal*, 1 B. 75: *Narayani* v. *Krishna*, 8 M 214 *See* also, *Brojeshwari Dasi* v *Guroo Churn*, 11 C 735 and *Rashmonee* v *Junmojoy*, 9 W. R 356

Form.—For Form of application to appeal *in forma pauperis*, *see* App. G, Form No 10 For Form of notice, *see* Form No. 11

Inquiry into pauperism.

2. The inquiry into the pauperism of the applicant may be made either by the Appellate Court or under the orders of the Appellate Court by the Court from whose decision the appeal is preferred

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court from whose decree the appeal is preferred, no further inquiry in respect of his pauperism shall be necessary, unless the Appellate Court sees cause to direct such inquiry.

COMMENTARY.

This rule corresponds to s. 593, C. P. Code, 1882, with some verbal alterations.

The order of the Court calling upon the subordinate Court to report, does not operate as a final disposal of the application, and it is open to the High Court upon receipt of the report to consider whether the case is one in which leave to appeal *in forma pauperis* ought to be granted.—*Hanifa Bai v. Haji Siddick*, 30 M. 547: 17 M. L. J. 447.

ORDER XLV.

APPEALS TO THE KING IN COUNCIL.

"Decree" defined.

1. In this Order, unless there is something repugnant in the subject or context, the expression "decree" shall include a final order. [S. 594.]

COMMENTARY.

This rule corresponds to s 594, C P Code, 1882, with some alterations. The words "*shall include a final order*" have been substituted for the words "includes also judgment and order," which occurred in the old section.

"Decree—Final Order."—For the meaning of the terms "*decree*" and "*final order,*" *see* notes under ss 109-110.

Application to Court whose decree complained of.

2. Whoever desires to appeal to His Majesty in Council shall apply by petition to the Court whose decree is complained of. [S. 598.]

COMMENTARY.

This rule corresponds to s 598, C P Code, 1882, with some alterations. The word "*shall*" has been substituted for the word "*must,*" which occurred in the old section The other alterations are merely verbal. *See notes under s.* 110.

Limitation for an Application for Leave to Appeal to the Privy Council.—The application for leave to appeal to the Privy Council must be made within 6 months from the date of the decree appealed from.—*See* Limitation Act, Art 179

The application for leave to appeal to the Privy Council must be made within six months from the date of decree, and in computing the period of limitation the time required for obtaining a copy of the decree cannot be excluded, as s 12 of the Limitation Act does not apply to such application. —*Moroba Ram Chandra* v *Ghanasham Nilkant*, 19 B. 301 *See* also. *Lakshmanan* v *Periyasami*, 10 M 373

The provisions of the second paragraph of s 5 of Act XV of 1877 (s 4 of Act IX of 1908) do not extend to applications for leave to appeal to Her Majesty in Council The limitation therefore for an application for leave to appeal to Her Majesty in Council is six months from the date of the decree to appeal from which leave is sought —*In the matter of Sita Ram*, 15 A. 14 (6 A 250, 2 M 230, 10 C 557, and L R 11 I A. 7 *referred to*) *See* also, *Shib Singh* v *Gandhrap Singh*, 28 A 391 · 3 A L J 165 (1 A 644, 15 M 159, 15 A. 14, 19 B 301 *followed*)

The aforesaid decisions are no longer law and it has now been expressly held that under s. 12 of the Limitation Act of 1908, the time requisite to obtain a copy of the decree appealed from is to be excluded.—*Abdullah* v. *Administrator-General of Bengal*, 42 C. 35; *Ram Sarup* v. *Jaswant Rai*, 38 A. 82.

Privy Council appeal filed during vacation, when the High Court was closed, but the offices were open. *Held*, that the applicant was entitled to the benefit of para. 2 of s. 5 of the Limitation Act, 1877 (s. 4 of Act IX of 1908).—*Rani Venkata Ramama* v. *Kherode Mull*, 10 C. L. J. 118; *Parameswar* v. *Baijnath*, 10 C. L. J. 120.

In an application for leave to appeal to the Privy Council, the disability by reason of minority is not to be excluded from the prescribed period of limitation.—*Thurai Rajah* v. *Jainiladeen*, 18 M. 484.

Application to Appeal to the Privy Council In Forma Pauperis.—When a person applies for leave to appeal to His Majesty in Council *in forma pauperis*, he must present an application for that purpose to the High Court, and a separate application to His Majesty in Council.—*Munni Ram* v. *Sheocharan*, 7 W. R. P. C. 29 : 4 M. I. A. 114. Or. XLIV, r. 1 does not apply to appeals to His Majesty in Council, and the High Court has no power to grant leave to appeal *in forma pauperis* to His Majesty in Council.—*Jagadanand* v. *Rajendra*, 17 C. L. J. 381; *Ram Kishen* v. *Manna Kumari*, 3 Pat. L. J. 179; *Amba* v. *Srinivasa*, 42 M. 32.

Certificate as to value or fitness

3. (1) Every petition shall state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of s. 110, or that it is otherwise a fit one for appeal to His Majesty in Council.

(2) Upon receipt of such petition, the Court shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted. [S. 600.]

COMMENTARY.

This rule corresponds to s. 600, C. P. Code, 1882, with some alterations. The words "*shall state*" have been substituted for the words "must state"; and in sub-rule (2) the words "*shall direct notice*" have been substituted for the words "may direct notice," which occurred in the old section. The other alterations are merely verbal.

Certificate.—In determining whether leave to appeal has been properly granted or not, the document which the Judicial Committee are bound to consider and act upon is the certificate of leave to appeal and not the order for such certificate and unless the certificate upon which the leave to appeal is based is in such a form as to justify that leave they ought to hold that leave has not been properly given.—*Radha Krishna* v. *Rai Krishna*, 23 A. 415 : 28 I. A. 182. *See* also, the cases noted under s. 109, (c), under the heading "IS CERTIFIED TO BE A FIT ONE FOR APPEAL

Petition to State the Grounds of Appeal.—The petition of appeal to the Privy Council should distinctly state what the substantial question of law is that it is proposed to submit to the Privy Council.—*Ali Akbar* v. *Abdul Latif*, 12 Bom H. C. 8.

It is incumbent upon a party applying for special leave to appeal to set out in the petition a full statement of the facts and legal grounds to show that there is a substantial case on the merits, and a point of law involved, proper to be determined by the Appellate Court A petition too general and vague was ordered to be dismissed or to stand over for amendment as being too general and vague—*Goree Monee* v *Juggut Indro*, 11 M. I. A. 1.

A petition for special leave to appeal being *ex parte*, it is a universal and most important rule of the Court, that every fact which is material to the determination of the question raised upon the petition should be truly and fairly stated and where there is an omission of material facts, whether it arises, *from improper intention on the part of the petitioner*, or whether it arises from accident or negligence, still the effect is the same, if the Court has been induced to make an order which, if the facts had been fully before it, it would not, or might not, have been induced to make —*Mohun Lall* v. *Bebee Doss*, 8 M I A 193

Where a party applies to the Judicial Committee for special leave to appeal, the matter being under the appealable value, he should first apply to the Court below for a certificate under s 600, C P. Code, 1882 (Or XLIV, r 3) But this rule will not bind this Board not to grant such leave in any special case, although that course has not been followed —*Moti Chand* v. *Ganga Prasad*, 24 A. 174, P C 6 C W N 362, P. C.

In a suit for malicious prosecution in which the plaintiff claimed Rs. 3,00,000 as damages, *held*, that the question of malice and reasonable and probable cause is a question of fact and not a substantial question of law, *and that the certificate was granted by the High Court* under a misapprehension —*Pestonji* v *The Queen Insurance Co.*, 25 B. 332

See notes under s 110 as to amount or value

Procedure.—If the applicant fails to take the necessary steps to prosecute his *petition for leave to appeal to the Privy Council*, it may be struck off for want of prosecution —*Moorajee Poonja* v *Visranjee*, 12 C 658

If leave to appeal be granted *ex parte*, the respondent may, as a matter of course, present a counter-petition to dismiss the appeal —*Sibnaram* v *Hullodhur*, 6 M I A 207

Form.—For Form of Notice under sub rule (2), *see*, App G, Form No 12

Appeal.—No appeal lies from an order granting a certificate that the case is a fit one for appeal to the Privy Council because such order is not a judgment within the meaning of cl 15 of the Letters Patent —*Lutif Ali* v *Asgur Reza* 17 C 455 So also no appeal lies under that clause from an order refusing leave to appeal to the Privy Council where such refusal is based on the ground that the case did not fulfil the requirements of s. 110 —*Manly* v *Patterson*, 7 C 339

Consolidation of suits.

4. For the purposes of pecuniary valuation, suits involving substantially the same questions for determination and decided by the same judgment may be consolidated: but suits decided by separate judgments shall not be consolidated, notwithstanding that they involve substantially the same questions for determination.
[New.]

COMMENTARY.

Consolidation of Suits.—This rule is new. It has been added to give effect to the following decisions of the Calcutta High Court in which it was held that consolidation could not be permitted unless the suits, besides involving the same questions for determination, where decided by the same judgment.—*Deo Narain Singh* v. *Guni*, 34 C. 400; *Royal Insurance Co.* v. *Akhoy Coomar*, 5 C. W. N. 41; *Byjnath* v. *Graham*, 11 C. 740.

The High Court has power to consolidate appeals under Or. XLV, r. 4, C. P. Code, and to calculate the amount of valuation upon the aggregate values of all the suits but the judgment appealed against should be the same. Where the trial Court disposed of all the analogous suits by one and the same judgment but in one case, valued at over Rs. 5,000, the appeal was decided by the High Court and the other cases were decided by the District Court, the appellate judgment, against which leave to appeal to the Privy Council was sought, being not the same, Or. XLV, r. 4 cannot apply, and no consideration can be granted by the High Court The inherent power to consolidate appeals cannot be exercised for setting pecuniary valuation when Or. XLV, r. 4 forbids it in cases governed by different judgments —*Deokinandan* v. *Narsing Raut*, 2 Pat. L. T. 157. 6 Pat. L J. 97.

Under Or. XLV, r. 4, the case is only consolidated for the purpose of pecuniary value. It does not matter what the reason is why the appeals are consolidated. Once they are consolidated for whatever reason, they form in fact one appeal and the parties in that appeal must be treated just as the parties in one suit.—*The Midnapore Zemindary Co.* v. *Madan Marwari*, (1923) Pat. 17. 70 I. C. 782.

Or. XLV, r. 4 allows consolidation but only to make good a defect of pecuniary valuation and not a defect of any other kind The rule speaks only of the consolidation of different suits decided by the same judgment but the principle applies where the interests of the two parties are so entirely separate that they are practically defendants in two different suits decided by one judgment.—*Seth Narayandas* v. *Mt. Kamalabai*, 69 I. C. 525; 1923 Nag. 108.

Inherent Power to Consolidate Suits.—This rule provides for consolidation of suits "for the purposes of pecuniary valuation". It has been held by the High Court of Patna that the High Court has inherent power to permit consolidation of cases on grounds other than those specified in this rule. Accordingly, two appeals to His Majesty in Council,

which were in substance one, were ordered to be consolidated and tried together "in the interest of justice and to save unnecessary expense."—*Chaudry Har Prasad* v. *Brij Kishore*, 3 Pat. L. J. 440. 45 I. C. 551.

See notes under s. 110.

Remission of dispute to Court of first instance

5. In the event of any dispute arising between the parties as to the amount or value of the subject-matter of the suit in the Court of first instance, or as to the amount or value of the subject-matter in dispute on appeal to His Majesty in Council, the Court to which a petition for a certificate is made under rule 2 may, if it thinks fit, refer such dispute for report to the Court of first instance, which last-mentioned Court shall proceed to determine such amount or value and shall return its report together with the evidence to the Court by which the reference was made. [New.]

COMMENTARY.

Dispute Regarding Value of Subject-matter.—This rule is new. It has given legislative sanction to the practice followed in cases where there was a dispute as to the true value of the subject-matter of the suit. When there is a contest as to the true value of the matter in dispute it has been the invariable practice, a practice sanctioned by the Judicial Committee, to ascertain by evidence and inquiry, what the true value is.—*Amrita Nath* v. *Abhoy Charan*, 9 C W N 370.

The High Court should not direct any fresh inquiry under this rule where the Court of first instance in the trial of the suit has already made an inquiry as to the value of the subject-matter of the suit and the appellant has acquiesced in the finding of the Court of first instance on this point.—*Anant* v. *Ramchandra*, 42 B 609 *See* also, *Hansman* v. *Bahuji*, 43 C 225, where it has been held that the Court of first instance should itself hold the inquiry when a reference is made to it under this rule.

Effect of refusal of certificate

6. Where such certificate is refused, the petition shall be dismissed. [S. 601, Para. 1.]

COMMENTARY.

This rule corresponds to para 1 of s 601, C P Code, 1882 The proviso attached to that section (regarding appeals from orders of refusal) has been relegated to Or XLIII as clause (v)

Costs.—Where the petition is made to the High Court and it is dismissed with costs, the proper Court to execute the order is the lower Court.—*Jogendra* v *Wazidunnissa*, 34 C 860

Appeal.—An order made by any Court other than a High Court refusing the grant of a certificate under this rule is appealable under **Or. XLIII, r. 1, cl (v)**

7. (1) Where the certificate is granted, the applicant shall within *ninety days or such further period, not exceeding sixty days, as the Court may upon cause shown allow*, from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date,—

Security and deposit required on grant of certificate.

(*a*) furnish security in cash or in Government securities for the costs of the respondent, and

(*b*) deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit except—

(1) formal documents directed to be excluded by any order of His Majesty in Council in force for the time being ;

(2) papers which the parties agree to exclude;

(3) accounts, or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included; and

(4) such other documents as the High Court may direct to be excluded;

Provided that the Court at the time of granting the certificate may, after hearing any opposite party who appears, order on the ground of special hardship that some other form of security may be furnished :

Provided further, that no adjournment shall be granted to an opposite party to contest the nature of such security.

(2) Where the applicant prefers to print in India the copy of the record, except as aforesaid, he shall also, within the time mentioned in sub-rule (1), deposit the amount required to defray the expense of printing such copy. [S. 602.]

COMMENTARY.

Rule Amended.—The italicized words were added into this rule by Act XXVI of 1920 In sub-rule (1) the words originally were "within six months." The period is now reduced to 90 days The provisos were also added by the same Act

"Date of the decree."—The date on which the decree is pronounced, not the date on which it is signed—*Harendra* v. *Haridas*, 14 C. W. N. 420: 5 I. C. 844.

Extension of Time.—The time allowed by this rule for giving the security and making the deposit may be extended by the High Court when there are cogent reasons—*Fazulunnissa* v. *Molu*, 6 A. 250; *Burjore* v. *Bhagana*, 10 C. 557, P. C. (2 C. 272 *approved*). *Followed* in *Jotindra Nath* v. *Prasanna Kumar*, 11 C. W. N. 1104.

The cogent reasons must be such as would lead the Court to believe that the party was diligent in due time to be prepared to lodge the deposit within the limited period, and that he was prevented from doing so, not owing to the absence and difficulty of getting funds, but owing to some circumstances, accidental or otherwise, over which he had no control, or owing to mistake which the Court would consider not unreasonable or caused by negligence—*Rangasaya* v. *Mahalakshmamma*, 14 M. 391. But where the sum of money required is large, and diligence of the petitioner is shown by his having paid in three-fourths of the money in time, there is sufficient reason for extension of time—*Bagga* v. *Salihon*, 44 P. R. 1910: 70 P. W. 1910: 6 I. C. 723. But the provisions of Act XXVI of 1920 do not apply to an appeal from a decree passed before the coming into force of the Act—*Debi Rai* v. *Prahlad*, 44 A. 242: 20 A. L. J. 51: 65 I. C. 840. A. I. R. 1922 All. 87.

Under Or. XLV, r. 7, as amended by s. 3 of Act XXVI of 1920, the High Court's discretion to extend the time for furnishing security and making a deposit for translation printing and other charges has been curtailed and limited to the period mentioned in the amendment. The High Court has no power to extend the period beyond six weeks—*Ram Dhan* v. *Prag Narain*, 44 A. 216: 20 A. L. J. 13: A. I. R. 1922 All. 43; *Ashiq Ali* v. *Arjunan Unnissa*, 70 I. C. 937: 1923 *Oudh* 50; *Kachi Reddi* v. *Saki Reddi*, (1923) M. W. N. 510: 18 L. W. 29, *J. N. Surty* v. *T. S. Chittyar*, 4 R. 265: A. I. R. 1927 *Rang.* 20.

The only discretion which the High Court has under r. 7 is to extend the period of 90 days from the date of the decree to a further period of 60 days, but no discretion is given to the High Court by the rule (as amended by Act XXVI of 1920) to extend it beyond the period of 6 weeks from the date of the grant of the certificate—*Ramani Ranjan* v. *Durga Dutt*, A. I. R. 1927 Pat. 330, *Jaikissen* v. *Baijnath*, 103 I. C. 213: A. I. R. 1927 Pat. 332.

It has, however, been recently held by the Bombay High Court that the High Court, under Rule 9 of the Privy Council Rules, 1920, has power to enlarge the time prescribed by r. 7 of Or. XLV, as amended by Act XXVI of 1920, for furnishing security and making the deposit after default has been made—*Nil Kant Balwant* v. *Sri Sachidanand*, 29 Bom. L. R. 352 F. B.: A. I. R. 1927 Bom. 217.

Inclusion of Unnecessary Papers in the Record.—The Privy Council have strongly condemned the inclusion in the record of unnecessary papers and disallowed the costs occasioned thereby—*Gopal* v. *Rajani*, 47 C. 5: 46 I. A. 299 P. C.

Delay.—If delay in the preparation of the record is due to the inaction of the appellant, it seems that the appeal may be certified as effectually prosecuted.—*Saklat* v *Bella*, 2 R 91: A I R 1924 Rang 217 80 I. C. 74.

Appeal.—No appeal will lie under cl. 15 of the Charter from an order refusing to extend the time for furnishing security for costs, and directing the appeal to be struck off for not furnishing security within the prescribed time.—*Kishen Pershad* v *Tiluckdhari*, 18 C. 182

Security in case of Consolidated Appeal.—Where two or more appeals are consolidated for purposes of pecuniary jurisdiction, the security required by this rule is the whole security which the applicants together have to furnish and not only a portion thereof. If, therefore, two or more appeals are consolidated and some sets of appellants furnish the security required from them, but others do not, the consolidated appeal cannot be admitted under r. 8 below.—*Bibi Nabi* v. *Rai Baijnath*, 4 Pat. L J 198: 50 I. C. 511.

As to the mode of enforcement, attestation and registration of security bond, see notes under s. 145.

Admission of appeal and procedure thereon.

8. Where such security has been furnished and deposit made to the satisfaction of the Court, the Court shall—

(*a*) declare the appeal admitted,

(*b*) give notice thereof to the respondent,

(*c*) transmit to His Majesty in Council under the seal of the Court a correct copy of the said record, except as aforesaid, and

(*d*) give to either party, one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable expenses incurred in preparing them. [S. 603.]

COMMENTARY.

This rule corresponds to s 603, C P Code, 1882, with some alterations

In the first para. of the rule, the word, "*furnished*," has been substituted for the word "completed" and the word, "*shall*," has been substituted for the word, "may," which occurred in the old section Th other changes are merely verbal.

"**Made to the satisfaction of the Court.**—A deposit made out of time is not one made to the satisfaction of the Court within Or. XLV, r. 8—*Jag Mohan* v. *Sahu Dorki Nandan*, 1923 A. 572.

Admission of Appeal.—After the admission of an appeal under this rule, only so much of the original record as bore upon, and is material to, the questions decided by the High Court and the subject of the appeal should be printed in the copy.—*Venkata Surya* v. *Court of Wards*, 20 M. 305, P. C.

After the declaration of admission of an appeal under this rule, the High Court refused to stay execution, but the execution of the decree was stayed pending the appeal by an order of the Privy Council.—*Shatrapat Singh* v. *Dwarka Nath*, 22 C. 1 P. C.

Where a petition for leave to appeal to the Privy Council from a decree of the High Court has been presented, the High Court may grant stay of execution, although the appeal has not as yet been admitted under this rule.—*Janbai* v. *Sale Mahomed*, 19 B. 10. Dissented from in *Bibi Jarao Kumari* v. *Gopi Chand*, 5 C. W. N 562

The High Court has power to strike off a petition of appeal to Her Majesty in Council for want of prosecution.—*Moorajee Poonja* v *Visranjee*, 12 C 658

An objection that an appeal has come before the Judicial Committee without proper authority ought to be taken at the earliest opportunity, but may be entertained at any stage of the appeal and is not unfrequently heard when the appeal is called on and before the arguments on the merits have commenced.—*Gajadhar Pershad* v *Widows of Eman Ali*, 15 B L R, P. C., 221, L. R 2 I A 205

The High Court passed a separate decree on a cross-appeal, identical in terms with those of a decree passed on the appeal in the suit. From the latter decree an appeal to the Privy Council was declared by the High Court to be admitted, under this rule *Held*, that special leave should be granted to appeal from the decree in cross-appeal, without further security being required than had already been taken in respect of the appeal in the other.—*Muhammad Ikramuddin* v *Musammat Najaban*, 19 A. 95

"Give notice thereof to the respondent."—The accidental omission to notify the respondents of the admission of an appeal to the Privy Council is not a sufficient ground for re-hearing provided the respondents in fact knew of the admission.—*Hardit Singh* v *Gurmukh Singh*, 4 P. W. R 1921: 59 I. C 7 P C

Such Security.—*See* Notes to r 7 above and s 145, *ante*.

Form.—For Form of notice under cl (*b*) of this rule, *see* App. G, Form No 10

Revocation of acceptance of security.

9. At any time before the admission of the appeal, the Court may, upon cause shown, revoke the acceptance of any such security, and make further directions thereon. [S. 604.]

COMMENTARY.

This rule exactly corresponds to s 604, C P. Code, 1882

9-A. Nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to the legal representative of any deceased opposite party or deceased respondent in case, where such opposite party or respondent did not appear either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court :

Power to dispense with notices in case of deceased parties

Provided that notices under sub-rule (2) of rule 3 and under rule 8 shall be given by affixing the same in some conspicuous place in the Court-house of the Judge of the District in which the suit was originally brought, and by publication in such newspapers as the Court may direct.

COMMENTARY.

This rule was added by Act XXVI of 1920.

10. Where at any time after the admission of an appeal but before the transmission of the copy of the record except as aforesaid to His Majesty in Council, such security appears inadequate,

Power to order further security or payment.

or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, except as aforesaid,

the Court may order the appellant to furnish, within a time to be fixed by the Court, other and sufficient security, or to make, within like time, the required payment. [S. 605.]

COMMENTARY.

This rule corresponds to s. 605, C. P. Code, 1882, with some verbal alterations.

"**Further payment is required.**"—Where it was impossible to say whether certain account-books and papers were material or relevant, or even were part of the evidence in the case, the High Court declined to put the appellant to the expense of translating and transcribing them but gave the respondent the option of translating them at his own expense, with a view to their being sent to England as an appendix to a record.—*In the matter of Rajkoomar Baboo*, 7 W. R. 90.

11. Where the appellant fails to comply with such order, the proceedings shall be stayed, and the appeal shall not proceed without an order in this behalf of His Majesty in Council,

Effect of failure to comply with order

and in the meantime execution of the decree appealed from shall not be stayed. [S. 606.]

COMMENTARY.

This rule corresponds to s 606, C P Code, 1882, with some verbal changes only.

12. When the copy of the record, except as aforesaid, has been transmitted to His Majesty in Council, the appellant may obtain a refund of the balance (if any) of the amount which he has deposited under r. 7. [S. 607.]

Refund of balance deposited.

COMMENTARY.

This rule exactly corresponds to s 607, C P Code, 1882 —*See notes under r 7.*

13. (1) Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless the Court otherwise directs.

Powers of Court pending appeal.

(2) The Court may, if it thinks fit, on special cause shown by any party interested in the suit, or otherwise appearing to the Court,—

(*a*) impound any moveable property in dispute or any part thereof, or

(*b*) allow the decree appealed from to be executed, taking such security from the respondent as the Court thinks fit for the due performance of any order which His Majesty in Council may make on the appeal, or

(*c*) stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from, or of any order which His Majesty in Council may make on the appeal, or

(*d*) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal, as it thinks fit, by the appointment of a receiver or otherwise. [S. 608.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s. 608, C. P. Code, 1882, with some additions and alterations.

The words " admitting the appeal " which occurred in the first para. of the old section after the word " Court " have been omitted. These words gave rise to a conflict of decisions. It was held by the High Court of Bombay that the Court had power, under the old section, to stay the execution of the decree appealed from, after a petition had been presented for leave to appeal but before the appeal was admitted.—*Dame Janbai* v. *Sale Mahomed*, 19 B. 10; on the other hand, it was held by the Calcutta High Court that the Court had no such power because the words " admitting the appeal " indicated that no stay could be granted until the appeal was admitted.—*Jarao Kumari* v. *Gopi Chand*, 5 C. W. N. 562. The omission of the words " admitting the appeal " now makes it clear that the power conferred by this rule may be exercised at any time after the presentation of the petition, and even before the grant of a certificate for the admission of the appeal.

The words " *by the appointment of a receiver or otherwise* " have been added in clause (*d*). By the addition of these words the power of the High Court has been enlarged. The other changes are merely verbal.

" The Court."—In this rule and r. 14, " the Court " means the High Court.—*Ram Bahadur* v. *Radha Krishen*, 3 Pat. L. J. 40.

Cl. (a). " Impound any moveable property."—In the case of an appeal to the Privy Council, the Court has no power, on failure of both parties to furnish security as required, to attach any property held by the appellant beyond that decreed.—*Khoroo Lall* v. *Kant Lall*, 5 W. R. Mis. 37.

Cl. (b). " Taking such security."—The Court has power to require security to be given under this rule even after the decree has been executed wholly or in part.—*Jariutool Batool* v. *Hoosainee Begum*, 10 M. I. A. 196; *Inder Kumari* v. *Jaipal Kumari*, 14 C. 290, 295, L. R. 14 I. A. 1; *Narayanan* v. *Aruna Chellam* 19 M. 140, 142.

The respondent decree-holder's failure to give security will not deprive him of the benefit of s. 15 of the Limitation Act.—*Panday Sadho* v. *Srimati Radhey*, 5 Pat. L. J. 89; 53 I. C. 9.

Stay of Execution.—The High Court has inherent power to make an order for stay of execution in view of an application by the judgment-debtor to the Judicial Committee for special leave to appeal to His Majesty in Council.—*Nanda Kishore* v. *Ram Golam*, 40 C. 955, 18 I. C. 207.

Practice.—In appeals pending before the Privy Council application to stay proceedings in execution ought always to be made, in the first instance at any rate, to the Court in India which has ample power to deal with the matter according to the circumstances of the particular case and has knowledge of the details which the Judicial Committee cannot possess on an interlocutory application.—*Vasudeva* v. *Sadagopa* 29 M 379 P C 4 C L J 101 10 C W N. 945, P C

If the application is refused by the High Court and the Judicial Committee is of opinion that the application ought to have been granted it may grant a stay of execution But it will not do anything further, for instance, it will not appoint a receiver of the property under attachment nor take the security referred to in cls (*b*) and (*c*) of sub-rule (2). In such cases, the Judicial Committee will grant leave to the applicant to apply to the High Court with an intimation of its opinion and the High Court is bound to act according to the direction of the Judicial Committee.—*Jariutool Batool* v *Hosseinee Begum*, 10 M I A. 196, 202; *Chatrapat Sing* v *Dwarka Nath*, 22 C 1, P C

Procedure where there is an order of Court to stay the execution of a decree obtained by a party who appealed to the Privy Council from another decree against himself, if the holder of the decree which is appealed against attempts to execute it.—*Dwarka Nath* v *Woomasoonduree*, 14 W R 329.

A party to a suit in an Appellate Court, who had obtained leave to appeal from its decree to Her Majesty in Council, petitioned for the order of the latter staying execution of interlocutory orders made in execution of such decree, and directing payment by the petitioner to the opposite party of large sums without security taken for their repayment in the event of the decree being reversed. This accompanied a petition for special leave to appeal against those orders The latter was granted, but the prayer for stay of execution was refused, with an intimation to the Court below that it appeared to be the reasonable course, that the opposite party should not, pending the appeal, be put in possession of the large sums in dispute —*Indur Kumari* v. *Jaipal Kumari*, 14 C 290; L R 14 I. A. 1 (10 M I A 196 and 322, *referred to*)

The Privy council which has seisin of the appeal and not the High Court which passed the decree, has power to stay proceedings in a partition suit after a preliminary decree Under Or XLV, r. 13, the High Court which passed the decree may stay execution of the final decree on special cause being shown.—*Lalitesvar Singh* v. *Bhabeswar Singh*, 9 C. L. J. 561 13 C W N. 690. On appeal to the P. C. the proceedings were stayed; *see* 13 C W. N. cclxxv (275-*n*).

Cl. (d). "To give such other direction."—Pending an appeal by special leave to the Privy Council, the High Court, on an application by the appellant, for an *interim* order for continuing a manager under the Encumbered Estates Act until final adjudication, or till respondent furnished proper security, refused it on the ground that the Code gives them no jurisdiction in an appeal not certified by themselves. But the Privy Council, on an application by the appellant ordered stay of proceedings at appellant's request.—*Mohesh Chandra* v. *Satrughan*, 4 C. W. N. 34 P. C. 27 C. 1, P. C.

(*d*) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal, as it thinks fit, by the appointment of a receiver or otherwise. [S. 608.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s 608, C P. Code, 1882, with some additions and alterations.

The words " admitting the appeal " which occurred in the first para. of the old section after the word " Court " have been omitted These words gave rise to a conflict of decisions It was held by the High Court of Bombay that the Court had power, under the old section, to stay the execution of the decree appealed from, after a petition had been presented for leave to appeal but before the appeal was admitted.—*Dame Janbai* v. *Sale Mahomed*, 19 B. 10; on the other hand, it was held by the Calcutta High Court that the Court had no such power because the words " admitting the appeal " indicated that no stay could be granted until the appeal was admitted.—*Jaroa Kumari* v. *Gopi Chand*, 5 C. W. N. 562. The omission of the words " admitting the appeal " now makes it clear that the power conferred by this rule may be exercised at any time after the presentation of the petition, and even before the grant of a certificate for the admission of the appeal.

The words " *by the appointment of a receiver or otherwise* " have been added in clause (*d*) By the addition of these words the power of the High Court has been enlarged The other changes are merely verbal.

" The Court."—In this rule and r. 14, " the Court " means the High Court.—*Ram Bahadur* v. *Radha Krishen*, 3 Pat L J. 40.

Cl. (a). " Impound any moveable property."—In the case of an appeal to the Privy Council, the Court has no power, on failure of both parties to furnish security as required, to attach any property held by the appellant beyond that decreed.—*Khoroo Lall* v. *Kant Lall*, 5 W. R. Mis. 37.

Cl. (b). " Taking such security."—The Court has power to require security to be given under this rule even after the decree has been executed wholly or in part.—*Jariutool Butool* v. *Hoosseinee Begum*, 10 M. I A 196; *Inder Kumari* v. *Jaipal Kumari*, 14 C. 290, 295, L R 14 I. A 1; *Narayanan* v. *Aruna Chellam* 19 M. 140, 142.

The respondent decree-holder's failure to give security will not deprive him of the benefit of s. 15 of the Limitation Act —*Panday Sadho* v. *Srimati Radhey*, 5 Pat. L J. 39, 53 I. C. 9.

Stay of Execution.—The High Court has inherent power to make an order for stay of execution in view of an application by the judgment-debtor to the Judicial Committee for special leave to appeal to His Majesty in Council.—*Nanda Kishore* v. *Ram Golam*, 40 C. 955; 18 I. C 207.

COMMENTARY.

This rule corresponds to s. 609, C. P Code, 1882, with some verbal alterations.

15. (1) Whoever desires to obtain execution of any order of His Majesty in Council shall apply by petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to be executed, to the Court from which the appeal to His Majesty was preferred.

Procedure to enforce orderf of King in Council.

(2) Such Court shall transmit the order of His Majesty in Council to the Court which passed the first decree appealed from, or to such other Court as His Majesty in Council by such order may direct, and shall (upon the application of either party) give such directions as may be required for the execution of the same; and the Court to which the said order is so transmitted shall execute it accordingly in the manner and according to the provisions applicable to the execution of its original decrees.

(3) When any monies expressed to be payable in British currency are payable in India under such order, the amount so payable shall be estimated according to the rate of exchange for the time being fixed at the date of the making of the order by the Secretary of State for India in Council with the concurrence of the Lords Commissioners of His Majesty's Treasury for the adjustment of financial transactions between the Imperial and the Indian Governments.

(4) Unless His Majesty in Council is pleased otherwise to direct, no order of His Majesty in Council shall be inoperative on the ground that no notice has been served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such opposite party or respondent did not appear either at the hearing in the Court whose decree was complained of or at any proceedings subsequent to the decree of that Court, but such order shall have the same force and effect as if it had been made before the death took place. [S 610]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s 610 C P Code, 1882, with some alterations and omissions

Paras 3—4 of the old section which related to execution of decree against the surety and the proviso attached to it, have been omitted.

The reason for the omission is, that s. 145 of the Code contains provisions for enforcement of decrees against sureties

The word "*enforce*" or "*enforcement*," which stood before the words "*execute*" or "*execution*" in the old section, have also been omitted

In sub-rule (3) the words "*at the date of the making of the order*" have been added before the words by the Secretary of State Sub-rule (4) was added by Act XXVI of 1920 in order to prevent delays in the disposal of Privy Council appeals

"Whoever desires to obtain execution."—An application to obtain execution under sub-rule (1) by some of the plaintiffs does not entitle all of them to apply under sub-rule (2) for execution to the Court to which the order of His Majesty in Council is sent for execution under that sub-rule unless the decree was passed in favour *of all the plaintiffs jointly*—*Maharaja Ravaneshwar* v *Rai Baijnath*, 2 Pat L. J. 496; 40 I C 508

Where a party to whom the Order in Council, in accordance with the ordinary practice, was issued, delays or refuses to lodge the order with the High Court, the opponent can apply to the High Court, under cl (1) of this rule, with a certified copy of the order and ask for a summary order on the party to lodge the order which had been entrusted to him so that execution might follow in terms of the judgment of the Board—*Sourendra* v *Hari Prasad*, 5 Pat 461: 53 I. A. 80. A I R 1926 P C 31

"Execution."—A person desiring to obtain execution even if it be by way of restitution, must apply in the first instance to the Court indicated by this rule because "execution" includes restitution as stated, in s 144—*Damodar Das* v *Brijlal*, 37 A. 567. The provisions of this rule are mandatory so that if the petition is presented to a different Court, the execution application is liable to be dismissed; *Bhagwanta* v. *Zamir*, 3 Pat 596· 78 I C 766· A I R 1924 Pat. 576

"To the Court from which the appeal to His Majesty was preferred.—A party in a suit, desirous of executing an order or judgment of Her Majesty in Council, ought to apply to the Court from which the appeal was finally brought to the Queen in Council; and it is the duty of such Court to give directions for executing the decree to the Court of first instance by which the suit was originally tried.—*In re Barlow* v. *Orde*, 18 W R. 175.

"Certified copy."—Before a decree-holder in the District Court can obtain execution of a decree which has been affirmed by the Privy Council, he must produce, on th[illegible] a certified copy of the order passed by Her [illegible]ath *Sahoo* v *Judoo Roy*, 5 C. 329 4 C I [illegible] [illegible]*llowed*)

The provisions of this rule are not to be construed as restricting the only admissible evidence of an order of Her Majesty in Council, to a certified copy, on an application for execution made under such rule They must be read as directory, having the object that proper information regarding the order shall be supplied to the Courts in India. When

the original order (given to the successful party) had not been filed in the High Court, so as to enable the proper officer to supply a certified copy: *held*, that a copy, though not certified by him, might accompany a petition for execution under this rule.—*Hurish Chunder* v. *Kali Sunderi*, 9 C. 482: 12 C. L R. 511.

Restitution.—Pending an appeal to the Privy Council, certain property, the subject-matter of the appeal, was sold in execution of a money decree against the plaintiff who held the decree of the High Court, under appeal. The defendant's appeal to the Privy Council was decreed. *Held*, that the successful appellant (defendant) was entitled to recover the property sold by an application under s. 47 read with this section.—*Garurdhuj* v. *Baij Mal*, 28 A. 337: 3 A. L J. 110 (26 A. 317 *followed;* 19 A. 136, 20 A. 139 *distinguished*)

" Shall transmit."—In receiving and filing for the purpose of execution an order of His Majesty in Council made on appeal from an order or decree of the Court of first instance, the latter Court does not exercise a discretionary power, but performs a function of a purely ministeral character The Court to which an order in Council is transmitted for execution must enforce or execute it in the manner and according to the rules applicable to the execution of its original decrees.—*Prem Lall* v. *Sumbhoo Nath*, 22 C. 960, 972; *Gooroo Saran* v. *Hunooman Prashad*, 20 W. R. 419; *Garurdhuj* v. *Baij Mal*, 28 A. 337, 339

The Court which formerly had, but now no longer has, territorial jurisdiction, ought, when the decree is sent to it, to transfer the decree for execution to the Court which has territorial jurisdiction. 'But the question whether or not the decree ought to be sent direct from the High Court to the Court having territorial jurisdiction was not decided.—*Girindra Chunder* v *Jarawa Kumari*, 20 C. 105.

Where a High Court acting under Or. XLV, r. 15 of the C P. Code transmits an order of His Majesty in Council to the first Court for execution, *it is competent to the High Court to give directions to pay out the* money on taking sufficient security from the decree-holder —*Rani Bijai Raj Koer* v *Thakur Jai Indra*, 9 O L J 5 66 I C 982

Though Or XLV, r 15, C P Code, makes it part of the procedure for the enforcement of order of His Majesty in Council that the person desiring to obtain execution of such an order shall obtain its transmission, it is inconvenient, if not impossible, to require that each person interested in the execution of a particular order shall obtain a separate transmission when that order has already been transmitted at the instance of another successful party The fact that a person applying for restitution was not a party to an appeal to the Privy Council does not disentitle him to such relief.—*Balusami Iyer* v *Venkataswami Naicken*, 32 M L T 249; 75 I. C. 219.

Rate of Exchange.—Under cl (3) of this rule the amount payable must be estimated at the rate of exchange " for the time being fixed by the Secretary of State for India in Council," and the words "for the time being " mean the *year in which the amount is realised or paid or execution* taken out, and not the year in which the decree was passed.—*Param*

Sukh v *Ram Dayal*, 8 A 650. Dissented from in *Dakhina Mohan* v. *Saroda Mohan*, 23 C 357, which has been followed in *Mahommed Abdul Hye* v *Gajrai Sahai*, 25 C 283. 2 C. W. N. 89

Costs and Mesne Profits.—It is settled law that where a decree is silent as regards interest or mesne profits subsequent to the institution of the suit, the Court executing the decree cannot assess or give execution for such interest or mesne profits.—*Aruna Chellam* v. *Aruna Chellam*, 15 M. 203; *Sadasiva Pillay* v *Ramalinga Pillai*, L. R 2 I. A. 219: 15 B. L R 383. 24 W R 193.

Execution of a decree for possession merely of certain land having been stayed and the defendant, pending an appeal to the Privy Council, continued in possession by the High Court, upon his giving security for the "due performance of such order as might be made by the Privy Council," the appeal was subsequently dismissed, no order being made as to mesne-profits. *Held*, that the decree-holder was entitled to mesne profits from the date of the decree until he was put in possession and that the amount of such mesne-profits should be determined by the execution department —*Gogun Chunder* v *Laidlay*, 5 C L. R. 189 (15 B L R 383, L R 2 I. A 219, and 24 W. R. 193 *referred to).*

When the Privy Council decrees not only a certain specified sum as the costs of the appeal to England, but also awards the costs incurred in the Courts in India, the decree-holder is entitled to the costs of translating the record of the appeal and of transmitting it to England.—*Asgur Ali* v *Nogendro Chunder*, 23 W R 463, *Madan Thakur* v *Lopez*, 9 B L R App 22 18 W R 253, *Umatul Fatima* v. *Azhur Ali*, 9 B L R Ap 23-*note* 15 W R. 356, *Saroda Prasad* v. *Luchmipat Singh*, 9 B. L. R. 23-*note* 18 W R 89, and *Nil Madhub* v. *Bissumbhur*, 21 W. R. 411.

Costs of printing and translation, certified by the Deputy Registrar of the High Court, are a necessary part of the costs of an appeal to the Privy Council The amount of such costs is left to be ascertained by the High Court, and is not assessed by the Privy Council office —*Ram Coomer* v *Prosunno Coomer*, 10 C 106.

A party to a suit whose case has been dismissed in both the lower Courts with costs, is entitled, when the decrees of the lower Courts are reversed by the Privy Council and the case remanded for re-trial, to apply for a refund of the costs already paid under the decrees of the lower Courts, but not for interest on such costs. Such an application need not be made to the Privy Council, but may be made to the Court in which the suit was instituted.—*Dorab Ally* v. *Abdool Azeez*, 4 C. 220: 3 C L R 358

Limitation for Execution of Decree of the Privy Council.—An application for execution under this rule is governed by Art. 183 of the Limitation Act —*Tribikram* v *Badri*, 1 Pat. L. J. 385; *Chutter Pat Singh* v. *Saita*, 20 C. W. N 889 Where an appeal is preferred to the Privy Council from the decree of a High Court, but the appeal is dismissed for want of prosecution, the order of the Judicial Committee does not amount to a decree for purposes of limitation or for any other purpose —*Abdul Majid* v. *Jawahir Ali*, 36 A 350 P. C.; *Batuk Nath* v. *Munni De*, 36 A. 284: L. R. 41 I. A. 104.

As to the mode of enforcement, attestation and registration of security bond, see notes under s. 145.

Letters Patent Appeal.—An order of a judge presiding over the Privy Council Department in the High Court, rejecting an application for execution, is a final order, and is a judgment within the meaning of clause (15) of the Charter, and is therefore appealable. *Per Garth*, C. J.—That the duties of a Judge in dealing with the meaning of decrees of the Privy Council are purely ministerial, and that any order made in such capacity is not appealable.—*Hurrish Chunder* v. *Kally Sundari*, 9 C. 482: L. R. 10 I. A 4.

Interest on Costs.—No interest on costs can be allowed by any Court in this country where it is not allowed by the Privy Council.—*Dakhina* v. *Saroda*, 23 C 357; *Forester* v *Secy. of State*, L R 4 I. A 137 3 C 161.

16. The orders made by the Court which executes the order of His Majesty in Council, relating to such execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the execution of its own decrees.

Appeal from order relating to execution.

[S. 611.]

COMMENTARY.

This rule corresponds to s 611, C P Code, 1882 with some omissions and alterations The words "*enforce*" and "*enforcement*," which occurred in the old section before the words "execute" and "execution," have been omitted The other alterations are merely verbal.

ORDER XLVI

REFERENCE.

Reference of question to High Court.

1. Where, before or on the hearing of a suit or an appeal i which the decree is not subject to appeal, c where, in the execution of any such decree any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, o executing the decree, entertains reasonable doubt, the Court may either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court.

[S. 617.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s. 617, C. P. Code, 1882, with some *alterations* and omissions; it should be read with s *113*

The word "*where*" has been substituted for the word "if" wherever it occurred in the old section. The words "*not subject to appeal*" have been substituted for the word "final," which occurred in the old section. The word "final" means, conclusive or decisive, that is, not open to *review* or revision; hence the words "*not subject to appeal*" have been substituted for it.

The words "on the construction of a document, which construction may affect the *merits*," have been omitted. The reason for the ommission will appear from the following *Report of the Special Committee*.

The words "on the constrution of a document, which construction may affect the *merits*," have been omitted, as they appear to be sufficiently covered by the power to refer any question of law.

Necessary Conditions of Reference—Reasonable Doubt.—A reference under this rule can only be made when the Judge trying the suit entertains a reasonable doubt on a question of law or usage having the force of law and he cannot ordinarily entertain a reasonable doubt on point of law clearly decided by the rulings of the High Court of his Presidency unless the authority of the decision can be questioned by virtue of anything said or decided in *Privy Council*.—*Bhanaji Raoji* v. *Joseph De Brito*, 30 B. 226: 7 Bom. L R. 995 (21 B. 198 *referred to*). *See* also, *Naru Koli* v *Chima Bhosle*, 13 B. 51. *Fillingham* v. *Dunn*, (1914) Punj Rec. No. 8 p. 22; 20 I. C. 198 If the Court has no reasonable doubt, it should not make a reference merely because it is asked to make one.—*Daroodjee* v. *Municipality of Rangoon*, 1 R. 220: 76 I C. 519: A I. R. 1923 Rang 193.

Order XLVI, r. 1 applies when doubts arise in the proceeding of a suit or appeal, or execution or other proceeding. This rule was not intended to provide for suppositious cases which do not naturally arise in a proper proceeding before the Court.—*Mahammad Haji* v. *Ahmadbhai*, 25 B. 327. See, *Harish Chundra* v. *O'Brien*, 14 W. R 248.

The High Court can only express its opinion upon a matter referred to it when three conditions have been complied with. (1) that the Court referring the matter entertains a reasonable doubt upon some question of law, (2) that it states what the point is upon which the doubt is entertained, and (3) that it gives a statement of the facts containing an expression of opinion on the point which is referred to the decision of the High Court.—*Garling* v. *Secretary of State*, 30 C. 458

" In which the decree is not subject to appeal."—A reference to the High Court is authorized by this rule only when the decree is not subject to appeal.—*Rangji* v *Bhaiji*, 11 B 57, *Krishna* v. *Ram Kumar*, 7 C. L R. 144; *Secy. of State* v *Fazal*, 18 C. 234, *Oriental Loan Association Ltd.* v. *Hatch*, 17 B. 735; *Mahant* v *Chudasama*, 12 B 30.

Where therefore, the applicant presented an application to a Sub-Judge praying that the adjustment of certain decrees might be certified, and the Sub-Judge being of opinion that the application could not be granted, inasmuch as the execution of the decree was then barred by limitation, referred the case to the High Court under this rule. *Held*, that the question could not be referred to, as the order applied for to the Sub-Judge was appealable under ss 2 and 47 of the Code.—*Ranji* v *Bhaiji Harijivan*, 11 B 57.

A question arising in execution of a decree cannot be referred for the decision of the High Court under s 617, C. P. Code, 1882, except where the decree is final.—*Oriental Loan Association* v *Hatch*, 17 B 735, *Mahant* v *Chudasama*, 12 B 30

It is only when a matter cannot come before the High Court as a Court of Appeal that a reference can be made under s 617, C P Code, 1882.—*Krishna Nath* v *Ram Kumar*, 7 C L R 144, *Secy of State* v *Fazal*, 18 C. 234.

A Munsif, being of opinion that he had no jurisdiction to entertain a particular suit, made an order returning the plaint for presention to the proper Court The District Judge, on appeal entertaining a doubt upon the question of jurisdiction, made a reference under this rule *Held* that, as the order of the Munsif is an appealable order and not a final decree in the suit, the High Court had no jurisdiction to entertain the reference — *Ram Phul* v. *Durga*, 7 A 815

A bail-bond was executed to a Munsif, who expressed no doubt as to the amount of duty to be paid, and made no application to have the case referred The District Judge referred the case to the High Court. *Held*, that the District Judge was not authorized to make the reference — *Reference under Stamp Act*, 1879, 11 M 38

The order made by a District Judge on an application for probate, not being a final order, cannot be referred for the opinion of the High

Court under s. 617, C. P. Code, 1882.—*In the matter of Monohur Mookerji*, 5 C. 756: 7 C. L. R 228

The question as to the amount of security required on granting an application to stay execution is a question relating to execution as contemplated by s. 244, C. P. Code, 1882 (s. 47), and therefore an order determining that question is appealable under s. 2, C. P. Code, 1882, and no reference would lie under this rule.—*Ishwargar* v. *Chudasama*, 12 B. 30

Reference Not Authorised by this Rule.—Or. XLVI, r. 1, does not authorize a reference, except on a point arising in a litigation between the parties in a suit, or appeal, or in a matter wherein the Court is called on to adjudicate, that is, to pronounce on the opposite pretensions of contending parties. An enquiry into the professional conduct of a pleader with reference to a case cannot be a proper subject of reference under this rule.—*Yeshvant Narayan* v. *DeSouza*, 12 B. 78; *Mahammad* v. *Ahmadbhai*, 25 B 327. Nor can any reference be made in a proceeding other than a suit or an appeal in a suit even by virtue of the provisions of s 141 above.—*Damodara* v. *Kittappa*, 36 M 16: 10 I. C. 879; *Tencred* v. *Mullick*, 29 C. W. N. 591: A. I R. 1925 Cal. 391. 84 I C. 543

This rule merely authorizes the reference of such questions as may arise in the trial of the suit, and not of questions arising on an application for a review of judgment, which cannot in any sense be considered as the trial of a suit.—*Bonomally* v. *Ram Sodoy*, 17 W. R. 94 and 95

The Full Bench of a Presidency Court of Small Causes cannot state a case for the opinion of the High Court on an application for a new trial made under s 37 of Act XV of 1882.—*Oakshott* v. *The British India Steam Navigation Co.*, 15 M. 179.

This rule does not contemplate a reference as to the proper Court fee payable on memorandum of appeal.—*Pir Boksh* v *Faiz Mahomed*, (1906) A. W N. 180

The High Court has no power to review a judgment passed by it on a reference from a Sub-Judge with Small Cause Court powers. The judgment of the High Court in such a case is not a decree or order, but it is simply a statement of the grounds in conformity with which the lower Court is to dispose of the case.—*Ram Chunder* v. *Sitaram*, 14 B 68

Practice and Procedure on Reference.—In making a reference under this rule, the precise question of law or usage having the force of law must be formulated; a general question without stating the precise question arising in the case should not be referred.—*Ralli Brothers* v. *Goculbhai Mulchand*, 15 B. 376 See also *Ishwardas* v. *Kalidas*, 20 B. 779.

A party requiring a judge to make a reference to the High Court, must do so before the Judge has delivered his judgment.—*Bank of Bengal* v. *Byabhoy Gangji*, 16 B. 618

The Small Cause Court passed a decree for the plaintiff, but contingent upon the opinion of the High Court, which decided that the plaintiff could not recover: *Held*, that the Small Cause Court, on receipt of the copy of the judgment of the High Court, was bound to enter judgment for the defendant.—*Yule & Co* v. *Mahomed Hossein*, 24 C. 129: 1 C. W. N. 71. Dissented from in 25 C. 505: 2 C W. N. 283.

On a reference under ss. 617 and 647, C. P. Code, 1882 (Or. XLVI, r. 1 and s. 141), *held*, that the word 'land' includes land covered by a house, and consequently a suit for house-rent, unless due under a written contract signed by a defendant is not cognizable in a village Munsif's Court. —*Narayanamma* v. *Kamakshamma*, 20 M. 21.

When, upon an application for a new trial, the Judges of the Presidency Small Cause Court differ in their opinion as to any question of law, and the majority without ordering a new trial reverse the decree of the judge who tried the suit, the Court is bound to state a case for the opinion of the High Court under s. 69 of Act XV of 1882.—*Seshammal* v *Munusami*, 20 M. 358.

On a reference to the High Court under s. 617, C P. Code, 1882, by a Court of Small Causes, *held*, that ss 27, 28 and 29 of the Legal Practitioners Act (XVIII of 1879) do not relate to any arrangements or agreement made between a litigant and his own pleader as to the receipt of the fees which are actually allowed upon taxation.—*Raziuddin* v. *Karim Bakhsh*, 12 A. 169 (9 M. 375 *followed*).

A reference to the High Court under this rule is not bad, merely because *it* arises out of *the* action taken *by* a *third* person *not a party to* the suit. In this case the reference was made at the instance of the Collector, who was not a party to the suit —*Purshottam* v *Balvant*, 32 B. 157: 10 Bom L R 13· 3 M L .T 135.

Court may pass decree contingent upon decision of the High Court.

2. The Court may either stay the proceedings or proceed in the case notwithstanding such reference, and may pass a decree or make an order contingent upon the decision of the High Court on the point referred;

but no decree or order shall be executed in any case in which such reference is made until the receipt of a copy of the judgment of the High Court upon the reference [S. 618.]

COMMENTARY.

This rule corresponds to s 618, C P Code, 1882, with some alterations

In para 1, the words " *make an* " have been added before the word " order;" and the word " *decision* " has been substituted for the word " opinion," which occurred in the old section, before the words " of the High Court."

In para. 2, the words " *but no decree or order shall be executed,*" have been substituted for the words " but no execution shall be issued, property sold, or person imprisoned," which occurred in the old section.

3. The High Court, after hearing the parties if they appear and desire to be heard, shall decide the point so referred, and shall transmit a copy of its judgment, under the signature of the Registrar, to the Court by which the reference was made, and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court. [S. 619.]

Judgment of High Court to be transmitted, and case disposed of accordingly.

COMMENTARY.

This rule corresponds to section 619, C. P. Code, 1882, with some modification.

"After hearing the parties."—The words "*after hearing the parties if they appear and desire to be heard,*" have been substituted for the words "shall hear the parties to the case in which the reference is made, in person or by their respective pleaders," which occurred in the old section The alteration in the language seems to have been made to make it clear that the parties may be heard only when they appear and desire to be heard; but according to the wording of the old section it was incumbent upon the High Court to hear the parties even if they had not appeared

"Dispose of the case."—The Calcutta Small Cause Court passed a decree for the plaintiff but contingent upon the opinion of the High Court, which decided that the plaintiffs could not recover The judgment of the High Court was transmitted to the Small Cause Court, and the Small Cause Court Judge, instead of entering judgment for the defendants, allowed the suit to be withdrawn by the plaintiffs with liberty to bring a fresh suit. *Held*, on revision, that the Small Cause Court on receipt of the copy of the judgment from the High Court was bound to enter judgment for the defendant and to dispose of the case in conformity with the decision of the High Court.—*Yule & Co.* v *Mahomed Hossein*, 24 C. 120

The High Court has no power to review a judgment passed by it on a reference from a Small Cause Court. The judgment of the High Court in such a case is not a decree or order, but is simply a statement of the ground in conformity with which the lower Court is to dispose of the case as provided by this rule —*Ramchandra* v *Sitaram*, 10 B. 68

4. The costs (if any) consequent on a reference for the decision of the High Court shall be costs in the case. [S. 620.]

Costs of reference to High Court.

COMMENTARY.

This rule corresponds to s 620, C P. Code, 1882, with some alterations

The word "*the*" has been added in the beginning, and the word "*decision*" has been substituted for the word "opinion," which occurred in the old section.

Costs.—Under this rule the cost of a reference to the High Court cannot be dealt with separately, but must be dealt with when awarding the costs of the suit. They are, however, in the discretion of the Court, and need not necessarily follow the event of the suit.—*Nicol* v. *Mathura Dass*, 15 C. 507.

Power to alter, etc. decree of Court making reference.

5. Where a case is referred to the High Court under r. 1, the High Court may return the case for amendment, and may alter, cancel or set aside any decree or order which the Court making the reference has passed or made in the case out of which the reference arose, and make such order as it thinks fit. [S. 621]

COMMENTARY.

This rule corresponds to s 621, C P. Code, 1882, with some alterations of a verbal character.

The word "*where*" has been substituted for the word "when," and the words "or made," have been added after the word "passed."

"For Amendment."—Where the three conditions mentioned in Or XLVI, r. 1, are not complied with, the High Court can under this rule return the case to the lower Court for amendment —*Garling* v. *Secretary of State,* 30 C 458.

Power to refer to High Court question as to jurisdiction in small causes

6. (1) Where at any time before judgment a Court in which a suit has been instituted doubts whether the suit is cognizable by a Court of Small Causes or is not so cognizable, it may submit the record to the High Court with a statement of its reasons for the doubt as to the nature of the suit.

(2) On receiving the record and statement, the High Court may order the Court either to proceed with the suit or to return the plaint for presentation to such other Court as it may in its order declare to be competent to take cognizance of the suit [S. 646-A.]

COMMENTARY.

This section corresponds to section 646-A of the C P Code, 1882, with some verbal changes only

"At any time before judgment."—A reference under Or XLVI, r 6, can only be made before judgment —*Ducali Bai* v. *Sadashirdas*, 24 B. 310

Power to District Court to submit for revision proceedings had under mistake as to jurisdiction in small causes.

7. (1) Where it appears to a District Court that a Court subordinate thereto has, by reason of erroneously holding a suit to be cognizable by a *Court of Small Causes or not to be so cognizable*, failed to exercise a jurisdiction vested in it by law, or exercised a jurisdiction not so vested, the District Court may, and if required by a party shall, submit the record to the High Court with a statement of its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous.

(2) On receiving the record and statement, the High Court *may make such order in the case as it thinks fit.*

(3) With respect to any proceedings subsequent to decree in any case submitted to the High Court under this rule, the High Court may make such order as in the circumstance appears to it to be just and proper.

(4) A Court subordinate to a District Court shall comply with any requisition which the District Court may make for any record or information for the purposes of this rule. [S. 646-B.]

COMMENTARY.

This rule corresponds to s 646-B with some verbal changes only.

Applicability of this Rule.—This rule does not apply to every case in which a Court of Small Causes has failed to exercise a jurisdiction vested in it by law or has exercised a jurisdiction not vested in it by law but only to a restricted number of such cases, namely, those cases, in *which a Court of Small Causes has erroneously held a suit to be*, or not to be cognizable by it Where no question as to Court's jurisdiction was raised by either party, and the Court proceeded to judgment as if the case was properly cognizable by it, the High Court refused to interfere upon a reference under this rule —*Ram Lall* v. *Kabul Singh*, 25 A. 135

Small Cause suit tried as ordinary suit by both the lower Courts—Or XLVI, r. 7 is an enabling rule and does not cut down the jurisdiction of the Appellate tribunal —*Sri Raja Simhadri* v. *Chelasane Bhaadrayya*, 30 M 41 1 M L T 414.

A plaint in a small cause suit was returned under s. 23 of Act IX of 1887, for presentation in the ordinary Civil Court, which tried the suit and passed a decree On appeal the decree was reversed on the ground that the Munsif had no jurisdiction to try the suit. *Held*, that, having regard to ss. 646-A and 646-B of the Code, 1882 (Or. XLVI, rr. 6 and 7) it is doubtful whether the Appellate Court would have been right in dismissing the suit for want of jurisdiction.—*Mahamaya* v. *Nety Hari*, 23 C. 425.

Powers of High Court under this Rule.—Notwithstanding s. 16 of the Provincial Small Cause Courts' Act, the High Court has, on a case being submitted to it under this rule, full power to consider the matter of jurisdiction, or to deal with it on the merits, so as to do substantial justice without putting the parties to the expense of a fresh trial. Where a suit cognizable by a Small Cause Court was tried both in the Munsif's and District Judge's Courts without objection to the jurisdiction, *held*, on a second appeal to the High Court that this rule must be read with s. 16 of the Provincial Small Cause Courts Act, so as to modify its full effect in the case wrongly tried by an ordinary Civil Court, and taken in appeal to the District Court.—*Suresh Chunder* v *Kristo Rangini*, 21 C 249 (1 C. 123: 24 W. R. 478 *referred to*) Followed in *Parameshwaran* v *Vishnu* (27 M. 478: 26 M 176 *not followed*). *See* also, *Parameshwari* v. *Jagat*, 19 C. W. N 900 A contrary view was however taken by the Madras High Court in *Kollipara* v *Kankipati*, 33 M. 323 F. B, in which it has been held that the High Court should in such a case set aside the decree of the District Court as having been made without jurisdiction and then dispose of the case on the merits either restoring or not restoring the decree passed by the Munsif as may in its discretion appear best. The same view was adopted by the Bombay High Court in *Sankarbhai* v *Soonabhai*, 25 B 417. The Allahabad High Court, in *Abdul Majid* v. *Bidyadhar*, 39 A. 101, followed the above Full Bench decision of the Madras High Court in 33 M. 323 F B

The Court should State its Reasons.—When a reference is made to the High Court under this rule, the Court which makes it should state its reasons for considering the opinion of the Subordinate Court with respect to the nature of the suit to be erroneous —*Chhotu* v *Jawahir*, 28 A. 293; 3 A. L J. 23.

" District Court shall submit, if required by a party."—Where a Small Cause Court Judge returned a plaint, for presentation to a Munsif, who again returned it, being of opinion that the suit was cognizable by a Court of Small Causes, and the plaintiff then applied to the District Judge to submit the record for the orders of the High Court. *Held*, that the District Judge was bound under this rule on the requisition of the plaintiff, to submit the record, although the plaintiff might have appealed to the District Judge against the order of the Munsif —*Simson* v *Mc Master*, 13 M 344 *See* also, *Suresh Chunder* v *Kristo Rangini*, 21 C 249 (251)

Before a District Court can make reference under this rule it must be of opinion that the Subordinate Court has erroneously held upon the point of jurisdiction in regard to the particular suit before it, and that, therefore, the matter is one in which the interference of the High Court should be sought. The word " shall " in s. 646-B, clause (1) C P Code, 1882 (Or. XLVI, r 7) is not mandatory, but directory —*Madan Gopal* v *Bhagwan Das*, 11 A 304

It would appear from the above rulings that there is a difference of opinion between the Calcutta and Madras High Courts on one side and the Allahabad High Court on the other The Calcutta and the Madras High Courts holding that the Judge is bound to make the reference if required by a party; the Allahabad High Court has held that the word " *shall* " in this rule is not mandatory but directory.

ORDER XLVII

REVIEW.

Application for review of judgment.

1. (1) Any person considering himself aggrieved—

(*a*) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(*b*) by a decree or order from which no appeal is allowed, or

(*c*) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review. [S. 623.]

COMMENTARY.

This rule corresponds to s. 623, C. P. Code, 1882, with some alterations and omissions. It should be read with s. 114. The word "*hereby,*" which stood before the word "allowed" in clauses (*a*) and (*b*) of the old section, has been omitted; and in clause (*c*) the word "*decision*" has been substituted for the word "judgment." The words, "*or to the Court (if any) to which the business of the former Court has been transferred,*" which occurred in the old section after the words "to the Court which passed the decree or made the order," have been omitted. This omission seems to have been made probably in view of s. 150 of the present Code (*See*, 35 C. 974; 12 C. W. N. 859).

In sub-rule (2), the word "*order*" has been added after the word "decree."

An application for review in a suit under the B. T. Act or under the Provincial Small Cause Courts Act shall not be admitted, unless a deposit of the decretal amount is made *See*, s. 153-A of Act I of 1907 B. C. and Act of 1908 E B Assam Tenancy Amendment Act; and s. 17 of the Provincial S. C. Courts Act.

Application for Review of Judgment.—Any person considering himself aggrieved by a decree or a decision as stated in clauses (*a*), (*b*) or (*c*) of sub-r. (1) is competent to apply for a review of judgment on any of the following grounds. (1) on the ground of the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of such person or could not be procured by him at the time when the decree was passed or order made, or (2) on account of some mistake or error apparent on the face of the record, or (3) for any other sufficient reason.

Petition of Review Involves Three Stages.—A petition of review involves three stages of procedure The first stage commences ordinarily with an *ex parte* application under this rule The Court may then either reject the application at once, or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage, the rule may either be admitted or rejected and the hearing of the rule may involve to some extent an investigation into the merits. If the rule is discharged then the case ends If, on the other hand, the rule is made absolute then the third stage is reached The case is re-heard on the merits and may result in a repetition of the former decree or in some variation of it. In either case, the whole matter having been re-opened, there is a fresh decree.—*Vadi Lal* v. *Ful Chand*, 30 B. 56· 7 Bom. L. R 664; until that fresh decree is passed, the old decree remains in suspense —*Achut* v *Tapibai*, 48 B 210 79 I C 753 A I. R 1924 Bom. 310.

" Any person considering himself aggrieved.''—This means a party to the suit against whom a decision has been pronounced, who has suffered some actual loss, or legal grievance, or derogation of some right, or who has failed to obtain some right, title or interest to which he is entitled directly as a matter of legal right It does not mean any person who is disappointed of benefit which he might have received if some other order had been made —*Jhabbal Lal* v. *Shib Charan*, 15 A L. J 1. But when defendants having separate interests bring separate second appeals which are dismissed, the Court cannot, on an application for review on the part of two of them, modify the decrees in which there is no application of review.—*Pegoo Jan* v *Waizoodeen*, 18 W R. 464.

" By a decree or order.''—An order under Or XXXIII, r 7, refusing leave to sue as a pauper is open to review under this rule —*Adarji* v *Manilji*, 4 B 414; so is an order rejecting an application for leave to appeal to His Majesty in Council —*Nand Kishore* v *Ram Gulam*, 39 C 1037; 16 C. W N. 1089; so is an *ex parte* order granting letters of administration.—*Parman* v *Nekram*, 13 A L J. 441; and an order as to costs —*Braja* v *Jagannath*, 6 Pat L J. 284· 63 I C 768. But an order under s 39 (*h*) of the Guardians and Wards Act, 1890, is not open to review —*Balla* v. *Manglan*, 116 P R 1912; nor is an order dismissing a second appeal under Or. XLI, r. 11, C P Code.—*Rajani* v.

Kali Prasanna, 41 C. 809. The provisions of this rule are applicable to an Insolvency Court.—*Challa Abtireddi* v. *Challa Venkatareddi*, 51 M. L. J. 60: 94 I. C 351

" By a decree or order from which an appeal is allowed."—This rule clearly shows that not only is an application for review by a party who has already appealed disallowed by that rule, but even in the case of a party not appealing no review lies when there is an appeal by some other party on a common ground, or where the former as a respondent is in a position to bringing before the Appellate Court the matter to be reviewed The manifest intention of the provision is to avoid a conflict of jurisdiction and to prevent any action on the part of the inferior Court which would have the effect of controlling the powers of the higher Court with reference to the matter actually under appeal. Though a party who has applied for a review is not precluded from appealing, the Code does not provide for the procedure to be followed when an appeal is preferred after the review. Of course both the proceedings cannot go on simultaneously. If the review proceeding is to be continued and the appeal stayed, expediency would require that the party affected by the final order in the review should be enabled to obtain a remedy in the pending appeal notwithstanding that such remedy would be in respect of what was not in existence on the date of the appeal.—*Ramanadhan Chetti* v *Narayanan Chetty*, 27 M. 602 (606): 14 M. L. J. 321

Clause (a). " From which an appeal is allowed but from which no appeal has been preferred."—Sub-rule (1) of this rule provides that any person considering himself aggrieved by a decree from which an appeal is allowed, but from which no appeal is preferred, may apply for a review of a judgment to the Court which passed the decree. Hence an application for a review of a decree after an appeal has been preferred against it, is not maintainable; *Muhammad Yusaf* v. *Raja Ram*, 35 I. C. 13; *Raja Indrajit Pratap* v. *Amar Singh*, 2 Pat. 676 F. C. A party against whom a decree has been passed is precluded, after dismissal of his appeal under Or. XLI, r. 11, from applying for a review. *Ramappa* v. *Bharma*, 30 B 625: 8 Bom L R 842. If an appeal is dismissed for default and an application under Or. XLI, r. 19 has become time-barred, review is incompetent —*Manphul Singh* v. *Hakim Hamid Ali*, 21 A. L J 416. 74 I. C. 528: A. I. R. 1923 All. 576. But after an appeal is withdrawn, the Court from whose decree the appeal was preferred, has jurisdiction to entertain an application to review its judgment. An appeal which has been withdrawn must be treated as if it had never been " preferred " within the meaning of this rule.—*Pandu* v. *Devji*, 7 B 289; *Ram Prasad* v. *Asaram*, 43 A. 228. 61 I C. 334, *Mariamunnissa* v *Baluram*. 45 A. 458: 73 I. C. 1016: A. I. R. 1923 All. 541; *Rambaran* v. *Bhagwati*, 47 A. 751: 89 I. C. 295: A I. R. 1925 All. 804; *Madhori* v *Parbati*, 47 A. 881: 88 I. C. 653. A. I. R. 1925 All. 552.

Filing of Appeal Pending Application for Review.—Where after the presentation of an application for review, by a party to the suit, an appeal is preferred from the same decree, whether by the same party or by the other party to the suit, the Court to which the application for review is made, is not thereby deprived of its jurisdiction to entertain the application.—*Chuma Reddi* v. *Peddaobi Reddi*, 32 M 416: 2 I. C. 802 F. B.;

Narayan v. *Laxmibai*, 38 B. 416: 23 I. C. 513; *Pyari Mohan* v. *Kalu Khan*, 44 C. 1011: 41 I. C. 497. But that power exists so long as the appeal is not heard, because once the appeal is heard, the decree on appeal is the final decree in the case, and the application for review of judgment of the Court of first instance can no longer be proceeded with.—*Pyari Mohan* v. *Kalu Khan*, 44 C. 1011: 41 I. C. 497; *Gour* v. *Nil Madhab*, 36 C. L. J. 84: 73 I. C. 34: A. I. R. 1923 Cal. 113; *Shivappa* v. *Ram Chandra*, 46 B. 1: 63 I. C. 910: A. I. R. 1922 Bom. 130. If, on the other hand, the application for review is granted and a new decree is passed, the appeal cannot be heard and it must be dismissed because the decree appealed from is superseded by the new decree.—*Kanhaiya Lal* v. *Baldeo Prasad*, 28 A. 240; *Brijbasi* v. *Saligram*, 34 A. 282; *Pyari Mohan* v. *Kalu Khan*, 44 C. 1011.

Review of Small Cause Court Decree.—The provisions of s. 17 of the Provincial Small Cause Courts Act as to the deposit of costs on an application for review are not mandatory, but merely directory.—*Ramsami* v. *Kurisu*, 13 M. 178. But see, *Jogi Ahir* v. *Bisen Dyal*, 18 C. 83. *See*, however, 32 C. 339: 1 C. L. J. 43: 8 C. W. N. 355

An application for a review of judgment by the High Court on a reference from a Small Cause Court, was not admissible under the Code of 1859.—*Doyle* v *Kosal*, 3 W R. S C. C. Ref. 8.

The High Court has no power to review a judgment passed by it on a reference from a Sub-Judge with Small Cause Court powers. Clause (c) of s 623, C. P Code, 1882, (Or. XLVII, r 1), allows of a review of judgment, on a reference only from a Court of Small Causes —*Ramchandra* v *Sitaram*, 10 B. 68.

The Judge of a mofusil Small Cause Court may grant an application for a review of judgment under the Civil Procedure Code.—*Isan Chunder* v. *Luchun Gopi*, 5 C 699, 5 C. L R. 539. *See* also, *Ratan Krishen* v. *Raghunath*, 8 C. 287: 10 C. L. R. 275; *Madan Mohan* v *Purno Chandra*, 10 C. 297 (in which distinction between new trial and review pointed out).

Review of Ex Parte Decree.—It is competent to a party against whom an *ex parte* decree has been made to apply for review of judgment —*Mutto* v. *Ilahi Begum*, 6 A 65; *Poresh Nath* v. *Khettro Monee*, 20 W. R. 284; *Ali Azim* v. *Ram Manick*, 12 W. R. 195; *Hari Hur* v. *Buddu*, 13 C. L. R. 254. *See* also, *Amir Hasan* v. *Ahmad Ali*, 9 A. 36, and *Ramchandra* v. *Droupadi*, 20 B 281

Review from Order of Dismissal for Default.—When a suit is dismissed under s. 98, C. P. Code, 1882 (Or IX, r 8), it can only be restored under s. 99 of that Code (Or. IX, r 4). A Court has no jurisdiction under this rule to reinstate the case, where a person by his own negligence allowed his rights under s 99, C. P. Code, 1882 (Or. IX, r 4), to be barred.—*Koilash Mondul* v *Nabadwip Chandra*, 2 C W N 318 *See*, however, *Rajnarain* v. *Ananga Mohan*, 26 C 598, where it has been held that a Court has jurisdiction to entertain an application for review under this rule in a suit dismissed for default under s. 102, C P Code, 1882 (Or. IX, r 8), without any previous application to have the order of dismissal set aside under s 103, C. P Code, 1882 (Or. IX, r 9)

For distinction between review and revival, see, *Jonardan Dobey* v. *Ramdhone*, 23 C. 738 (760 and 764).

Review of Consent and Compromise Decree.—When a consent decree is sought to be attacked on the ground of fraud, misrepresentation, mistake, coercion or undue influence, or any similar grounds, the appropriate remedy is by a suit although on the terms of this rule, as also on the authorities, it cannot be said that a Court has no jurisdiction to review a consent decree —*Mirali Rahimbhoy* v. *Rehmobhoy*, 15 B. 491; *Fool Coomary* v *Woodoy*, 25 C. 649; *Barhamdeo* v. *Banarsi*, 3 C L J. 119; *Golab Koer* v. *Badshah Bahadur*, 10 C. L. J. 420: 13 C. W. N 1197

The ground that fraud was practised upon a party in connection with a petition of compromise upon which a decree was made is a good ground for review A mistake in the matter of copying out the petition of compromise may not, by itself, fall within the scope of this rule but taking it with other ground stated above it might be a good ground of review.—*Rasik Chandra* v. *Rajani Ranjan*, 10 C W. N. 286 (Referred to in *Chandra Mohan* v *Prosunna Kumar*, 64 I C. 259).

A person who wishes to displace a decree passed in terms of a compromise to which she was a party on the ground that she affixed her signature to the compromise at the instance of an agent in ignorance of its contents, can either apply for a review of the decree or institute a separate suit for the purpose; the affixing of signature in ignorance of the contents of the document is "new and important matter" within the meaning of Or. XLVII, r. 1, C. P. Code.—*Alamelu Ammal* v. *Rama Iyer*, 43 M L J. 290: A I. R 1922 Mad. 446.

A Court has no jurisdiction under Or. XLVII, r. 1, to review a compromise decree on the ground that the compromise had been procured by undue influence or coercion and that subsequent to the decree that compromise has been repudiated A Court's power to review its order depends on a ground which existed on the date when the order was made and cannot be exercised on a ground which has came into existence subsequently —*Nathulal* v. *Raghubir*, 48 A. 160: 23 A. L. J. 1029: A. I. R. 1926 All. 50.

Discovery of New and Important Matter or Evidence.—The Code of Civil Procedure permits applications for review, on the ground of discovery of new and important evidence, but exacts very strict conditions, so as to prevent litigants lying on their oars when they ought to be looking for evidence. It enjoins the Judge to require the facts as to the absence of the negligence to be strictly proved, and makes the Judge who tried the case final on such application. Where such an application for review was refused by the original Court, but the Court of Appeal, upon a special and preliminary application and before hearing the appeal on the merits, made an order for the admission of the further evidence, *held*, that the Appellate Court's order was without jurisdiction —*Kesowji* v *The G. I. P Ry. Co*, 31 B. 281, P. C.; 11 C. W. N 721· 6 C L. J. 5: 17 M L J. 347: 4 A. L. J. 461.

A review of judgment, on the ground of discovery of new evidence not within the applicant's knowledge at the hearing of the case, should not be admitted without proof of the truth of the ground alleged.—*Umrao Thakur*

v. *Gokul Mundul*, 8 B. L. R. Ap. 34; 16 W. R. 7; *Nolita Mohan* v. *Dinonath*, 13 B. L. R. 427-*note*, *Khelat Chander* v. *Pran Kisto*, 11 B. L. R. 428-*note*; 12 W. R. 461; *Nuffar Chunder* v. *Sandes*, 8 B. L. R. Ap. 35-*note* · 10 W. R 432; *Ram Dhan* v *Jainarayan*, 8 B. L. R. Ap. 36-*note*: 12 W. R. 536; *Sitanath* v. *Shama Sundari*, 8 B. L. R. Ap. 37-*note*: 14 W. R. 26; *Nudiar Chand* v. *Hreedoy Mundul*, 11 B. L. R 424-*note*: 17 W. R. 458; *Shumsher Ali* v. *Ram Chunder*, 2 W. R. 174; *Rakub Dass* v. *Sooraj Mull*, Bourke O C 131; *Jhubhoo Sahoo* v *Jusoda*, 17 W. R. 230; *Amritraw* v *Manaji*, 3 B H. C 49; *Brojendro Coomar* v. *Wise*, 19 W R 130; *Nissa Bibee* v *Abdoor Ruhman*, 18 W. R. 413. The " discovery of new and important evidence " in Or. XLVII, r 1, would refer only to a discovery made since the order sought to be reviewed was passed.—*Musst. Tribeni* v *Mohan Lal*, (1922) A. 366: 66 I. C. 558.

A Court's power to review its order depends on a ground which existed on the date when the order was made and cannot be exercised on a ground which had come into existence subsequently.—*Nathu Lal* v. *Raghubir*, 48 A. 160. 23 A. L J. 1029: A. I. R. 1926 All. 50; *Katagiri Venkata* v. *Vellanki*, 24 M. 1 · 27 I. A. 197 P. C.. 4 C. W. N. 725; *Balwant Rao* v *Farid Sahib*, A. I. R 1926 Nag. 10.

A judgment delivered after the passing of the decree sought to be reviewed is no material on which an application for review can be based; for " the new and important matter " alleged to have been discovered must have existed at the date of the decree.—*Kaliprasanna* v. *Bhagabati*, 64 I. C 324.

The words " or could not be produced by him at the time " in Or. XLVII, r. 1, C P Code, must refer to the words which precede, namely, " was not within his knowledge." The whole clause means that the new and important matters alleged by the applicant were not within his knowledge and as such could not have been produced by him at the trial.—*Rameshwardhari* v. *Sadho Saran*, 75 I. C. 91.

When a review is sought on the ground of the discovery of new evidence, the evidence must be relevant and of such character that if it had been given in the suit it might possibly have altered the judgment —*In re Appa Rao*, 10 M. 73, 77 · L R 13 I. A. 155, *Nandalal* v. *Panchanan*, 45 C 60 (67-68) But the discovery of evidence not originally available tending to prove that a decree had been obtained by perjury is ground for an application for review.—*Munshi Mosaful* v. *Surendra*, 16 C. W. N 1002; *Abdul Huq* v. *Abdul Hafi*, 14 C. W. N. 695, *Lakshmi* v. *Nur Ali*, 38 C. 936 15 C. W. N 1010.

If a suit is dismissed on two grounds and the plaintiff applies for a review on the discovery of new evidence on one of the grounds only, the application ought to be rejected —*Mahabir* v *Collector of Allahabad*, 36 A. 277.

The High Court will not accept a review of a judgment in a Second appeal dismissed under Or. XLI, r 11, C P Code, on the ground that new evidence to prove a fact has been discovered —*Sailabala* v. *Gadadhar*, 36 C. L. J. 76

As a general rule, the discovery of new evidence is not a ground for the admission of a review of a judgment passed in special appeal. When new evidence is discovered, the proper course for the appellant to adopt is to withdraw his special appeal, and, apply to the lower Court for a review of its judgment.—*Nanabhai* v. *Nathabhai*, 9 Bom. H. C 89 Followed in *Ram Chandra* v. *Krishnaji*, 28 B. 4. *See* also, *Pandurang* v. *Moro Bhasudev*, 6 Bom H. C. 68; *Pandu* v. *Revji*, 7 B 287; and *Raru Kutti* v *Ramad*, 18 M. 480.

The High Court cannot, in a second appeal, entertain an application for a review of judgment based on the ground that, since the disposal of the appeal, documentary evidence has been discovered which if sufficiently proved, would have led the Court below to come to a different finding, although had such evidence been discovered before the disposal of the appeal the Court might have allowed the appellant to withdraw the appeal with a view to apply to the lower appellate Court for a review of judgment on the discovery of fresh evidence.—*Marianunnaissa* v. *Babu Ram*, 45 A 458: 21 A. L. J. 377.

The decision of the Privy Council in an appeal is "new and important matter" for the purposes of an application for review in respect of a decree made on a subsequent accrual of the same cause of action as that on which the decree appealed against was barred.—*Waghela* v. *Masludin*, 13 B. 330; *Ramlal* v. *Kalka*, 33 A. 566; *Waman* v. *Hari*, 31 B. 128.

The production of a new ruling or authority, which if brought to the notice of the Judge at the first hearing might have altered the judgment is "new and important matter" within the meaning of this rule.—*Ellem* v. *Bashu*, 1 C. 181; *Abdul Sadiq* v *Abdul Aziz*, 21 A. 152, 153.

The objection to the admission of a review of judgment on the strength of a new document was not allowed to prevail in a case where the so-called new document was not the sole reason for the admission of the review.—*Huro Gobind* v. *Huro Sundari*, 18 W. R. 316.

The High Court has no authority to admit a review of judgment passed in special appeal merely on the ground that new evidence to prove a fact has been discovered.—*Bhyrup Nath* v. *Kally Chunder*, 16 W. R. 112; *Ex parte Basigagarulu*, 1 Mad H. C. 254; *Jacammal* v. *Palneappa*, 5 Mad. H. C. 464; *Punchanan* v. *Radha Nath*, 4 B L. R 213

Where no case of fraud or surprise having been made out, a party to the suit sought for a new trial on the ground of discovery, after judgment of an important document, which was in the possession of the opposite party but which the party first-named had neglected to obtain discovery before judgment. *Held*, that a new trial should not be lightly granted and in the present case it ought not to be granted.—*Turnbull & Co* v. *Duval*, 6 C. W. N. 809, P. C.

During the pendency of a suit for rent, a plaintiff applied for postponement on the ground that he was unable to obtain a copy of a document, which he had applied for from the Collectorate. The application was refused, and the plaintiff got a modified decree. He subsequently obtained a review of judgment and a decree in full. *Held*, that the review was properly admitted.—*Goor Dyal* v. *Deka Noonya*, 22 W. R. 446

Where new evidence is adduced in an application for review, it need not be *per se*, sufficient to show that the previous decision is wrong or such as to cause an overmastering balance of evidence. If there is sufficient ground for receiving the new evidence, the case is to be heard as if it were being originally heard with the materials then before the Court.—*Saleb Jan* v. *Sufdur Ali*, 22 W. R. 288.

Decree Rendered Ineffectual by Reversal.—The plaintiffs sued the defendant to recover the amount of assessment paid in respect of land for the years 1872-76, and got a decree. The defendant appealed to the Privy Council. The plaintiffs subsequently filed a second suit to recover the assessment paid in respect of the land for the years 1877-82, and obtained a decree solely on the strength of the former decree. The Privy Council reversed the decree. The defendant thereupon applied for review of the decree in the second suit. *Held, that the Court had jurisdiction* to entertain the application for review. The decision of the Privy Council reversing the first decree was a "new and important matter" within the meaning of this rule.—*Waghela Rai Sangji* v. *Masludin*, 13 B. 330, and *Jogesh Chundra* v. *Kali Churn*, 3 C. 30, F B., p. 46. *See* also, *Satto Saran* v. *Tarini Charan*, 3 B. L. R. 287; 12 W. R. 154. Doubted in *Panchanan* v. *Gurudas*, 9 B L R 187. 18 W. R. 317. But it has been held that a subsequent Full Bench case overruling the authority on which the judgment sought to be reviewed was based was not a ground for granting an application for review.—*Amritlal* v. *Madho Das*, 6 A. 292. The discovery of a fresh authority was also held to be not a good ground for review.—*Velleya* v. *Jaganatha*, 7 M. 307; *see* also, *Banu Pershad* v. *Radha Pershad*, 15 W. R 143; *Chandi Charan* v. *Manoranjan*, 17 C. L. J. 416.

Mistake or Error Apparent on the Face of the Record.—A review of judgment may be granted for the ends of justice where there is an error of law on the face of the judgment, or where the decision of the Court has proceeded upon a mistaken view of the law.—*Sharup Chand* v. *Pat Dassee*, 14 C. 627 (14 C. 18, P. C., *referred to*, 6 B. L. R. 126, L. R. 3 I. A. 221, 2 C 131 *cited*) *See also, Koh Poh v. Moung Tay*, 19 W R. 143.

A review may be granted whenever the Court considers that it is necessary to correct an *evident* error or omission whether on any ground urged at the original hearing of the suit or not.—*Kalu* v *Vishram*, 1 B 543; but see, *Sheoratan* v *Lappa Kuar*, 5 A. 14 Thus a review was granted where *an error on a point of law* was apparent on the face of the judgment.—*Sharup Chand* v *Pat Dassee*, 14 C 627; *Jatra Mohun* v. *Aukhil*, 24 C. 334, *Murari* v *Balvanth*, 46 M 955 76 I C 342: A. I. R. 1924 Mad. 98, *Probhas* v *Nithar Lal*, 28 C W N. 928. 84 I C 278: A. I. R. 1921 Cal 1054.

Where in a case the provisions of the second paragraph of s 575, C P Code, 1882 [s 98, sub-s (2)], were erroneously applied, it was held that there was a mistake or error apparent on the face of the record, and that there was a sufficient cause for granting a review of the Court's decree.—*Husani Begum* v *Collector of Muzaffarnagar*, 11 A 176

A mere omission to raise a point of law which had it been raised, might and probably would have brought about a different result is not

necessarily "a mistake or error apparent on the face of the record" for which a review can be claimed.—*Kamla Prasad* v. *Kunj Behari*, (1922) Pat. 1.

It is no ground for review that the judgment proceeds on an incorrect exposition of the law.—*Chhajju Ram* v. *Neki*, 49 I. A. 144. 72 I C 566: A. I. R. 1922 P. C. 112; nor is it a ground for review that the judgment proceeds on a ruling which has subsequently been modified or reversed —*Garabini* v. *Suraja Narain*, 3 Pat. 134: 75 I. C. 177: A. I. R 1924 Pat. 250, *Laxman* v. *Mt. Shevantibai*, 102 I. C. 6: A. I. R. 1927 Nag 252; *Venkamma* v. *Rangrao*, 43 M. L J. 33: 70 I C. 741: A. I R. 1922 Mad. 227. See, *contra* in *Brindaban* v. *Damodar*, 29 C. W N. 148: 85 I. C. 65: A. I. R. 25 Cal. 304.

Where there is no mistake in computing the period of notice but only an error in law in holding that 15 days from the 17th to the 31st inclusive of the month were sufficient, there is no sufficient ground for review, *Akshay Kumar* v. *Agarwala*, (1922) P. 308.

Where in ignorance of a decision of the High Court, *the Court below* decided a question and subsequently on the decision being brought to its notice reviewed its prior judgment. *Held*, the error of law was one apparent on the face of the record and Or. XLVII, r. 1, applied to the case. Error need not necessarily be limited to errors of fact —*Murari Rao* v. *Balvanth*, 46 M. 955: 45 M. L. J. 309.

Where a Court passed an order under a wrong section, it has jurisdiction to review the wrong order for sufficient reason, and the High Court will not interfere under s. 115 if the right result has been reached and that which was irregularly done has been set right.—*Bollapragoda Guru* v. *Bollapragoda Janki*, 31 M. 414.

For Any Other Sufficient Reason.—The words "any other sufficient reason," as pointed out by the Privy Council in L. R. 3 I. A. 221: 2 C 131, confer a wide discretion on the Court to which an application for review is presented and enables it to grant a review for good and sufficient reasons so far as may be requisite for the ends of justice.—*Gobinda Lal* v. *Shiva Das*, 3 C. L J. 545 (557): 10 C. W. N. 986. 33 C. 1323

Rule 1 of Or. XLVII of the C. P. Code must be read as in itself definitive of the limits within which review is permitted and reference to practice under *former* and *different statutes* is misleading. The words "any other sufficient reason" in Or. XLVII, r. 1 mean a reason sufficient on grounds at least analogous to those specified immediately previously that is to say, to excusable failure to bring to the notice of the Court new and important matters or error on the face of the record—*Chhajju Ram* v. *Neki*, 41 P. L R. 1922 P. C. : 26 C. W. N. 697 P. C: 49 I A. 144 P. C. A. I. R. 1922 (P. C.) 112: *Ramaraghavareddi* v *Raja of Venkatagiri*, 52 M. L J. 123: 99 I C. 954: A. I. R. 1927 Mad 355; *In the application of Dwarkadhish*, 46 A. 245: A. I. R 1924 All 398, *Kumar Gopika* v. *Mahar Ali*, 39 C. L J. 217.

The reversal of a judgment of the lower Appellate Court was not a "sufficient reason" for review within the meaning of Or. XLVII, r. 1. "Sufficient reason" must be some reason analogous to the reasons which

have been stated in Or. XLVII, r. 1.—*Sudanunda* v. *Rakhal*, 31 C. W. N 822 (*Chhajju Ram* v. *Neki*, L. R. 49 I. A 144: 26 C. W. N. 697 *referred to*).

The words "or for any other sufficient reason" mean that the reason must be one sufficient to the Court or Judge to whom the application for review is made, and they cannot be held to be limited to the discovery of new and important matter on evidence or the occurring of a mistake or error apparent on the record. Whether or not there is in such cases "any other sufficient reason" may depend on a question of law or a question of fact, or mixed question of law and fact.—*Amir Hasan* v. *Ahmad Ali*, 9 A. 36 (2 C. 131, P. C, *referred to*). *Gangabai* v *Ghansaram*, 62 I. C. 253. In *Gopal Chandra* v. *Solomon*, 13 C. 62 (reversing 11 C. 767), it has been held that although it is difficult to define precisely the meaning of the words "any other sufficient cause" in this rule yet, from the earlier part of the clause, it is clear that a point which might have been, but which has not been, discovered at the trial by the exercise of due diligence, was not intended by the rule to afford any sufficient reason for review. In *Narayan* v. *Chiranji*, 46 A. 568· 79 I. C. 945· A. I. R. 1924 All. 730, the Allahabad High Court described the rule in *Chhajju Ram's case* (49 I. A. 144) as "technical," and said· "In our opinion the words in Or. XLVII, r I, '*for any other sufficient reason*' are not only very wide in themselves, but are intentionally so made by the Legislature because of the possibility of exceptional cases arising in which obvious injustice would be worked by a strict adherence to the terms of the decree." Mukerji, J, in *Gopika* v *Mahar Ali*, 39 C. L J. 247: A. I. R 1924 Cal 827, referring to *Chhajju Ram's case*, said: "Whether any analogy can be discovered between the two grounds specified, *viz.*, the discovery of new and important matter or evidence, and some mistake or error apparent on the face of the record, need not be discussed. But whether a particular reason is analogous to either one or other of these two grounds may obviously lead to very refined if not subtle arguments." The powers exercisable under s 151 and under Or. XLVII, r. 1 are not mutually exclusive (*Prabhas* v *Nitharlal*, 28 C. W. N 928: 84 I. C. 278 A I R 1924 Cal 1045), and it has held in the following cases that it is immaterial whether the review was granted under Or. XVII or under the inherent jurisdicion —*Basanta* v. *Abhoy*, 37 C L J 99· A I R 1923 Cal 450, *Adit Prasad* v *Ravi Harakh*, 4 Pat. 180 A I R. 1925 Pat 435, *Rameshwar* v. *Dwarka Prasad*, 3 Pat. 778· A. I R 1925 Pat 36

An appeal was heard and disposed of by the Full Bench in the absence of the respondent Subsequently, on the application of the respondent, a review was granted on the ground that no notice of reference to the Full Bench was served on him, and that his absence of the hearing came within the words "any other sufficient reason" in this rule — *Ghanasham* v *Lal Singh*, 9 A. 61

Where the point sought to be raised in review had not been raised or argued by either party, but was first taken by the Court itself in giving its opinion upon the case referred to it, the Court granted a review observing as follows "The question arising in this case is not a question merely between two parties, but is one of great general commercial importance, and under the circumstances, and on very special grounds we think th

review ought to be granted."—*Sulleman Hussein* v. *New Oriental Bank Corporation*, 15 B. 267.

The words "for any other sufficient reason" in this rule will cover the case where there is a good ground for not filing the deficient printing costs, and therefore an application to set aside a dismissal of appeal for failure to file printing costs is one for review and not an application under Or. XLI, r. 19.—*Anant Patdar* v. *Mangal Patdar*, 7 Pat. L. T. 291: A. I. R. 1926 Pat. 27.

A suit was dismissed on the ground of deficiency of Court-fee stamp. Subsequently the Court granted a review having found that the Court-fee paid was sufficient. *Held* that this constituted most fitting ground for granting a review and was clearly "any other sufficient ground" within the meaning of this rule.—*Ali Akbar* v. *Khurshed Ali*, 27 A. 695: 2 A. L. J. 465 Followed in *Gopala Aiyar* v. *Ramaswami*, 31 M. 49: 17 M. L. J. 603.

It is not a "sufficient reason" for granting a review that if another opportunity was given to the applicant, he would satisfy the Court that its previous order was wrong.—*Binda Prasad* v. *Raghubir*, 37 A. 440.

Where an auction purchaser applied for an order for delivery of possession and the order was made, it was held that it was a sufficient ground for reviewing the order that the application was on the face of it barred by limitation.—*Dhanindar Das v. Bakshi*, 3 Pat. L. J. 571.

Omission to raise a point of law is not sufficient.—*Kamala Prasad* v. *Kunj Behari*, 5 Pat. L. J. 344: 57 I. C. 11. Nor is it a ground for review of compromise that a party alleges that his consent was procured by undue influence.—*Alamelu v. Rama*, 43 M. L. J. 290: 90 I. C. 425: A. I. R. 1922 Mad. 446.

The mere fact that another Judge is inclined to take a different view of the case from that taken by a Judge who originally decided the case, is no ground for review.—*Ma Kyaw* v. *Ma Kyin*, (1922) U. B. 16: 64 I. C. 895.

The absence of a pleader is not a ground for review.—*Rama Raghavareddi* v. *Raja of Venkatagiri*, 52 M. L. J. 123: A. I. R 1927 Mad. 355 (A. I. R. 1926 Mad 980 *folld.*).

That the lower Court should have improperly neglected to examine a witness is not a ground for a review of judgment, if the objection was not taken when the case was heard by the Court in regular appeal.—*Munshad Bibee* v. *Luchmeeput*, 9 W. R. 129.

The fact that the High Court ought to have remanded the case on the ground that the Judge had wrongly decided a point of law is no ground for review.—*Prasunno Nath* v. *Judoo Nath*, 9 W. R. 589.

It is not a proper ground for granting a review of judgment that a Judge, by going through the evidence a second time, might arrive at a different conclusion.—*Chunder Churn* v. *Loodun Ram*, 25 W. R. 324.

A review cannot be given merely for the purpose of allowing the parties to re-argue the case upon the evidence, on the chance of eventually

throwing doubt upon the decision already passed.—*Kolcemoodden* v. *Heerun Mundal*, 24 W. R. 186.

A review cannot be granted on the ground that, if the facts had been better or more fully placed before the Court, the judgment would have been different, or even on the ground of a subsequent decision of a question of law by the Privy Council in another suit where there has been no discovery of new evidence such as is contemplated in this rule.—*Jadub Ram* v. *Ram Lochun*, 19 W. R. 189.

Where a Judge had made a mistake as to the subject of certain *daugh* in a Government *chitta, held*, that an error of this kind was sufficient ground for entertaining a review.—*Gunesh Ram* v. *Rohinee Dassee*, 14 W. R. 236.

Where a Judge on appeal declined to admit additional evidence on the ground that the application should have been made to the lower Court, *held*, it was a ground for applying for a review of his order pointing out his mistake.—*Ram Lall* v. *Rung Lal*, 17 W. R. 47.

It is not a sufficient ground to order a review that the decision of the Court was based on a view of the law which had been overruled by a Full Bench decision, but which had not been taken to the notice of the Court by the pleader appearing in the case.—*Sm. Garabini Kumari* v. *Surja Narain*, 1923 Pat. 361: 75 I. C. 177.

It is not a sufficient ground for a review of judgment passed on special appeal that the point which was then raised and on which the Court's decision was based, was one not raised in either of the lower Courts, and specially, as in this case, where the question was pointedly raised in the special appeal, and the respondent had ample time to prepare himself to meet the statement therein.—*Cowell* v *Mahadeb Mundul*, 17 W. R. 182.

A Munsif granted a review on a ground which was no ground in law for granting a review, but his order in review had the effect of making the decree in the suit a right decree instead of a wrong decree. The District Judge allowed an appeal from that order On an application for revision, *held*, that the proper course was to set aside the District Judge's order and to leave standing the order of the Munsif granting the review, which order, though wrong in principle, was right in its results —*Abdul Sadiq* v. *Abdul Aziz*, 21 A 152.

Where a suit is dismissed for non-joinder of parties, the Court is justified in granting a review of his order and in allowing the plaintiff to bring in all the persons interested.—*Girish Chunder* v. *Juramoni De*, 5 C. W. N. 83.

New Exposition of Law by Privy Council, Full Bench or Division Bench.—A lower Court admitted a review of judgment on the ground that the decision of a Divisional Bench of the High Court, which it had followed in that judgment, had subsequently been overruled by the Full Bench. *Held*, that the lower Court was not authorized to admit a review of judgment on such ground —*Amrit Lal* v *Madho Das*, 6 A. 292

A new exposition of the law by a Full Bench after the passing of the original decree is " just and reasonable cause " for admitting a review

after the prescribed period.—*Jonmejoy* v. *Das Monee*, 8 C. 700; *Forbes* v. *Dyanutoollah*, 10 W. R. 415. *Contra*—*Madhub Chunder* v. *Radhika*, 7 W. R. 405; *Dwarka Nath* v *Manick Chander*, 9 W. R. 102, *Shama Shurn* v. *Bindabun*, B. L R. Sup. Vol. 892: 9 W. R. 181; *Bura Boodha* v. *Kaylash Chunder*, 6 W. R 100; and *Allad Monee* v. *Joy Sunkur*, W. R. 408.

The ground for review under Or. XLVII, r. 1, must be something which existed at the date of the decree and the rule does not authorize the review, of a decision which was right when it was made on the ground of happening of some subsequent event. Where the lower Court had decided a case following the decision of the High Court in a connected case which was subsequently reversed on appeal by the Privy Council, the reversal of the High Court's judgment is not a ground for review of the lower Court's jugdment.—*Katagiri Venkata* v. *Vellanki Venkata*, 24 M. 1 (P. C.); *Ganna Bathula Venkamma* v. *Ganna Bathula Ranga Rao*, 43 M. L J. 33: (1922) M. W. N. 304: 15 L. W. 593 (24 M 1, P. C., 4 M. L. T. 86 *folld* ; 13 B 330, 33 A. 566, 31 B. 128, 13 M. L. T. 225, 3 Pat. L. J. 372 *refd. to*); *Sar Faraj Khan* v. *Ramachandra*, 73 I. C. 4, *Sudananda* v. *Rakhal*, 31 C. W. N. 822.

Although the discovery of a new ruling may not entitle a party to a review of judgment, yet when a Court is satisfied that its judgment has proceeded upon an erroneous view of the law, the provisions of this rule allow review of judgment —*Vallaya* v *Jagannatha*, 7 M. 307.

That one Division Bench of the High Court has decided a point at variance with the decision of another Division Bench is no reason for granting a review of judgment.—*Nobeen Kishen* v. *Shib Pershad*, 9 W. R. 161, and *Fergusson* v. *Government*, 9 W R. 158.

The production of an authority which was not brought to the notice of the Judge at the first hearing, and which lays down a view of the law contrary to that taken by the Judge, is not a sufficient ground for granting a review.—*Ellen* v. *Bosheer*, 1 Cal. 184: 24 W. R. 382; *Sheikh Abdul Aziz* v. *Musst. Munro*, (1921) Pat. 152: 1 P. L T. 561.

Where a review of judgment was applied for on the ground of the subsequent publication of the report of a High Court decision on a point of law which governed the case, but which had not been urged at the previous hearing, it was considered that the applicant was not to blame for this omission, and the application for review was granted.—*Achuta* v. *Mammavu*, 10 M 357. *See* also, *Jatra Mohun* v. *Akhil Chandra*, 24 C. 334 (336).

Review by Minors.—A decree passed against an infant properly represented is binding upon him like a decree passed against an adult, and it not subject to review on his application after attaining majority; but it is open to the infant to impeach such a decree by a suit in cases where his guardian had been guilty of fraud or negligence —*Gursanda Natha* v. *Ladkavahu*, 19 B 571.

The only modes of setting aside a decree prescribed by the Indian Code of Civil Procedure are by review under this rule and by suit under s. 9 —*Mirali Rahimbhoy* v *Rehmoobhoy*, 15 B 594 (affirming 13 B. 137). *See* also, *Ram Sarup* v. *Shah Latapat Hossein*, 29 C. 735, where it has

been held that where the next friend of a minor plaintiff withdraws from the suit, it is open to the minor through another next friend to have the suit re-opened on review. *See* also, *Rakhal Moni* v. *Advaita Prosad*, 30 C. 613: 7 C. W. N. 419, and 2 C. L. J. 508: 10 C. W N. 529. But see, *Baramdeo Prasad* v. *Banarasi Prasad*, 3 C. L. J. 119, where it has been held that if a decree is regular in itself and on the face of it correct, the minor's remedy lies in a fresh suit and not by an application for review. *See*, also, *Gulab Koer* v. *Badshah*, 13 C. W. N 1197.

Review of Judgment in Letters Patent Appeals.—The High Court has power to review judgments passed in appeals preferred under cl. 15 of the Letters Patent.—*Venkata Subbarayudu*, v. *Sri Rajah Krishna*, 40 M. 651.

Order Made by One Judge Cannot be Set Aside by Another Judge.—One Judge of a High Court cannot set aside an order made by another Judge of that Court although such order might be wrong The proper remedy in such a case is by review on any of the grounds mentioned in this rule.—*Basanta Kumar* v. *Kusum Kumari*, 44 C. 28

Commissioner.—A Commissioner for taking accounts has no power of review under this order; but before his report is submitted, he may re-open the enquiry into any item on grounds analogous to those of this rule —*Fernandez* v. *Rodrigues*, 47 B. 593: 82 I C 593: A I. R. 1924 Bom. 231.

Court-fee on Application for Review.—The proper fee leviable on an application for review of judgment when it refers to a portion of the decree is the fee leviable on the plaint or memo of appeal, in which the judgment, review of which is asked for, is passed —*In re Sheikh Maqbul*, 31 A. 294 (4 B. 26 *not followed;* 3 C W N. 292 *followed*).

The stamp-fee on an application for review must be calculated on the amount that would be obtained if the review were granted, and not necessarily on the whole value of the suit —*In re Manohar G Tambekar*, 4 B. 26; *Anonymous*, 7 Mad H C Ap. 1. But see, *Nobin Chandra* v *Mahamed Uzir Ali*, 3 C. W. N. 292, in which a different view has been taken

An application for review of an interlocutory order is properly stamped with a Court-fee of Rs 2 and neither art 4 nor 5 of Sch I of the Court Fees Act refers to an interlocutory order —*Jagannath* v *Mulchand*, 31 A. 262.

An application for review of judgment, such as is alluded to in Arts 4 and 5, Schedule I of the Court Fees Act (VII of 1870), does not include an application for a new trial in a Small Cause Court in the mofussil.—*Gopeenath* v *Ram Joy*, 14 W R 249

To whom applications for review may be made.

2. An application for review of a decree or order of a Court not being a High Court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the Judge who passed the decree or made the order

sought to be reviewed; but any such application may, if the Judge who passed the decree or made the order has ordered notice to issue under rule 4, sub-rule (2), proviso (*a*), be disposed of by his successor. [S. 624 and cl. (*c*) of S. 626.]

COMMENTARY.

This rule is not applicable to S. C. Courts.—*See*, Or. L.

The first part of this rule corresponds to s. 624 and the latter part corresponds to cl (*c*) of s. 626 of the C. P. Code, 1882. The wording of the old section has been changed in order to make the provisions more clear.

The words "*or the existence of a*" have been substituted for the word "some," and the words "*or arithmetical mistake*" have been added.

Section 624 and s. 626, cl. (*c*) are reproduced below for the purpose of comparison:—

"624. *Except upon the grounds of the discovery of such new and important matter or evidence as aforesaid, or some clerical error apparent on the face of the decree, no application for a review of judgment, other than that of a High Court, shall be made to any Judge other than the Judge who delivered it.*"

"626. (*c*) *An application made under s. 624 to the Judge who delivered the judgment may, if that Judge has ordered notice to issue under proviso (a) to this section, be disposed of by his successor.*"

To whom Applications for Review may be Made.—Where a decree is passed by a Judge other than a High Court Judge and the review is sought not upon the grounds mentioned above, but upon other grounds the application shall be made to the very Judge who passed the decree; it cannot be made to his successor in office.—*Sarangapani* v. *Narayanasami*, 8 M. 567, *Moheshur Singh* v *Bengal Government*, 7 M. I. A. 283 · *Ram Barran* v. *Bhagwati*, 47 751: 89 I. C. 295: A. I. R. 1925 All. 804

A review was intended to be a consideration of the same subject by the same Judge, as distinguished from an appeal, which is a *hearing* before another tribunal. A review, therefore, should be presented with as much expedition as possible with a view to the re-hearing before the same Judge. The exceptions to this rule are allowable only *ex necessitate*, that is, from the death of the original Judge, or some unexpected or unavoidable cause which prevents him from hearing the review. The causes accounting for delay in applying for a review must, to justify the grant of it, be of grave importance —*Moheshur Singh* v. *Government of India*, 3 W. R, P. C, 45; 7 M. I. A. 283, *Shamser Ali* v. *Jagannath*, 17 C. W N. 403; *Sarut Soondurec* v *Rajendra Kishore*, 9 W. R., 125.

A Judge has no power to allow a review of his predecessor's judgment on the ground that *he comes to a different conclusion on the facts* of the case. It is only the discovery of new evidence or the correction of a patent and indubitable error or omission or some other particular grounds

of like description which justifies the granting of a review.—*Roy Megh Raj* v. *Becjoy Gobind*, 1 C. 197: 23 W R. 438; *In the petition of Mathura Pershad*, 1 A. 296; *Banee Madhub* v. *Kalee Churn*, 24 W. R. 387; *Muneeroodeen* v. *Kadir Buksh*, 24 W. R. 410; and *Wolfut* v. *Nusrutoollah*, 25 W. R. 48.

Under this rule a review petition, on the ground of an "accidental slip", in the decree, is entertainable before the successor of the Judge who disposed of the case. Only if the ground is other than accidental slip or discovery of fresh evidence, such petition cannot be entertained by successor.—*Kathyumma* v. *Muhammad Kutty*, 24 L. W. 447: 97 I. C. 545: A. I. R. 1926 Mad 1083.

If review of a decree passed by a Judge other than a High Court Judge is sought on the ground of a supposed error of judgment, the application for review must be made to the Judge who passed the decree or made the order —*Behari Lall* v *Mungolanath*, 5 C. 110: 4 C. L. R. 371. So also where review is sought on the ground that the order complained of was made by the Judge in the absence of or without notice to a party, the application for review should be made to the Judge who made the order.—*Khema* v. *Dhangi*, 14 B. 101.

A Judge (not being a Judge of the High Court), other than a Judge who delivered the judgment, has no jurisdiction to grant a review on the ground that no leave or consent of the Court under s. 462, C. P. Code, 1882 (Or. XXXII, r. 7), had been given to the guardian *ad litem* to refer the matter in dispute between the parties to the suit to arbitration.—*Ananda Krishna* v *Jogendra Nath*, 8 C. L. J. 294.

An application for review of judgment upon a ground other than those mentioned in s 624, C P Code, 1882 (this rule), if presented to the Judge who delivered it, and who thereupon directs notice to be given to the opposite party, may be heard and disposed of by his successor.—*Karoo Singh* v *Deo Narain*, 10 C 80: 13 C. L R. 261 (4 A. 278 *dissented from*); *Fazel Biswas* v. *Jamadar Sheikh*, 13 C. 231; *Rama Sami* v. *Kurisu*, 13 M. 178; and *Gunpat* v *Jiran*, 16 B 603. *Contra*—*Pancham* v. *Jhinguri*, 4 A. 278.

A Judge of a Mofussil Small Cause Court was held to have jurisdiction to direct a new trial of a case tried by his predecessor. The Judge however, in dealing with applications for new trial, should have regard to the rule laid down in s 624, C. P Code, 1882 (this rule) —*Shumsher Ally* v *Kurkut Shah*, 6 C. 236. 6 C. L. R 549.

An application for review of judgment was presented, on other grounds than those specified in s. 624, C P. Code, 1882 (this rule), to a District Munsif, who had delivered the judgment, and he thereupon ordered the decree to be produced The District Munsif having resigned, his successor heard and determined the application *Held*, it was not competent to the District Munsif, who had not delivered the original judgment, to entertain the application for review —*Cheru Kurup* v *Cheru Khanda*, 12 M 509.

A suit was decided by the Additional Sub-Judge, who was afterwards transferred to the Court of the permanent Sub-Judge Application for review was made to the successor of the Additional Sub-Judge, and was

subsequently transeferred to the same Sub-Judge, who was then the presiding officer of the permanent Court. *Held*, that the requirements of s. 624, C. P. Code, 1882 (this rule), were substantially complied with—*Sundar Das* v. *Saroda Charan*, 13 C. W. N. xci (91-*n*).

Per Mahmood, J.—Where a decree has been simply affirmed on appeal, s 579, C. P. Code, 1882, does not imply that the appellate decree supersedes the original decree so as to render it ineffective for purposes of execution. In such a case the lower Court continues to have jurisdiction to entertain an application for amendment of its own decree under s. 206, C P Code, 1882, and such application is not governed by any article of the Limitation Act, and may be made at any time. It may be granted under s 206, even where an application for review of judgment under s 623 upon the same ground would be barred by s. 624, C. P. Code, 1882.—*Muhammad Sulaiman* v *Muhammad Yar Khan*, 11 A. 267.

A Judge cannot, by transferring a case to his own file, confer on himself the power to review an order of dismissal pronounced by a principal sudder ameen —*Golam Esha* v. *Hurrish Chunder*, W. R. (1864) Mis. 29.

In a pre-emption suit, the money was directed to be given to a wrong person and the decree was passed in pursuance of the judgment. An application for review was made to the successor of the Judge who passed the decree *Held*, the erroneous direction in the decree as to the person to whom the pre-emption price was to be paid was not a clerical mistake apparent on the face of the decree under Or. XLVII, r. 2, and the successor in office cannot entertain such an application —*Baliram Piraji* v. *Yeshwant*, 75 I. C 829.

"If the Judge who passed the decree has ordered notice to issue."—An application for review of judgment, upon a ground other than those mentioned in s 624 of the C P. Code, 1882 (this rule) if presented to the Judge who delivered it, and who thereupon directs notice to be given to the opposite party, may be heard and disposed of by his successor.—*Karoo Singh* v *Deo Narain*, 10 C 80: 13 C. L. R. 261; *Fazel Biswas* v. *Jamadar Sheik*, 13 C. 231; *Ganpat* v *Jivan*, 16 B. 603; *Ramasami* v *Kurisu*, 13 M. 178 *Contra*—*Pancham* v *Jhinguri*, 4 A. 278; *Cheru Kurup* v *Cheru Kanda*, 12 M. 509.

Form of applications for review.

3. The provisions as to the form of preferring appeals shall apply, *mutatis mutandis*, to applications for review. [S. 625.]

COMMENTARY.

This rule corresponds to s 625, C. P. Code, with change of some words. This rule is not applicable to S C. Courts —*See* Or. L.

Form of Applications for Review.—Applications for review of judgment should set forth concisely the grounds mentioned in the application for review.—*Purna Chandra* v. *Nil Madhub*, 5 C. W. N. 485.

Applications for review of judgment should set forth concisely the grounds of objection to the decision of which a review is sought, without argument or narrative, and such grounds should be numbered consecutively.—*Mahadaji Ramchandra* v. *Vithal*, 1 Bom. H. C. 185.

A petitioner applying for review under s. 623, C. P. Code, 1882 must file a copy of the order of which he seeks a review, together with a memorandum of objections.—*Adurji Edulji* v. *Manikji Edulji*, 4 B. 414. But see *Wajid Ali* v *Nawal Kishore*, 17 A. 213.

This rule relates to form and does not enlarge the right. It does not make Or. XLIII, r. 1 (*t*) applicable to a refusal to restore an application for review.—*Girdhari Lal* v. *Zorawar Singh*, 47 A 1· 80 I C. 649: A. I. R. 1925 All. 57.

Application where rejected.

4. (1) Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

Application where granted.

(2) Where the Court is of opinion that the application for review should be granted, it shall grant the same·

Provided that—

(*a*) no such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree or order, a review of which is applied for: and

(*b*) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation. [s. 626.]

Alterations in the Rule.—This rule corresponds to s. 626, C P. Code, 1882, with some alterations and omissions

In sub-rule (2) which corresponds to para. 2 of the old section, the words "*and the Judge shall record with his own hand his reasons for such opinion,*" which occurred in the concluding part of para 2 of the old section, have been omitted By the omission, the rulings in 4 C W. N. 203, P. C., 23 M 496, 3 A 316 and 22 C 734 noted below have been rendered obsolete

Cl (c) of the old section has been detached from this rule and added to the last part of r 2 The other alterations are merely verbal

Sufficient Ground for Review.—On application for review of Judgment, *held*, a party applying for review of judgment must show that there is good and sufficient cause for granting the review before he can be heard to argue that the decision is erroneous. In so showing cause (1) no point

can be raised which has been already discussed and decided on the original hearing of the appeal, and (2) no new point which has not been raised at the hearing of the appeal can be argued on the application for review. *Bhawabal Singh* v. *Rajendra*, 5 B. L. R. 321: 14 W. R. 105 (upholding on review, 13 W. R. 157); *Janab Ali* v. *Chandi Charan*, 5 B. L. R. 334-*note*: 11 W. R. 202; *Gunga Persad* v. *Agra and Masterman's Bank*, 5 B L. R. 340-*note*: 15 W. R., F. B., 5-*note; Hazra Begum* v *Hossein Ali*, 5 B. L. R. 341-*note; Collector of Tipperah* v. *Mafzunnissa*, 5 B. L R. 341-*note*: 14 W. R. 84; *Garib Hossein* v. *Wise*, 5 B L. R. 342-*note; Mehuroonissa* v. *Wise*, 15 W. R., F. B., 2-*note; Beni Madhab* v *Ganga Gobind*, 5 B. L. R. 345-*note* 15 W. R., F. B., 3-*note*. But see, *Chintamani* v. *Pyari Mohuun*, 6 B. L. R 126: 15 W. R., F. B., 1. *See also*, *Kalu Bin* v. *Vishram*, 1 B. 543; and *Huree Pershad* v. *Nund Kishore*, 17 W. R. 479.

The Judges are not required to re-adjudicate points considered and adjudicated when brought before them by a pleader then employed, though they may be better argued, and put in a different light by another pleader subsequently, but are to be guided in their admission of reviews by the definite terms of ss. 377 and 378 of the C. P. Code, 1859.—*Choonee Mundur* v. *Chundee Lall*, 14 W. R. 334.

Where a Sub-Judge, after deciding a regular appeal, granted an application for review of judgment on the ground that new evidence had been discovered, but without any inquiry or proof that such evidence was not within the knowledge of the applicant, or could not have been adduced by him at the time the decree was passed, *held*, that this was an error or defect in the procedure or investigation of the case which affected the decision, and was a ground of appeal when the decision, upon review was brought before the High Court on special appeal.—*Bhyrub Chunder* v. *Madhubram*, 11 B. L. R., F. B., 423: 20 W. R. 84; *Nubo Kishore* v *Jadub Chunder*, 20 W. R. 426; *Dhunka Devla* v. *Hira Ramla*, 4 Bom. H. C. 57.

Where, owing to the conduct of the opposite party, who, though served with notice, made no objection, an applicant for review had no opportunity of showing that a new piece of evidence which he adduced was not within his knowledge, and could not be adduced by him when the decree was passed, such opposite party cannot afterwards be allowed to object on the ground of the Full Bench ruling in 11 B L. R. 423: 20 W. R. 84.—*Ramjoy* v. *Jugodessurer*, 22 W. R. 399.

A decree of the Division Bench of the High Court, dismissing an appeal for default in depositing the estimated costs of preparation of the paper-book under the Rules of the High Court can only be set aside by an order under s. 626, C P. Code, 1882 (this rule).—*Fatimunnissa* v. *Deoki Pershad*, 24 C. 350, F. B.: 1 C. W. N. 21. (*Ramhari Sahu* v. *Madan Mohun*, 23 C. 339, so far as it decides the contrary, is wrongly decided)

Previous Service of Notice Necessary.—A proceeding admitting a review, without notice to the opposite party, as required by this rule, is wholly vitiated by such defect, and not binding on that party.—*Golaboo* v *Ram Dyal*, 8 W. R. 304. See, *In re Huro Mohun Mookerji*, 16 W. R. 135.

Notice to the other side is imperative under this rule, and an order without such notice is illegal and not merely an irregularity, and a party is not bound by the illegal order.—*Narayana Chettiar* v. *Muthu Chettiar*, 51 M. L. J. 219: 97 I. C. 1008 A. I R 1926 Mad 980; *Abdul Hakim* v. *Hem Chandra*, 42 C. 433: 30 I. C. 165.

In the case of a summary dismissal of appeal under Or. XLI, r. 11, the order of dismissal may be set aside on an *ex parte* application for review without notice to the respondent because the respondent in such a case cannot be said to mean the " opposite " party within the meaning of cl. (*a*) of this rule.—*Janki Nath* v. *Prabhasini*, 43 C. 178 (42 C. 433 *dissented from*); *Official Trustee of Bengal* v *Benode*, 51 C 943: 84 I. C 147: A. I. R. 1925 Cal 114.

Where the defendant was given every opportunity to raise any objection that he could raise, he is in no way, therefore, prejudiced by reason of the fact that no notice was issued to him *Held*, the order granting review should not be set aside by the Appellate Court —*The Firm Gopal Mal Ganda Mal* v. *Harachand*, 75 I. C 656.

The expression " opposite party " in Or XLVII, r. 4 (2) (*a*) of the C P. Code is not limited to cases in which such party has actually appeared before the Court It means the party interested to support the order or decree sought to be set aside on review Where an appeal has been dismissed for default, it cannot be restored under Or. XLI, r. 19, which has no application to such a case; nor can it be restored under Or XLVII, r. 4 (2), without notice to the opposite party —*Surajpal* v. *Utim Pandey*, A. I XLVII, r. 4 R. 1922 Pat. 281 63 I C 99

Strict Proof of Such Allegation.—*See notes to rule 1 of this Order under the heading* " DISCOVERY OF NEW AND IMPORTANT MATTER OR EVIDENCE."

The provision of s 626, C P. Code, 1882, requiring the Judge granting a review to record his reasons, is rather a direction to the Judge how to act when he has decided to grant the application than a condition of granting it, and the failure to record his reasons is not a ground for granting special leave to appeal to the Privy Council.—*Thakur Sunker Buksh* v *Balwant Singh*, 4 C W N. 203, P C : 27 C 333 *See* also, *Manicka Mudaliar* v. *Gurusami Mudaliar*, 23 M 496, where it has been held that the provision in s 626, C P. Code, 1882, requiring a Judge to record reasons for granting review is rather directory and not mandatory.

Before a review of judgment is granted, an order granting the application for review, and the reasons for granting the same should be recorded —*Bhairon Din Singh* v *Ram Sahai*, 3 A 316. *See* also, *Gyanund Asram* v *Bepin Mohun*, 22 C 734.

These cases, in so far as they decided that reason for granting the review must be recorded, are no longer the law

Death of Party Pending Review.—The order granting a review only holds the judgment in suspense The death of a party does not therefore cause the suit or appeal to abate —*Achyut* v *Tapibai*, 48 B 210 79 I. C. 753 · A. I. R. 1924 Bom 310

Form.—For Form of notice, *see*, App G, Form No 14

Appeal.—Or. XLIII, r. 1, cl. (*w*) provides that an appeal lies from an order under this rule granting applications for review. Cl. (*w*), however, should be read with r 7 of this Order as subject to it —*Hari Charan* v. *Baran Khan*, 41 C. 746; *Ahia* v. *Mohendra*, 42 C. 830; *Nundalal* v. *Panchanan*, 45 C. 60, 78; *Sundar Mull* v *Upendra Nath*, 1 Pat. L J. 193 An order granting a review on the ground that the view of the law taken was contrary to a Full Bench decision which had not been taken to its notice is appealable.—*Garabini* v. *Surja Narain*, 1923, Pat 361: 75 I. C. 177.

Application for review in Court consisting of two or more Judges.

5. Where the Judge or Judges, or any one of the Judges, who passed the decree or made the order, a review of which is appied for, continues or continue attached to the Court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same. [S. 627.]

COMMENTARY.

This rule corresponds to s. 627, C. P. Code, 1882, with some verbal alterations only. This rule is not applicable to S C. Courts —*See*, Or. L.

" Attached to the Court."—A second appeal was heard and decided by two Judges, and an application for review was filed with the Registrar. One of the Judges having left India, it was heard and decided by the other of the two Judges sitting alone. *Held*, that he had jurisdiction to hear and dispose of the rule.—*Aubhoy Churn* v. *Shamant Lochun*, 16 C. 788.

" No other Judge shall hear the same."—A review may be admitted by the sole remaining Judge of the Bench which heard the case originally. —*Jardine, Skinner & Co.* v. *Dhun Kishen*, 13 W. R. 82.

Where an appeal was heard by two Judges and thereafter on account of the absence of one of them, a review application came before the other Judge sitting with a third new Judge and was granted. *Held*, the proceedings were entirely vitiated, as the terms of Or. XLVII, r. 5 prohibited the new Judge from taking part in the review.—*Chhajju Ram* v *Neki*, 41 P. L. R. 1922: 26 C W. N. 697, P. C : 49 I. A. 144, P. C

Application for Review in Courts Consisting of Two or More Judges. —Application for re-admission of an appeal dismissed on failure to deposit the costs for the preparation of the paper-book under the Rules of the High Court is not an application for review of judgment, and cannot be disposed of by a single Judge of the High Court under this rule —*Ramhari Sahu* v. *Madan Mohan*, 23 C. 839 Partially overruled by *Fatimunnissa* v. *Deoki Pershad*, 24 C. 350, F. B.: 1 C. W. N. 21.

Application where rejected.

6. (1) Where the application for a review is heard by more than one Judge and the Court is equally divided, the application shall be rejected.

(2) Where there is a majority, decisions shall be according to the opinion of the majority. [S. 628.]

COMMENTARY.

This rule croresponds to s. 628, C. P. Code, 1882, with some verbal changes only This rule is not applicable to S C Courts.—*See*, Or L.

Where *two Judges of a Division Bench have concurred in a final* decree, the fact that there is a difference of opinion as to one point amongst others, raised in review on the judgment on which such final decree is based, is no ground for an appeal under clause 15 of the Letters Patent.—*Hurbuns Sahay* v *Thakoor Pershad*, 10 C. 108: 13 C L R 285.

Order of rejection not appealable. Objections to order granting application.

7. (1) An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to on the ground that the application was—

(*a*) in contravention of the provisions of r. 2,

(*b*) in contravention of the provisions of r. 4, or

(*c*) after the expiration of the period of limitation prescribed therefor and without sufficient cause.

Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit.

(2) Where the application has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file, and where it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same.

(3) No order shall be made under sub-rule (2) unless notice of the application has been served on the opposite party [S 629.]

COMMENTARY.

Alterations in the Rule.—This rule corresponds to s 629, C. P. Code, 1882, with some alterations and omissions.

In sub-rule (1), the words "*shall not be appealable*" have been substituted for the word "final," and the words "*but an order granting the application*" have been substituted for the words "but whenever such application is admitted, the admission," which occurred in the old section. The words "the Court *shall* order it to be restored" in sub-rule (2) have been substituted for the words "the Court *may* order it to be restored." The word "*final*" means conclusive and not open to revision or review, hence it has been replaced by the words "*shall not be appealable.*" There was a diversity of opinion on the point (*see*, 25 C 432 and 26 B. 485).

The last para. of s. 629 has been detached from this rule and reproduced in a modified form as r 9

The other changes are mere changes of words and phrases.

It should be noted here that, besides the provisions *contained in* sub-rule (1) for appealing against an order granting review, appeal has also been allowed by cl (*w*) of Or XLIII, from an order granting review. Clause (*w*) seems to be more general and it includes the grounds mentioned in sub-rule (1). For the difference between sub-rule (1) and cl. (*w*) of Or. XLIII, *see*, notes under the latter.

Small Cause Courts.—This rule is not applicable to S. C. Courts.—*See*, Or. L

Order of Rejection Not Appealable.—Where a Court rejects an application for review its decision is not open to revision —*Ram Lal* v. *Ratan Lal*, 26 A. 572 (Distinguished in *Wallis* v *Jamad Husain*, 29 A. 468; 4 A. L J 439). *See* also, *Somayya* v *Subbamma*, 26 M. 599 (602) But see, *Akbar Khan* v *Muhammad Ali Khan*, 31 A. 610, where it has been held that the order of rejection is open to revision where it was made on the erroneous view that the Court had no jurisdiction to entertain the application.

No appeal lies even if the application be rejected by a single Judge on the Original Side of the High Court —*Achaya* v. *Ratnavelu*, 9 M. 253

An order rejecting an application for review of an order dismissing an *execution case for non-payment of process-fees is not appealable* —*Raja Pudmanund* v. *Doorga Pershad*, 4 C. W N. 89. *See* also, *Vadi Lal* v. *Fulchand*, 30 B. 56, 7 Bom L R. 30.

Only the order rejecting the application for review is final; but the decision as to whether there was just and reasonable cause for allowing the application to be made after the prescribed period of ninety days is not final.—*Shama Churn* v *Bindabun*, B. L R. Sup. Vol. 892: 9 W. R 181; also, *George* v. *Hamilton and Co.*, 4 N. W. P. 74.

A mere refusal to grant a review of judgment cannot alter the judgment sought to be reviewed or the decree founded on it, and nothing which the Judge says with reference to his refusal to grant the review can be

binding so as to alter such judgment or decree.—*Ramhurry* v. *Mothoor Mohun*, 20 W. R., P. C., 450

Order Granting Review is ... , r. 1, cl. (*w*), an appeal lies from an orde ... eview; but an order granting a review is n ... conditions specified in this rule, and where ... an appeal in contravention of the provisions of this rule, the High Court set aside the order on revision —*Abdul Sadiq* v *Abdul Aziz*, 21 A. 152; *Akbar Ali* v. *Kurshed Ali*, 27 A 695 2 A L J 465, *Hari Charan* v *Baran Khan* 41 C 746, *Sundar* v *Habib*, 42 A 626 18 A L J. 838, *Munnu Lal* v. *Kunj Behari Lal*, 20 A L J 517 44 A. 605; *Kola China Venkata* v *Veena Tolasi Babu*, 46 M L J. 463 (1924) M W N 355 Clause (*w*) of Or. XLIII, r 1 has to be read along with the provisions of this rule which specifically lay down that an order granting an application for review can be objected to in appeal only on one or the other of the three grounds specified therein. There is no real inconsistency between the two rules the former rule merely gives a party aggrieved by an order granting a review a right of appeal, but it does not deal with the grounds on which the order appealed against can be objected to The two provisions of the Code are not mutually inconsistent but are really complementary to each other. The one gives the right to appeal, and the other defines the extent to which that right can be exercised.—*Sikandar Khan* v *Baland Khan*, A. I. R. 1926 Lah. 436, *Srinivasa* v *Official Assignee, Madras*, 52 M L J. 682. A. I. R 1926 Mad 641.

Where an application for review is granted for " any other sufficient reason," the sufficiency or otherwise of the reason is not a good ground of appeal against the order —*Gopala Aiyar* v *Ramaswami*, 31 M 49, 17 M L J. 603 · 2 M L T 519 (27 A 695, 24 C 878 *followed*, 23 M 314 *distinguished*), *Benarsi* v *Altaf Husain*, 63 I C 171

No appeal lies from an order granting a review of judgment either under this rule or under cl 15 of the Letters Patent except under the conditions specified in this rule —*Abhoy Churn* v. *Shamant Lochun* 11 C. 788; *Bombay, Persia, Steam Navigation Co* , v *Zuari*, 12 B. 171, and *Achaya* v. *Ratnavelu*, 9 M 253 *See* also, *Harnandan* v *Behari*, 22 C 3; *Barada* v *Gobind Pershad*, 22 C 984, *Ramanadhan Chetti* v *Narayanan Chetty*, 27 M 602 (607), *Daryai Bibi* v *Badri Pershad*, 18 A 14. *Chuni Lal* v. *Sonibai*, 21 B 328; *Munni Ram* v *Bishen Perkash*, 21 C 878, and *Mahabir* v. *Nathin*, 1 C W N 338, *Madhori* v *Parbati*, 47 A 881 88 I. C. 653: A I R 1925 All 552, *Meah* v *Durga*, 29 C. W N 1027 90 I. C. 456. A I R 1926 Cal 243, *Venkata* v *Veena*, 46 M L J 463 83 I C 518. A I R 1924 Mad 602

An application under s 311, C P Code, 1882 (Or XXI, r 90), to set aside a sale was rejected Subsequently on review the sale was set aside The District Judge on appeal set aside the order setting aside the sale *Held*, that the order was not appealable, as it was not an order granting application for review, but one setting aside a sale —*Bhairon Din Singh* v *Ram Sahai*, 3 A 316.

Second Appeal from Order Passed in Appeal under this Rule.—No second appeal lies from an order passed in appeal from an order granting an application for review of judgment —*Gopal Das* v *Alaf Khan*, 11 A

383, *Than Singh* v. *Chundun Singh*, 11 C 296, and *Papayya* v. *Chela mayya*, 12 M. 125. But see, *Balanath* v. *Bhiva Natha*, 18 B. 496 This is now clear from the provisions of Or XLIII, r. 1 (*w*), read with s. 104, sub-s. (2).

No second appeal lies to the High Court from an order setting aside an order granting a review of judgment — *Kanti Chunder* v. *Saligram*, 24 C 319 and 319-*note*.

The admission of a review presented out of time without any sufficient cause is a good ground of appeal under s 629, clause (c) of the Civil Procedure Code, 1882 (r. 7) —*Purna Chandra* v. *Nil Madhub*, 5 C W. N. 485

Where an order granting a review has been set aside on appeal, the order passed in appeal is final and not open to second appeal —*Jainal Bibi* v. *Abdul Jalil*, 6 C L. J 225

May be Objected to in any Appeal from the Final Decree.—Under this rule it is open to the appellant on appeal from the final decree, to take objection to the order passed on the application for review.—*Ananda Krishna* v *Jogendra Nath*, 8 C L. J 294

A suit was at first dismissed, but afterwards a review was applied for by the plaintiff and granted, overruling the objections of the defendant Both plaintiff and defendant adduced new evidence, and a decree was given for the plaintiff *Held*, on special appeal, that the fact of the defendant's having adduced fresh evidence in the Court below, did not debar him from objecting on appeal that the review was wrongly granted — *Prannath* v *Sreekant*, 2 C L R 257

Sections 584 and 591, C P Code, 1882 (ss. 100 and 105), do not control s. 629, C P Code, 1882 (r 7), so as to confer a right of appeal in a case, where appeal is not based on one of the objections mentioned in this rule An objection against an order of admission of an application for review cannot be taken in an appeal against the final decree except on one of the grounds mentioned, as grounds of objection in this rule.—*Gopal Aiyar* v *Ramaswami*, 31 M 49, 17 M L J. 603. 2 M. L. T. 519 (27 A 695 24 C 878 *followed*) —*Khurseed* v. *Rahamatullah*, 40 A. 68, *Baroda Charan* v *Gobind Prosad*, 22 C. 984.

The provisions of this rule that objection can be taken by appeal against the order or an appeal against the final decree are not controlled by s 591, C P Code, 1882 (s 105) —*Gyanund Asram* v. *Bepin Mohun*, 22 C 734 *See also*, *Manicka* v *Gurusami*, 23 M. 496

Sub-rule (1), Cl. (b). Application in Contravention of the Provisions of Rule (4).—This clause does not refer to the weight or sufficiency of evidence, and an Appellate Court cannot set aside an order of review merely because in its opinion the probative force of the evidence is insufficient to establish the allegations made in support of the application for review, though such evidence had such probative force to the Court granting the review —*Ahid* v. *Mohendra*, 42 C. 830; *Bai Nematbu* v *Bai Nematullabu*, 43 B. 295; *Nandalal* v. *Panchanan*, 45 C. 60: 42 I. C. 484.

Where the Court of first instance grants an application for review on the ground of discovery of new and important evidence not within the knowledge or power of the applicant at the time of the trial, the Appellate Court will not generally consider the evidence afresh and disturb the conclusion of the lower Court.—*Ambika Charan* v. *Bhaniram*, 64 I. C 219.

The appeal under this rule will be confined to a disregard of the provisions of r 2 or r. 4 only and not to any matter on which the granting of the review is based Where the ground of attack is that the lower Court was incorrect in thinking that there was mistake or error apparent on the face of the record, no appeal is provided for in such a case under Or. XLVII —*Shaukat Ali* v. *Mt Shakila Bano*, 94 I C. 78 A. I. R. 1926 All. 492

Cl. (c). Application After Prescribed Time.—Under Arts. 161, 162, and 173 of the Limitation Act, the period for an application for review of judgment by a Provincial Small Cause Court is 15 days, by the High Court in the exercise of its original jurisdiction, 20 days, and by other Courts, 90 days from the date of the decree, and the applicant is entitled, under s 12 of the Limitation Act, to deduct the time spent in obtaining copy of the decree —*Fazal* v *Umar*, 7 Lah L J 129 88 I. C 1029. A I. R. 1925 Lah 377 But s. 5 of that Act says that the Court may admit the application if the applicant satisfies the Court that he had " sufficient cause " for not making the application within the prescribed period.

Where a party, applying for a review of judgment after the expiry of the prescribed period, had not shown any just and reasonable cause for not preferring his application within the prescribed period, the order admitting the review was held to have been improperly granted, and was set aside with all subsequent proceedings thereon —*Luchmun Singh* v *Tirbani Baksh*, 14 B L R. 373 P C , *Luleet Mohun* v *Sowtra Beebee*, 10 W R. 42, *Gour Pershad* v *Anjub Ali*, 24 W R. 294; *Fakira* v *Basapa*, 8 Bom. H C 234; *Gunganarain* v *Gonomonee*, 8 W R 184, *Betts* v *Bonsi Mundul*, 25 W R 343, *Kristo Gobind* v *Jugobundhoo*, 12 W R 94; *Sreenath* v *Kritattomoyee*, 18 W R 286 *See* also, *Shama Churn* v. *Bindabun*, B L R Sup Vol 892 9 W R 181; *Mahomed Gazi* v *Dullab Bibi*, 5 B. L R 318-*note*, 11 W R 22, *Kasheenath* v *Luckheenarain*, W R (1864) 91 *Jhubhoo Sahoo* v *Jusoda*, 17 W R 230

There seems to be no limit to the time after the expiration of ninty days at which the application for review may be filed, provided the applicant can satisfy the Court that there is a just and reasonable ground for review —*Joogal Kishore* v *Oogor Narain*, 8 W R 483

A new exposition of the law by a Full Bench after the passing of the original decree is not " just and reasonable cause for admitting a review after the prescribed period When a review has been granted, the Court is bound to decide the case according to any new exposition of the law by a Full Bench made since the original decision —*Shama Churn* v *Bindabun*, B L R Sup Vol 892, 9 W R 181; *Buru Boodho* v *Koylash Chunder*, 6 W R 100, *Alladmonee* v *Joysunkur*, 7 W R 408, *Madhub Chunder* v *Radhika*, 7 W R 405, *Dwarkanath* v *Manick*

Chunder, 9 W. R. 102 *Contra—Forbes* v. *Dyanutullah*, 10 W R 415; and *Jonmenjoy* v *Dasmoney*, 8 C. 700.

An application for review of judgment of a lower Court is not admissible after the limited period merely in consequence of a decision of the High Court, or of the Privy Council, modifying the law or practice which prevailed at the time when the judgment sought to be reviewed was passed.—*Onoop Chunder* v. *Ekkowree Singh*, 6 W R 167 But see, *Banee Pershad* v. *Radha Pershad*, 15 W. R. 143.

Where an application for review is not made within the prescribed period the pendency of a special appeal is not such a " just and reasonable cause " for the loss of time, as the Court to which the application is made is bound to arrive at before it can entertain the application at all.—*Lucas* v *Stephen*, 9 W. R. 301; *Fakera* v. *Basapa*, 8 Bom H. C 234

An applicant for review cannot plead his ignorance of the effect of the judgment as a justification for his delay.—*Gulam Husen* v *Musa Miya*, 8 B. 260.

An application for a review of judgment having been made on the first day after the vacation, after the ninetieth day from the date of the judgment which it was sought to review, it appeared that the ninetieth day fell during the vacation when the High Court was closed. *Held*, that the full fee leviable on the memorandum of appeal must be paid in the first instance, but that the Court, if satisfied that the delay was not caused by the *laches* of the applicant, might direct a refund of one-half of such fee —*In the matter of Doorga Prosunno*, 9 C. L. R. 479.

In computing the period of 90 days from the date of decree, within which an application for review of judgment may be presented on payment of half the fee, leviable on the plaint or memorandum of appeal (under Art 5 of Sch. I of the Court Fees Act, 1870), the time during which the Court is closed for vacation cannot be excluded.—*In re Kota*, 9 M. 131

Pendency of second appeal is not a sufficient cause for the delay in filing an application for review.—*Gulam Husen* v. *Musa Miya*, 8 B 260

An insufficiently stamped application for review was presented to the *Munsarim of the Court within 90 days, but the deficiency was not sup*plied till after the expiry of that period *Held*, that there was no presentation within the prescribed period, and that the Judge had no power to admit the application.—*Munro* v. *Cawnpore Municipal Board*, 12 A 57.

Review Granted Without Jurisdiction.—If review is granted in a case where the Court granting it had no jurisdiction, the order is open to revision under s. 115 as made without jurisdiction but it is doubtful whether in such a case an appeal will lie from the order granting the review.—*Ramanadhan* v.*Narayanan*, 27 M. 602, 607; *Chunilal* v. *Sonibai*, 21 B. 329.

Registry of application granted, and order for rehearing

8. When an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.

[S. 630.]

COMMENTARY.

This rule exactly corresponds to s. 630 C P. Code, 1882.

What Questions may be Gone into After Grant of Review.—When a review of a decision has been admitted, the whole case is thereby re-opened —*Sainal Ranchhod* v. *Dullabh*, 10 Bom H C 360

Where a review of judgment is granted on a particular ground, the Court is not bound to re-hear the whole case under this rule It is in the discretion of the Court to re-hear the whole case, or only the particular point on which the review has been granted —*Hurbuns Sahye* v *Thakoor Pershad*, 9 C 209. 12 C. L. R. 64

It cannot be treated as a universal rule that no point can be raised on an application for review which has been already discussed and decided on the original hearing of the appeal, or that no new point, which has not been raised on the hearing of the appeal, can be argued on the application for a review In each case, the Court to which the application, is made must consider and decide whether a review is necessary to correct any evident error or omission, or is otherwise requisite for the ends of justice —*Chintamani* v. *Pyari Mohun*, 6 B L R 126, F B 15 W. R 1, F B Followed in *Kalu Bin* v *Vishram*, 1 B. 543 *See* also *Huree Pershad* v *Nund Kishore*, 17 W R 479 *But see the cases noted under r. 4 of this Order.*

Effect of Grant of Review on Original Decree.—When the application for review is granted, the decree previously made is vacated, with the consequence that an appeal preferred against the decree can no longer be prosecuted But the parties can appeal from the final decree passed on review —*Gour Krishna* v *Nilmadhab*, 36 O. L J 484

Bar of certain applications.

9. No application to review an order made on an application for a review or a decree or order passed or made on a review shall be entertained.

[S. 629, last para.]

COMMENTARY.

This section corresponds to last para of s 629, C P Code, 1882, with some modifications The last para of s 629 is reproduced here for comparision —" *No application to review an order passed on review or on an application for a review shall be entertained* "

Second Application for Review.—There is nothing in the Civil Procedure Code which prevents a second application for a review being made after a previous application for review has been made and rejected, and such an application can therefore be entertained if it is based on grounds different from those taken in the first application —*Gobinda Ram* v *Bholanath*, 15 C 432 Distinguished in *Vaman* v *Malhari*, 26 B 187 4 Bom L R 121 *See* also, *Nasiruddin* v *Indro Narain*, B L R Sup. Vol 367 5 W R 93, *Kasheenath* v *Lukhee Narain*, W R (1864) 91, *Fukheeroodin* v *Kala Chand*, 1 W R 287, *Needoo Monee* v *Saroda Monee*, 2 W R 61 and 62, *Rash Beharee* v *Kunj Beharee*, W. R. (1864), Mis 31; *Asudooddeen* v *Abdool Kureem*, 6 W R 110. But see, *Venkama* v *Pamo*, 5 M. H C. 323

ORDER XLVIII.

MISCELLANEOUS.

1. (1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs.

Process to be served at expense of party issuing.

(2) The court-fee chargeable for such service shall be paid within a time to be fixed before the process is issued. [S. 93.]

Costs of service.

COMMENTARY.

This rule corresponds to s 93, C. P. Code, 1882, with some verbal changes

In sub-rule (2), the word "*chargeable*" has been substituted for the word "leviable," and the word "*paid*" has been substituted for the word "levied" which occurred in the old section.

"**Unless the Court otherwise directs.**"—This rule does not give a Court any power to depart from the rules of the High Court on the subject of levy of fees or to remit them. The rule relates to the payment of process fees by the parties to a suit, and gives the Court, acting judicially, power to make an order, between party and party only, as to who should pay the process fees It does not expressly give power to remit the fees, and to order that the process should be served free, at the expense of Government —*In the matter of the application of Studd*, 26 C. 124: 3 C. W. N. 82

2. All orders, notices and other documents required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons. [Part of s. 94.]

Orders and notices how served

COMMENTARY.

This rule corresponds to the latter part of s. 94 of the C. P. Code, 1882 The former part of s. 94 has been made a separate section (s 142) This rule should be read with s. 142.

The rules for issue and service of summons are given in Or. V.

3. The forms given in the appendices, with such variation as the circumstances of each case may require, shall be used for the purposes therein mentioned. [S. 644.]

Use of forms in appendices.

COMMENTARY.

This rule corresponds to the latter part of s 644 with some modifications.

Form 149 of Schedule IV of the C P. Code, 1882, provided that sixty days should elapse between a sale in execution of a decree and its confirmation A sale having been confirmed before the expiry of sixty days, *held*, that the sale was not rendered inoperative, and that its effect was not postponed by reason of the provision in Form No. 149.—*Haji* v. *Atharman*, 7 M 512 *See* also, *Achalabala* v *Surendra Nath*, 24 C 766, p. 772

ORDER XLIX.

CHARTERED HIGH COURTS.

1. Notice to produce documents, summonses to witnesses, and every other judicial process, issued in the exercise of the original civil jurisdiction of the High Court, and of its matrimonial, testamentary any intestate jurisdictions, except summonses to defendants, writs of execution and notices to respondents may be served by the attorneys in the suits, or by persons employed by them, or by such other persons as the High Court, by any rule or order, directs. [S. 636.]

Who may serve processes of High Court.

COMMENTARY.

This rule corresponds to s. 636, C. P. Code, 1882, with some alterations of a verbal character.

"Or by persons employed by them."—There is no provision of law for handing the notice to a village headman to serve upon a party resident in his village. The special employment of an individual does not seem to be contemplated by Or. XLIX, r. 1, which might be deemed to refer to persons in the attorneys regular service.—*Sugan Chand v. Kanappa Chetty*, 30 C. W. N. 734: 96 I. C. 375: A. I. R. 1926 Cal. 977.

2. Nothing in this schedule shall be deemed to limit or otherwise affect any rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court. [New.]

Saving in respect of Chartered High Courts.

COMMENTARY.

Section 633, C P. Code, 1882, contained provisions for the taking of evidence and recording judgment and orders. The section ran as follows:—"*The High Court shall take evidence and record judgments and orders in such manner as it by rule from time to time directs.*"

The intention of the Legislature, as expressed in s. 633 of the C P. Code, 1882, was that the High Court might frame rules as to how its judgments should be given, whether orally or in writing, or according to any mode which might appear to it best in the interests of justice—*Sundar Bibi v. Bisheshwar Nath*, 9 A. 93.

3. The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely :—

Application of rules.

(1) rule 10 and r. 11, clauses (b) and (c), of Or. VII;

(2) rule 3 of Or. X;

(3) rule 2 of Or. XVI;

(4) rules 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16 (so far as relate to the manner of taking evidence) of Or XVIII;

(5) rules 1 to 8 of Or. XX; and

(6) rule 7 of Or. XXXIII (so far as relates to the making of a memorandum);

and r. 35 of Or. XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction. [S. 638.]

COMMENTARY.

This rule corresponds to part of s 638, C. P. Code, 1882, with some additions, alterations and omissions. The first part and the last part of the old section, are inserted in s 120, and this rule is to be read with s. 120.

This order is to be read with PART IX of this Code, which contains special provisions relating to the Chartered High Courts

For the power of the High Courts to make rules, *see*, PART X

ORDER L.

PROVINCIAL SMALL CAUSE COURTS.

Provincial Small Cause Courts.

1. The provisions hereinafter specified shall not extend to Courts, constituted under the Provincial Small Cause Courts Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say—

(*a*) so much of this schedule as relates to—

(*i*) suits excepted from the cognizance of a Court of Small Causes or the execution of decrees in such suits;

(*ii*) the execution of decrees against immoveable property or the interest of a partner in partnership property;

(*iii*) the settlement of issues; and

(*b*) the following rules and orders—

Order II, r. 1 (frame of suit);

Order X, r. 3 (record of examination of parties);

Order XV, except so much of r. 4 as provides for the pronouncement at once of judgment;

Order XVIII, rr. 5 to 12 (evidence);

Orders XLI to XLV (appeals);

Order XLVIII, rr. 2, 3, 5, 6, 7 (review);

Order LI. [New.]

ORDER LI.

PRESIDENCY SMALL CAUSE COURT.

Presidency Small Cause Court.

1. Save as provided in rr. 22 and 23 of Or. V, rr. 4 and 7 of Or. XXI, and r. 4 of Or. XXVI, and by the Presidency Small Cause Courts Act, 1882, this schedule shall not extend to any suit or proceedings in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay [New.]

THE FIRST SCHEDULE

APPENDIX A

PLEADINGS

(1) TITLES OF SUITS.

IN THE COURT OF

A. B (*add description and residence*) ... *plaintiff*,
against
C. D. (*add description and residence*) .. ... *defendant*.

---

(2) DESCRIPTION OF PARTIES IN PARTICULAR CASES.

The Secretary of State for India in Council.

The Advocate General of

The Collector of

The State of

The A. B. Company, Limited, having its registered office at

A. B., a public officer of the C. D. Company.

A. B (*add description and residence*), on behalf of himself and all other creditors of C. D., late of (*add description and residence*)

A. B (*add description and residence*), on behalf of himself and all other holders of debentures issued by the Company, Limited

---

The Official Receiver.

A. B., a minor (*add description and residence*), by C. D. [*or* by the Court of Wards], his next friend.

A. B., (*add description and residence*), a person of unsound mind [*or* of weak mind], by C D., his next friend.

A. B., a firm carrying on business in partnership at

A. B. (*add description and residence*), by his constituted attorney C. D. (*add description and residence*).

A. B (*add description and residence*), Shebait of Thakur.

A. B. (*add description and residence*), executor of C. D., deceased.

A. B. (*add description and residence*), *heir of* C. D., deceased.

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(3) PLAINTS.

No. 1.

MONEY LENT.

(Title.)

A. B., the above-named plaintiff, states as follows —

1. On the day of 19 , he lent the defendant rupees repayable on the day of

2. The defendant has not paid the same, except rupees paid on the day of 19 .

[*If the plaintiff claims exemption from any law of limitation say:—*]

3. The *plaintiff was a minor* [*or insane*] *from the day of till* the *day of*

4. [*Facts showing when the cause of action arose and that the Court has jurisdiction*]

5. The value of the subject-matter of the suit for the purpose of jurisdiction is rupees and for the purposes of court-fees is rupees.

6 The plaintiff claims rupees, with interest at per cent. from the day of 19 .

No. 2.

MONEY OVERPAID.

(Title.)—

A. B., the above-named plaintiff, states as follows:—

1 On the day of 19 , the plaintiff agreed to buy and the defendant agreed to sell bars of silver at annas per tola of fine silver.

The plaintiff procured the said bars to be assayed by *E. F.*, who was paid by the defendant for such assay, and *E. F.*, declared each of the bars to contain 1,500 tolas of fine silver, and the plaintiff accordingly paid the defendant rupees.

3. Each of the said bars contained only 1,200 tolas of fine silver, of which fact the plaintiff was ignorant when he made the payment

4. The defendant has not repaid the sum so overpaid

[*As in paras.* 4 *and* 5 *of Form No* 1, *and Relief claimed.*]

No. 3.

GOODS SOLD AT A FIXED PRICE AND DELIVERED.

(Title)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , *E. F.*, sold and delivered to the defendant (one hundred barrels of flour, *or* the *goods* mentioned in the schedule hereto annexed *or* sundry goods).

2. The defendant promised to pay rupees for the said goods on delivery [*or* on the day of , *some day before the plaint was filed*].

3. He has not paid the same.

4. *E. F.* died on the day of 19 . By his last will be appointed his brother, the plaintiff, his executor.

[*As in paras.* 4 *and* 5 *of Form No.* 1.]

7. The plaintiff as executor of *E. F. claims* [*Relief claimed*].

No. 4.

GOODS SOLD AT A REASONABLE PRICE AND DELIVERED.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , plaintiff sold and delivered to the defendant (sundry articles of house-furniture), but no express agreement was made as to the price.

2. The goods were reasonably worth rupees.

3. The defendant has not paid the money.

[*As in paras.* 4 *and* 5 *of Form No.* 1, *and Relief claimed.*]

No. 5.

GOODS MADE AT DEFENDANT'S REQUEST, AND NOT ACCEPTED.

(*Title.*)

A. B, the above-named plaintiff, states as follows:—

1. On the day of 19 , *E. F.* agreed with the plaintiff that the plaintiff should make for him [*six tables and fifty chairs*], and that *E. F.* should pay for the goods on delivery rupees.

2. The plaintiff made the goods, and on the day of 19 , offered to deliver them to *E. F.*, and has ever since been ready and willing so to do.

3. *E. F*, has not accepted the goods or paid for them.

[*As in paras.* 4 *and* 5 *of Form No* 1, *and Relief claimed.*]

No. 6.

DEFICIENCY UPON A RE-SALE (GOODS SOLD AT AUCTION).

(*Title.*)

A. B, the above-named plaintiff, states as follows —

1. On the day of 19 , the plaintiff put up at auction sundry [*goods*], subject to the condition that all goods not paid for and removed by the purchaser within [*ten days*] after the sale should be re-sold by auction on his account, of which condition the defendant had notice.

2. The defendant purchased [*one crate of crockery*] at the auction at the price of rupees.

3. The plaintiff was ready and willing to deliver the goods to the defendant on the date of the sale and for [*ten days*] after

4 The defendant did not take away the goods purchased by him nor pay for them within [*ten days*] after the sale, nor afterwards

5 On the day of 19 , the plaintiff re-sold the [*crate of crockery*], on the account of the defendant, by public auction, for rupees

6 The expenses attendant upon such re-sale amounted to rupees

7. The defendant has not paid the deficiency thus arising, amounting to rupees

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 7.

SERVICES AT A REASONABLE RATE.

(Title.)

A. B., the above-named plaintiff states as follows:—

1. Between the day of 19 , and the day of 19 , at , plaintiff [executed sundry drawings, designs and diagrams] for the defendant, at his request; but no express agreement was made as to the sum to be paid for such services.

2 The services were reasonably worth rupees.

3 The defendant has not paid the money.

[As in paras 4 and 5 of Form No. 1, and Relief claimed]

No. 8.

SERVICES AND MATERIALS AT A REASONABLE COST.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , at , the plaintiff built a house [known as No , in], and furnished the materials therefor, for the defendant, at his request, but no express agreement was made as to the amount to be paid for such work and materials.

2 The work done and materials supplied were reasonably worth rupees.

3 The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 9.

USE AND OCCUPATION.

(Title.)

A. B., the above-named plaintiff, executor of the will of *X. Y.*, deceased, states as follows.—

1. That the defendant occupied the [house No. , Street] by permission of the said *X. Y.*, from the day of 19 , until

the day of 19 , and no agreement was made as to payment for the use of the said premises.

2. That the use of the said premises for the said period was reasonably worth rupees.

3. The defendant has not paid the money.

[*As in paras. 4 and 5 of Form No. I.*]

4 The plaintiff as executor of *X. Y.*, claim [*Relief claimed*].

No. 10.

ON AN AWARD.

(*Title.*)

A. B., the above-named plaintiff, states as follows.—

1. On the day of 19 , the plaintiff and defendant, having a difference between them concerning [a demand of the plaintiff for the price of ten barrels of oil, which the defendant refused to pay), agreed in writing to submit the difference to the arbitration of *E. F.* and *G. H.*, and the original document is annexed hereto.

2 On the day of 19 , the arbitrators awarded that the defendant should [pay the plaintiff rupees].

3. The defendant has not paid money.

[*As in paras. 4 and 5 of Form No 1, and Relief claimed.*]

No. 11.

ON A FOREIGN JUDGMENT.

(*Title.*)

A. B., the above-named plaintiff, states as follows.—

1. On the day of 19 , at in the State [*or* Kingdom], of , the Court of the State [*or Kingdom*], in a suit therein pending between the plaintiff and the defendant, duly adjudged that the defendant should pay to the plaintiff rupees, with interest from the said date

2. The defendant has not paid the money

[*As in paras. 4 and 5 of Form No 1, and Relief claimed.*]

No. 12.

AGAINST SURETY FOR PAYMENT OF RENT.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , *E. F.*, hired from the plaintiff, for the term of years the [house No. , Street], at the annual rent of rupees payable [monthly].

2 The defendant agreed, in consideration of the letting of the premises to *E F.*, to guarantee the punctual payment of the rent

3 The rent for the month of 19 , amounting to rupees, has not been paid.

[If, by the terms of the agreement, notice is required to be given to the surety, add:—]

4 On the day of 19 , the plaintiff gave notice to the defendant of non-payment of the rent, and demanded payment thereof

5. The defendant has not paid the same.

[As in paras. 4 and 5 of Form No 1, and Relief claimed.]

No. 13.

BREACH OF AGREEMENT TO PURCHASE LAND.

(Title) .

A B, the above-named plaintiff, states as follows:—

1 On the day of 19 , the plaintiff, and defendant entered into an agreement, and the original document is hereto annexed.

[*Or*, on the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant and that the defendant should purchase from the plaintiff forty bighas of land in the village of for rupees

2 On the day of 19 , the plaintiff, being then the absolute owner of the property [and the same being free from all incumbrances as was made to appear to the defendant], tendered to the defendant a sufficient instrument of transfer of the same [or, was ready and willing, and is still ready and willing and offered, to transfer the same to the defendant by a sufficient instrument] on the payment by the defendant of the sum agreed upon.

3. The defendant has not paid the money.

[As in paras 4 and 5 of Form No 1, and Relief claimed.]

No 14.

NOT DELIVERING GOODS SOLD.

(Title.)

A. B, the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred barrels

of flour to the plaintiff *on the day of 19] and that the* plaintiff should pay therefor rupees on delivery.

2. On the [said] day the plaintiff was ready and willing, and offered, to pay the defendant the said sum upon delivery of the goods.

3. The defendant has not delivered the goods, and the plaintiff has been deprived of the profits which would have accrued to him from such delivery.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 15.

WRONGFUL DISMISSAL.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [an accountant, *or* in the capacity of foreman, *or as the case may be*] and that the defendant should employ the plaintiff as such for the term of [one year] and pay him for his services rupees (monthly).

2 On the day of 19 , the plaintiff entered upon the service of the defendant and has ever since been, and still is ready and willing to continue in such service during the remainder of the said year whereof the defendant always has had notice

3. On the day of 19 , the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, or to pay him for his services.

[*As in paras 4 and 5 of Form No 1, and Relief claimed*]

No. 16.

BREACH OF CONTRACT TO SERVE.

(*Title*)

A B, the above-named plaintiff, states as follows·—

1. On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at an [annual] salary of rupees, and that the defendant should serve the plaintiff as [an artist] for the term of (one year)

2. The plaintiff has always been ready and willing to perform his part of the agreement [and on the day of 19 , offered so to do].

3. The defendant [entered upon] the service of the plaintiff on the above-mentioned day, but afterwards, on the day of 19 , he refused to serve the plaintiff as aforesaid

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 17.

AGAINST A BUILDER FOR DEFECTIVE WORKMANSHIP.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant entered into an agreement, and the original document is hereto annexed [*Or state the tenor of the contract.*]

[2. The plaintiff duly performed all the conditions of the agreement on his part.]

3. The defendant built the house referred to in the agreement in a bad and unworkmanlike manner.]

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 18.

ON A BOND FOR THE FIDELITY OF A CLERK.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff took *E. F.* into his employment as a clerk.

2. In consideration thereof on the day of 19 , the defendant agreed with the plaintiff that if *E. F.* should not faithfully perform his duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all monies, evidences of debt or other property received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof, not exceeding rupees.

[*Or*, 2 In consideration thereof, the defendant by his bond of the same date bound himself to pay the plaintiff the penal sum of rupees, subject to the condition that if *E. F.* should faithfully perform his duties as clerk and cashier to the plaintiff and should justly account to the plaintiff for all monies, evidences of debt or other property which should be at any time held by him in trust for the plaintiff, the bond should be void.]

[*Or.*, 2. In consideration thereof, on the same date the defendant executed a bond in favour of the plaintiff, and the original document is hereto annexed.]

3. Between the day of 19 , and the day of 19 , *E. F.* received money and other property, amounting to the value of rupees, for the use of the plaintiff, for which sum he has not accounted to him, and the same still remains due and unpaid.

[*As in paras 4 and 5 of Form No 1, and Relief claimed*]

No. 19.

BY TENANT AGAINST LANDLORD, WITH SPECIAL DAMAGE

(Title)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant by a registered instrument, let to the plaintiff [the house No , Street] for the term of years contracting with the plaintiff, that he, the plaintiff, and his legal representatives should quietly enjoy possession thereof for the said term.

2 All conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain his suit

3. On the day of during the said term, *E. F*, who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

4. The plaintiff was thereby [prevented from continuing the business of a tailor at the said place, was compelled to expend rupees in moving, and lost the custom of *G H* and *I. F.* by such removal].

[*As in paras 4 and 5 of Form No 1, and Relief claimed.*]

No. 20.

ON AN AGREEMENT OF INDEMNITY.

(Title.)

A B, the above-named plaintiff, states as follows —

1 On the day of 19 , the plaintiff and defendant, being partners in trade under the style of *A B* and *C D*, dissolved the partnership, and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the firm

2 The plaintiff duly performed all the conditions of the agreement on his part .

3 On the day of 19 , [a judgment was recovered against the plaintiff and defendant by *E F*, in the High Court of

Judicature at upon a debt due from the firm to *E F.*, and on the day of 19 ,] the plaintiff paid rupees [in satisfaction of the same.]

4. The defendant has not paid the same to the plaintiff.

[*As in paras.* 4 *and* 5 *of Form No.* 1, *and Relief claimed*]

No. 21.

PROCURING PROPERTY BY FRAUD.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant, for the purposes of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he the defendant, was solvent, and worth rupees over all his liabilities]

2. The plaintiff was thereby induced to sell [and deliver] to the defendant, [dry goods] of the value of rupees

3 The said representations were false [*or, state the particular falsehoods*] and were then known by the defendant to be so.

4. The defendant has not paid for the goods. [*Or, if the goods were not delivered*]. The plaintiff, in preparing and shipping the goods and procuring their restoration, expended rupees.

[*As in paras.* 4 *and* 5 *of Form No.* 1, *and Relief claimed*]

No. 22.

FRAUDULENTLY PROCURING CREDIT TO BE GIVEN TO ANOTHER PERSON.

(Title.)

A. B, the above-named plaintiff, states as follows.—

1. On the day of 19 , the defendant represented to the plaintiff that *E F.* was solvent and in good credit, and worth rupees over all his liabilities [*or*, that *E. F.* then held a responsible situation and was in good circumstances, and might safely be trusted with goods on credit.]

2. The plaintiff was thereby induced to sell to *E. F.* [rice] of the value of rupees [on months' credit].

3. The said representations were false and were then known by the defendant to be so, and were made by him with intent to deceive and defraud the plaintiff [*or*, to deceive and injure the plaintiff].

4. *E. F.* [did not pay for the said goods at the expiration of the credit aforesaid, or] has not paid for the said rice, and the plaintiff has wholly lost the same.

[*As in paras.* 4 *and* 5 *of Form No* 1, *and Relief claimed.*]

No. 23.

POLLUTING THE WATER UNDER THE PLAINTIFF'S LAND.

(Title.)

A. B., the above-named plaintiff, states as follows.—

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain land called and situate in , and of a well therein, *and of water in the well, and was entitled to the use and benefit* of the well and of the water therein, and to have certain springs and streams of water which flowed and ran into the well to supply the same to flow or run without being fouled or polluted.

2. On the day of 19 , the defendant wrongfully fouled and polluted the well and the water therein and the springs and streams of water which flowed into the well

3 In consequence the water in the well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the well and water

[*As in paras* 4 *and* 5 *of Form No* 1, *and Relief claimed*]

No. 24.

CARRYING ON A NOXIOUS MANUFACTURE.

(Title.)

A B, the above-named plaintiff, states as follows —

1 The plaintiff is, and at all the times hereinafter mentioned was possessed of certain lands called , situate in .

2 Ever since the day of 19 , the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter, which spread themselves over and upon the said lands, and corrupted the air, and settled on the surface of the lands

3 Thereby the trees, hedges, herbage and crops of the plaintiff growing on the lands were damaged and deteriorated in value, and the cattle and live-stock of the plaintiff on the lands became unhealthy, and many of them were poisoned and died

4 The plaintiff was unable to graze the lands with cattle and sheep as he otherwise might have done, and was obliged to remove his cattle,

sheep and farming-stock therefrom, and has been prevented from having so beneficial and healthy a use and occupation of the lands as he otherwise would have had.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed*]

No. 25.

OBSTRUCTING A RIGHT OF WAY.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of [a house in the village of].

2. He was entitled to a right of way from the [house] over a certain field to a public highway and back again from the highway over the field to the house, for himself and his servants [with vehicles, *or* on foot] at all times of the year.

3 On the day of 19 , defendant wrongfully obstructed the said way, so that the plaintiff could not pass [with vehicles, *or* on foot, or in any manner] along the way [and has ever since wrongfully obstructed the same].

4 *(State special damage if any.)*

[*As in paras. 4 and 5 of Form No 1, and Relief claimed.*]

No. 26.

OBSTRUCTING A HIGHWAY.

(Title.)

1. The defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from to so as to obstruct it

2. Thereby the plaintiff, while lawfully passing along the said highway, fell over the said earth and stones [or into the said trench] and broke his arm, and suffered great pain, and was prevented from attending to his business for a long time, and incurred expense for medical attendance.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 27.

DIVERTING A WATER-COURSE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is, and at the time hereinafter mentioned was, possessed, of a mill situated on a [stream] known as the , in the village of district of .

2. By reason of such possession the plaintiff was entitled to the flow of the stream for working the mill.

3. On the day of 19 , the defendant, by cutting the bank of the stream, wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill.

4. By reason thereof the plaintiff has been unable to grind more than sacks per day, whereas, before the said diversion of water, he was able to grind sacks per day.

[*As in paras.* 4 *and* 5 *of Form No.* 1, *and Relief claimed.*]

No. 28.

OBSTRUCTING A RIGHT TO USE WATER FOR IRRIGATION.

(Title.)

A. B., the above-named plaintiff, states as follows.—

1. Plaintiff is, and was at the time hereinafter mentioned, possessed of certain lands situate, etc., and entitle to take and use a portion of the water of a certain stream for irrigating the said lands.

2. On the day of 19 , the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid, by wrongfully obstructing and diverting the said stream.

[*As in paras* 4 *and* 5 *of Form No* 1, *and Relief claimed.*]

No. 29.

INJURIES CAUSED BY NEGLIGENCE ON A RAILROAD.

(Title.)

A. B, the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendants were common carriers of passengers by railway between and .

2. On that day the plaintiff was a passenger in one of the carriages of the defendants on the said railway

3. While he was such passenger, at [*or near the station of or between the stations of* and] a collision occurred on the said railway, caused by the negligence and unskilfulness of the defendants' servants, whereby the plaintiff was much injured [having his leg broken, his head cut, etc., *and state the special damage, if any, as*], and incurred expense for medical attendance, and is permanently disabled *from carrying* on his former business as a salesman]

[*As in paras* 4 *and* 5 *of Form No* 1, *and Relief claimed.*]

[*Or this*:—2. On that day the defendants by their servants so negligently and unskilfully drove and managed an engine and a train of carriages attached thereto upon and along the defendants' railway which the plaintiff was then lawfully crossing, that the said engine and train were driven and struck against the plaintiff, whereby, etc., *as in para* 3].

No. 30.

INJURIES CAUSED BY NEGLIGENT DRIVING.

(Title.)

A. B, the above-named plaintiff, states as follows:—

1 The plaintiff is a shoemaker, carrying on business at . The defendant is a merchant of .

2. On the day of 19 , the plaintiff was walking southward along Chowringhee, in the City of Calcutta, at about 3 o'clock in the afternoon He was obliged to cross Middleton Street which is a street *running into Chowringhee at right angles. While he was crossing this* street, and just before he could reach the foot-pavement on the further side thereof, a carriage of the defendant's drawn by two horses under the charge and control of the defendant's servants was negligently, suddenly and without any warning turned at a rapid and dangerous pace out of Middleton Street into Chowringhee The pole of the carriage struck the plaintiff and knocked him down, and he was much trampled by the horses

3. By the blow and fall and trampling the plaintiff's left arm was broken and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in suffering, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business *and profits*

[*As in paras 4 and 5 of Form No 1, and Relief claimed*]

No. 31.

FOR MALICIOUS PROSECUTION.

(Title)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant obtained a warrant of arrest from [a Magistrate of the said city, *or as the case may be*] on a charge of , and the plaintiff was arrested thereon, and imprisoned for [days, or hours, and gave bail in the sum of rupees to obtain his release].

2. In so doing the defendant acted maliciously and without reasonable or probable cause.

3. On the day of 19 , the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff.

4. Many persons, whose names are unknown to the plaintiff, hearing of the arrest, and supposing the plaintiff to be a criminal, have ceased to do business with him; *or*, in consequence of the said arrest, the plaintiff lost his situation as clerk to one *E F.*; *or* in consequence the plaintiff suffered pain of body and mind, and was prevented from transacting his business and was injured in his credit, and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 32.

MOVEABLES WRONGFULLY DETAINED.

(*Title*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , plaintiff owned [*or state facts showing a right to the possession*] the goods mentioned in the schedule hereto annexed [*or describe the goods*], the estimated value of which is rupees.

2. From that day until the commencement of this suit the defendant has detained the same from the plaintiff.

3. Before the commencement of the suit, to wit on the day of 19 , the plaintiff demanded the same from the defendant but he refused to deliver them

[*As in paras 4 and 5 of Form No 1*]

6. The plaintiff claims—

(1) delivery of the said goods, or rupees, in case delivery cannot be had,

(2) rupees in compensation for the detention thereof.

The Schedule

No. 33.

AGAINST A FRAUDULENT PURCHASER AND HIS TRANSFEREE WITH NOTICE.

(*Title*)

A. B., the above named plaintiff, states as follows —

1. On the day of 19 , the defendant *C D*, for the purpose of inducing the plaintiff to sell him certain goods, represented to

the plaintiff that [he was solvent, and worth rupees over all his liabilities].

2. The plaintiff was hereby induced to sell and deliver to *C. D* [one hundred boxes of tea], the estimated value of which is rupees

3. The said representations were false, and were then known by *C. D.* to be so [*or*, at the time of making the said representations, *C. D.* was insolvent, and knew himself to be so].

4. *C. D.* afterwards transferred the said goods to the defendant *E. F* without consideration [*or* who had notice of the falsity of the representation].

[*As in paras 4 and 5 of Form No.* 1.]

7 The plaintiff claims—

(1) delivery of the said goods, or rupees, in case delivery cannot be had;

(2) rupees compensation or the detention thereof.

No. 34.

RESCISSION OF A CONTRACT ON THE GROUND OF MISTAKE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant, situated at , contained [ten bighas].

2. The plaintiff was thereby induced to purchase the same at the price of rupees in the belief that the said representation was true, and signed an agreement, of which the original is hereto annexed. But the land has not been tranferred to him.

3. On the day of 19 , the plaintiff paid the defendant rupees as part of the purchase-money.

4 That the said piece of ground contained in fact only [five bighas]

[*As in paras. 4 and 5 of Form No.* 1.]

7. The plaintiff claims—

(1) rupees with interest from the day of 19 ;

(2) that the said agreement be delivered up and cancelled.

No. 35.

AN INJUNCTION RESTRAINING WASTE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is the absolute owner of [*describe the property.*]

The defendant is in possession of the same under a lease from the plaintiff.

3. The defendant has [cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale] without the consent of the plaintiff.

[As in paras. 4 and 5 of Form No. 1.]

6 The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises.

[Pecuniary compensation may also be claimed.]

No. 36.

INJUNCTION RESTRAINING NUISANCE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. Plaintiff is, and at all the times hereinafter mentioned was, the absolute owner of [the house No , Street, Calcutta]

2 The defendant is and at all the said times was, the absolute owner of [a plot of ground in the same street].

3. On the day of 19 , the defendant erected upon his said plot a slaughter-house, and still maintains the same, and from that day until the present time has continually caused cattle to be brought and killed there [and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff]

4. In consequence the plaintiff has been compelled to abandon the said house, and has been unable to rent the same

[As in paras. 4 and 5 of Form No. 1]

The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further nuisance.

No. 37.

PUBLIC NUISANCE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. The defendant has wrongly heaped up earth and stones on a public road known as street at so as to obstruct the passage of the public along the same and threatens and intends, unless restrained from so doing, to continue and repeat the said wrongful act.

2 The plaintiff has obtained the consent in writing of the Advocate-General [*or* of the Collector or other officer appointed in this behalf] to the institution of this suit

[*As in paras.* 4 *and* 5 *of Form No.* 1.]

The plaintiff claims—

(1) a declaration that the defendant is not entitled to obstruct the passage of the public along the said public road;

(2) an injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stones wrongfully heaped up as aforesaid.

No. 38.

INJUNCTION AGAINST THE DIVERSION OF A WATER-COURSE.

(Title.)

A. B, the above-named plaintiff, states as follows:—

[*As in Form No* 27.]

The plaintiff claims that the defendant be restrained by injunction from diverting the water as aforesaid.

No. 39.

RESTORATION OF MOVEABLE PROPERTY THREATENED WITH DESTRUCTION, AND FOR AN INJUNCTION.

(Title.)

A. B., the above-named plaintiff, states as follows.—

1. Plaintiff is, and at all times hereinafter mentioned was, the owner of [a portrait of his grand-father which was executed by an eminent painter], and of which no duplicate exists [*or, state any facts showing that the property is of a kind that cannot be replaced by money*].

2. On the day of 19 , he deposited the same for safe keeping with the defendant.

3. On the day of 19 , he demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same.

4. The defendant refuses to deliver the same to the plaintiff and threatens to conceal, dispose of, cut or injure the same if required to deliver it up.

5. No pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the [painting].

[*As in paras.* 4 *and* 5 *of Form No.* 1.]

8. The plaintiff claims—

(1) that the defendant be restrained by injunction from disposing of, injuring or concealing the said [painting];

(2) that he be compelled to deliver the same to the plaintiff.

No. 40.

INTERPLEADER.

(Title)

A. B., the above-named plaintiff, states as follows —

1. Before the date of the claims hereinafter mentioned *G H* deposited with the plaintiff [*describe the property* for safe-keeping]

2 The defendant *C. D* claims the same [under an alleged assignment thereof to him from *G H*]

3. The defendant *E. F* also claims the same [under an order of *G. H.* transferring the same to him]

4 The plaintiff is ignorant of the respective rights of the defendants.

5. He has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such persons as the Court shall direct

6 The suit is not brought by collusion with either of the defendants.

[*As in paras.* 4 *and* 5 *of Form No.* 1]

9 The plaintiff claims—

(1) that the defendants be restrained, by injunction, from taking any proceedings against the plaintiff in relation thereto;

(2) that they be required to interplead together concerning their claims to the said property,

(3) that some person be authorized to receive the said property pending such litigation.

(4) that upon delivering the same to such person the plaintiff be discharged from all liability to either of the defendants in relation thereto.

No. 41.

ADMINISTRATION BY CREDITOR ON BEHALF OF HIMSELF AND ALL OTHER CREDITORS.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. *E. F.*, late of , was at the time of his death, and his estate still is indebted to the plaintiff in the sum of [*here insert nature of debt and security, if any*].

2. *E. F.*, died on or about the day of . By his last will, dated the day of , he appointed *C. D.*, his executor [*or* devised his estate in trust, etc., *or* died intestate, *as the case may be*].

3. The will was proved by *C. D.* [*or* letters of administration were granted, etc.]

4. The defendant has possessed himself of the moveable [and immoveable, or, the proceeds of the immoveable] property of *E. F.*, and has not paid the plaintiff his debt

[*As in paras.* 4 *and* 5 *of Form No* 1.]

7. The plaintiff claims that an account may be taken of the moveable [and immoveable] property of *E. F.*, deceased, and that the same may be administered under the decree of the Court.

No. 42.

ADMINISTRATION BY SPECIFIC LEGATEE.

(Title.)

[*Alter Form No.* 41 *thus*]—

[*Omit paragraph* 1 *and commence paragraph* 2] *E. F.*, late of , died on or about the day of . By his last will, dated the day of he appointed *C. D.*, his executor, and bequeathed to the plaintiff [*here state the specific legacy*].

For paragraph 4 substitute—

The defendant is in possession of the immoveable property of *E. F.* and, amongst other things, of the said [*here name the subject of the specific bequest*].

For the commencement of paragraph 7 substitute—

The plaintiff claims that the defendant may be ordered to deliver to him the said [*here name the subject of the specific bequest*], or that, etc.

No. 43.

ADMINISTRATION BY PECUNIARY LEGATEE.

(Title.)

[*Alter Form No. 41 thus*]—

[*Omit paragraph 1 and substitute for paragraph 2*] *E. F.*, late of , died on or about the day By his last will, dated the day of he appointed *C. D.*, his executor, and bequeathed to the plaintiff a legacy of rupees.

In paragraph 4 substitute " legacy " *for* " debt."

Another Form.

(Title.)

E. F., the above-named plaintiff, states as follows:—

1. *A. B.* of *K.* in the died on the day of . By his last will, dated the day of , he appointed the defendant and *M. N.* [who died in the testator's life-time] his executors, and bequeathed his property, whether moveable or immoveable, to his executors in trust, to pay the rents and income thereof to the plaintiff for his life; and after his decease, and in default of his having a son who sholud attain twenty-one, or a daughter who should attain that age or marry, upon trust as to his immoveable property for the person who would be the testator's heir-at-law, and as to his moveable property for the persons who would be the testator's next-of-kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid.

2. The will was proved by the defendant on the day of . The plaintiff has not been married.

3. The testator was at his death entitled to moveable and immoveable property; the defendant entered into the receipt of the rents of the immoveable property and got in the moveable property, he has sold some part of the immoveable property.

[*As in paras. 4 and 5 of Form No. 1.*]

6. The plaintiff claims—

(1) to have the moveable and immoveable property of *A. B.* administered in this Court, and for that purpose to have all proper directions given and accounts taken;

(2) such further or other relief as the nature of the case may require.

No. 44.

EXECUTION OF TRUSTS.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. He is one of the trustees under an instrument of settlement bearing date on or about the day of made upon the marriage of

E. F. and *G. H.*, the father and mother of the defendant [*or an instrument of transfer of the estate and effects of E. F. for the benefit of C. D*, the defendant, and the other creditors of *E. F.*].

2. *A. B.* has taken upon himself the burden of the said trust, and is in possession of [*or of the proceeds of*] the moveable and immoveable property transferred by the said instrument.

3. *C. D.* claims to be entitled to a beneficial interest under the instrument.

[*As in paras.* 4 *and* 5 *of Form No.* 1.]

6. The plaintiff is desirous to account for all the rents and profits of the said immoveable property [and the proceeds of the sale of the said, *or* of part of the said, immoveable property, *or* moveable, *or* the proceeds of the sale of, *or* of part of, the said moveable property, *or* the profits accruing to the plaintiff as such trustee in the execution of said trust]; and he prays that the Court will take the accounts of the said trust, and also that the whole of the said trust estate may be administered in the Court for the benefit of *C. D*, the defendant and all other persons who may be interested in such administration, in the presence of *C. D*, and such other persons so interested as the Court may direct, or that *C. D* may show good cause to the contrary.

[*N.B.—Where the suit is by a beneficiary, the plaint may be modelled,* mutatis mutandis, *on the plaint by a legatee.*]

No. 45.

FORECLOSURE OR SALE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is mortgagee of lands belonging to the defendant.

2. The following are the particulars of the mortgage.—

(*a*) (date);

(*b*) (names of mortgagor and mortgagee);

(*c*) (sum secured);

(*d*) (rate of interest);

(*e*) (property subject to mortgage);

(*f*) (amount now due);

(*g*) (*if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims.*)

(*If the plaintiff is mortgagee in possession, add*)

3. The plaintiff took possession of the mortgaged property on the day of and is ready to account as mortgagee in possession from that time

[*As in paras.* 4 *and* 5 *of Form No.* 1.]

6. The plaintiff claims:—

(1) payment, or in default [*sale or*] foreclosure [*and possession*];

[*Where Order XXXIV, rule* 6, *applies.*]

(2) in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff then that liberty be reserved to the plaintiff, to apply for a decree for the balance.

No. 46.

REDEMPTION.

(*Title.*)

A. B., the above-named plaintiff states as follows:—

1. The plaintiff is mortgagor of lands of which the defendant is mortgagee.

2. The following are the particulars of the mortgage:—

(*a*) (date);

(*b*) (names of mortgagor and mortgagee);

(*c*) (sum secured);

(*d*) (rate of interest);

(*e*) (property subject to mortgage);

(*f*) *if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims.*)

(*If the defendant is mortgagee in possession, add*)

3. The defendant has taken possession [*or has received the rents*] of the mortgaged property.

[*As in paras.* 4 *and* 5 *of Form No.* 1.]

6. The plaintiff claims to redeem the said property and to have the same re-conveyed to him [and to have possession thereof].

No. 47.

SPECIFIC PERFORMANCE (No. 1).

(*Title*)

A. B., the above-named plaintiff, states as follows:—

1. By an agreement, dated the day of and signed by the defendant, he contracted to buy of [*or* sell to] the plaintiff certain immoveable property therein described and referred to, for the sum of rupees

2. The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so.

3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice

[*As in paras. 4 and 5 of Form No 1.*]

6. The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [*or* to accept a transfer and possession of the said property] and to pay the costs of the suit

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No. 48.

SPECIFIC PERFORMANCE (No. 2).

(*Title.*)

A. B, the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant entered into an agreement, in writing, and the original document is hereto annexed.

The defendant was absolutely entitled to the immoveable property described in the agreement.

2. On the day of 19 , the plaintiff tendered rupees to the defendant, and demanded a transfer of the said property by a sufficient instrument.

3. On the day of 19 ,the plaintiff again demanded such transfer [*or* the defendant refused to transfer the same to the plaintiff].

4. The defendant has not executed any instrument of transfer

5 The plaintiff is still ready and willing to pay the purchase-money of the said property to the defendant

[*As in paras. 4 and 5 of Form No. 1*]

8. The plaintiff claims—

(1) that the defendant transfers the said property to the plaintiff by a sufficient instrument [*following the terms of the agreement*];

(2) rupees compensation for withholding the same.

No. 49.

PARTNERSHIP.

(*Title.*)

A. B., the above-named plaintiff, states as follows —

1. He and *C. D.*, the defendant, have been for years [*or* months] past carrying on business together under articles of partnership in writing, [*or* under a deed, *or* under a verbal agreement]

2. Several disputes and differences have arisen between the plaintiff and defendant as such partners whereby it has become impossible to carry on the business in partnership with advantage to the partners [*Or* the defendant has committed the following breaches of the partnership articles.

(1)
(2)
(3)

[*As in paras 4 and 5 of Form No 1*]

5 The plaintiff claims—

(1) dissolution of the partnership,

(2) that accounts be taken,

(3) that a receiver be appointed

[*N.B —In suits for the winding-up of any partnership, omit the claim for dissolution, and instead insert a paragraph stating the facts of the partnership having been dissolved*]

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(4) WRITTEN-STATEMENTS.

GENERAL DEFENCES.

Denial. The defendant denies that (*set out facts*)

The defendant does not admit that (*set out facts*)

The defendant admits that but says that

Protest. The defendant denies that he is a partner in the defendant firm of

The defendant denies that he made the contract alleged or any contract with the plaintiff.

The defendant denies that he contracted with the plaintiff as alleged or at all.

The defendant admits assets but not the plaintiff's claim.

The defendant denies that the plaintiff sold to him the goods mentioned in the plaint or any of them.

Limitation. The suit is barred by article or article of the Second Schedule to the Indian Limitation Act, 1877.

Jurisdiction. The Court has no jurisdiction to hear the suit on the ground that (*set forth the grounds*).

On the day of a diamond ring was delivered by the defendant to and accepted by the plaintiff in discharge of the alleged cause of action.

Insolvency. The defendant has been adjudged an insolvent.

The plaintiff before the institution of the suit was adjudged an insolvent and the right to sue vested in the receiver.

Minority. The defendant was a minor at the time of making the alleged contract.

Payment into Court. The defendant as to the whole claim (*or as to Rs part of the money claimed, or as the case may be*) has paid into Court Rs. and says that this sum is enough to satisfy the plaintiff's claim (*or the part aforesaid*).

Performance remitted. The performance of the promise alleged was remitted on the (*date*).

Rescission. The contract was rescinded by agreement between the plaintiff and defendant.

Res judicata. The plaintiff's claim is barred by the decree in suit (*give the reference*).

Estoppel. The plaintiff is estopped from denying the truth of (*insert statement as to which estoppel is claimed*) because (*here state the facts relied on as creating the estoppel*).

Ground of defence subsequent to institution of suit. Since the institution of the suit, that is to say, on the day of , (*set out facts*).

No. 1.

DEFENCE IN SUITS FOR GOODS SOLD AND DELIVERED.

1. The defendant did not order the goods.
2. The goods were not delivered to the defendant.

3. The price was not Rs.

(or).

4 }
5. } Except as to Rs. same as { 1. 2 3.
6 }

7. The defendant (or A. B, the defendant's agent) satisfied the claim by payment before suit to the plaintiff (or to C. D., the plaintiff's agent) on the day of 19 .

8. The defendant satisfied the claim by payment after suit to the plaintiff on the day of 19

No. 2.

DEFENCE IN SUITS ON BONDS.

1. The bond is not the defendant's bond.

2. The defendant made payment to the plaintiff on the day according to the condition of the bond.

3. The defendant made payment to the plaintiff after the day named and before suit of the principal and interest mentioned in the bond.

No. 3.

DEFENCE IN SUITS ON GUARANTEES.

1. The principal satisfied the claim by payment before suit

2 The defendant was released by the plaintiff giving time to the principal debtor in pursuance of a binding agreement

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No. 4.

DEFENCE IN ANY SUIT FOR DEBT.

1 As to Rs. 200 of the money claimed, the defendant is entitled to set off for goods sold and delivered by the defendant to the plaintiff.

Particulars are as follows.—

	Rs.
1907, January 25th	150
,, February 1st	50
Total	200

2 As to the whole (or as to Rs , part of the money claimed) the defendant made tender before suit of Rs. , and has paid the same into Court

No. 5.

DEFENCE IN SUITS FOR INJURIES CAUSED BY NEGLIGENT DRIVING.

1. The defendant denies that the carriage mentioned in the plaint was the defendant's carriage, and that it was under the charge or control of the defendant's servants. The carriage belonged to of Street, Calcutta, livery stable keepers employed by the defendant to supply him with carriages and horses; and the person under whose charge and control the said carriage was, was the servant of the said

2. The defendant does not admit that the said carriage was turned out of Middleton Street, either negligently, suddenly or without warning, or at a rapid or dangerous pace.

3. The defendant says the plaintiff, might and could by the exercise of reasonable care and diligence, have seen the said carriage approach him, and avoided any collision with it.

4. The defendant does not admit the statements contained in the third paragraph of the plaint.

No. 6.

DEFENCE IN ALL SUITS FOR WRONGS.

1 Denial of the several acts (*or* matters) complained of

No. 7.

DEFENCE IN SUITS FOR DETENTION OF GOODS.

1. The goods were not the property of the plaintiff.

2 The goods were detained for a lien to which the defendant was entitled.

Particulars are as follows:—

1907, May 3rd. To carriage of the goods claimed from *Delhi to* Calcutta :—

45 maunds at Rs 2 per maund ... ... Rs 90

No. 8.

DEFENCE IN SUITS FOR INFRINGEMENT OF COPYRIGHT.

1. The plaintiff is not the author (*assignee, etc*)

2 *The book was not registered*

3 The defendant did not infringe.

No. 9.

DEFENCE IN SUITS FOR INFRINGEMENT OF TRADE-MARK.

1. The trade-mark is not the plaintiff's.

2. The alleged trade-mark is not a trade-mark.

3. The defendant did not infringe

No. 10.

DEFENCE IN SUITS RELATING TO NUISANCES.

1. The plaintiff's lights are not ancient [*or* deny his other alleged prescriptive rights].

2 The plaintiff's lights will not be materially interfered with by the defendant's buildings.

3 The defendant denies that he or his servants pollute the water [*or* do what is complained of].

(If the defendant claims the right by prescription or otherwise to do what is complained of, he must say so, and must state the grounds of his claim, i e , whether by prescription, grant or what)

4. The plaintiff has been guilty of laches of which the following are particulars —

1870 Plaintiff's mill began to work

1871 Plaintiff came into possession

1883. First complaint.

5 As to the plaintiff's claim for damages the defendant will rely on the above grounds of defence, and says that the acts complained of have not produced any damage to the plaintiff [*If other grounds are relied on, they must be stated, e g , limitation as to past damage*]

No. 11.

DEFENCE TO SUIT FOR FORECLOSURE.

1. The defendant did not execute the mortgage

2. The mortgage was not transferred to the plaintiff (*if more than one transfer is alleged, say which is denied*)

3 The suit is barred by article of the Second Schedule to the Indian Limitation Act, 1877

4 The following payments have been made, viz .

		Rs
(Insert date.)	———,	1,000
(Insert date)	———,	500

5 The plaintiff took possession on the of , and has received the rents ever since.

6 That plaintiff released the debt on the of

7 The defendant transferred all his interest to A. B. by a document dated

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No. 12.

DEFENCE TO SUIT FOR REDEMPTION.

1 *The plaintiff's right to redeem is barred by Article* of the Second Schedule to the Indian Limitation Act, 1877.

2. The plaintiff transferred all interest in the property to A. B

3. The defendant, by a document dated the day of transferred all his interest in the mortgage-debt and property comprised in the mortgage to A B

4 The defendant never took possession of the mortgaged property, or received the rents thereof

(If the defendant admits possession for a time only, he should state the time and deny possession beyond what he admits.)

No. 13.

DEFENCE TO SUIT FOR SPECIFIC PERFORMANCE.

1 The defendant did not enter into the agreement.

2. A B was not the agent of the defendant *(if alleged by plaintiff.)*

3 The plaintiff has not performed the following conditions.—*(Conditions)*

4 The defendant did not—*(alleged acts of part performance)*

5 The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reasons of the following matter—*(State why)*

6. The agreement is uncertain in the following respects—*(State them)*

7. (*or*) The plaintiff has been guilty of delay;

8 (*or*) The plaintiff has been guilty of fraud (*or* misrepresentation);

9. (*or*) The agreement is unfair;

10 (*or*) The agreement was entered into by mistake.

11. The following are particulars of (7), (8), (9), (10), *or as the case may be.*

12. The agreement was rescinded under Conditions of Sale, No II (*or by mutual agreement*).

(In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches, or show whatever other ground of defence he intends to rely on, e g., the Indian Limitation Act, accord and satisfaction, release, fraud, etc.)

No. 14.

DEFENCE IN ADMINISTRATION SUIT BY PECUNIARY LEGATEE.

1. A B's will contained a charge of debts; he died insolvent; he was entitled at his death to some immoveable property which the defendant sold and which produced the net sum of Rs , and the testator had some moveable property which the defendant got in, and which produced the net sum of Rs

2. The defendant applied the whole of the said sums and the sum of Rs. which the defendant received from rents of the immoveable property in the payment of the funeral and testamentary expenses and some of the debts of the testator.

3 The defendant made up his accounts and sent a copy thereof to the plaintiff on the day of 19 , and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer

4 The defendant submits that the plaintiff ought to pay the costs of this suit.

No. 15.

PROBATE OF WILL IN SOLEMN FORM.

1 The said will and codicil of the deceased were not duly executed according to the provisions of the Indian Succession Act, 1865 [*or* of the Hindu Wills Act, 1870]

2 The deceased, at the time the said will and codicil respectively purport to have been executed, was not of sound mind, memory and understanding

3. The execution of the said will and codicil was obtained by the undue influence of the plaintiff [and others acting with him whose names are at present unknown to the defendant]

4 The execution of the said will and codicil was obtained by the fraud of the plaintiff, such fraud, so far as is within the defendant's present knowledge, being [*state the nature of the fraud*].

5 The deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof [*or* of the contents of the residuary clause in the said will, *as the case may be*].

6 The deceased made his true last will, dated the 1st January, 1873, and thereby appointed the defendant sole executor thereof.

The defendant claims —

(1) that the Court will pronounce against the said will and codicil propounded by the plaintiff

(2) that the Court will decree probate of the will of the deceased, dated the 1st January, 1873, in solemn form of law.

No. 16.

PARTICULARS (Or. VI, r. 5).

(Title of Suit)

Particulars

The following are the particulars of (*here state the matters in respect of which particulars have been ordered*) delivered pursuant to the order of the of

(Here set out the particulars ordered in paragraphs if necessary)

APPENDIX B.

PROCESS.

No. 1.

SUMMONS FOR DISPOSAL OF SUIT (Or. V, rr. 1, 5).

(Title.)

To

[Name, description and place of residence.]

WHEREAS
has instituted a suit against you for
you are hereby summoned to appear in this Court in person or by a pleader duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions, on the day of 19 , at o'clock in the noon, to answer the claim; and as the day fixed for your appearance is appointed for the final disposal of the suit, you must be prepared to produce on that day all witnesses upon whose evidence and all the documents upon which you intend to rely in support of your defence

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

NOTICE —1. Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call upon the witness to produce on applying to the Court and on depositing the necessary expenses

2 If you admit the claim you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property, or both.

No. 2.

SUMMONS FOR SETTLEMENT OF ISSUES (Or. V, rr. 1, 5).

(Title.)

To

[Name, description and place of residence]

WHEREAS
has instituted a suit against you for
you are hereby summoned to appear in this Court in person, or by a

pleader duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions, on the day of 19 , at o'clock in the noon to answer the claim; and you are directed to produce on that day all the documents upon which you intend to rely in support of your defence

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence

GIVEN under my hand and the seal of the Court, this day of 19

NOTICE — 1 Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call on the witness to produce, on applying to the Court and on depositing the necessary expenses

2 If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property or both

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No. 3.

SUMMONS TO APPEAR IN PERSON (Or. V, r. 3).

(Title)

To

[Name, description and place of residence.]

WHEREAS
has instituted a suit against you for
you are hereby summoned to appear in this Court in person on the day of 19 , at o'clock in the noon, to answer the claim, and you are directed to produce on that day all the documents upon which you intend to rely in support of your defence

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

No. 4.

SUMMONS IN SUMMARY SUIT, ON NEGOTIABLE INSTRUMENT (Or. XXXVII, r. 2)

(Title.)

To

[Name, description and place of residence.]

WHEREAS has instituted a suit against you under Or. XXXVII of the Code of Civil Procedure, 1908, for Rs , balance of principal and interest due to him as the of a of which a copy is hereto annexed, you are hereby summoned to obtain leave from the Court within ten days from the service hereof to appear and defend the suit and within such time to cause an appearance to be entered for you. In default whereof the plaintiff will be entitled at any time after the expiration of such ten days to obtain a decree for any sum not exceeding the sum of Rs. and the sum of Rs for costs.

Leave to appear may be obtained on an application to the Court supported by affidavit or declaration showing that there is a defence to the suit on the merits, or that it is reasonable that you should be allowed to appear in the suit

GIVEN under my hand and the seal of the Court, this day of 19

Judge

No. 5.

NOTICE, TO PERSON, WHO, THE COURT CONSIDERS, SHOULD BE ADDED AS CO-PLAINTIFF. (Or. I, r. 10).

(Title)

To

[Name, description and place of residence]

WHEREAS has instituted the above suit against for and whereas it appears necessary that you should be added as a plaintiff in the said suit in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved

Take notice that you should on or before day of 19 , signify to this Court whether you consent to be so added

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 6.

SUMMONS TO LEGAL REPRESENTATIVE OF A DECEASED DEFENDANT (Or. XXII, r. 4).

(Title.)

[*Name, description and place of residence.*]

To

WHEREAS the plaintiff instituted a suit in this Court on the day of 19 , against the defendant who was since deceased, and whereas the said plaintiff has made an application to this Court alleging that you are the legal representative of the said deceased, and desiring that you be made the defendant in his stead

You are hereby summoned to attend in this Court on the day of 19 , at A.M., to defend the said suit, and, in default of your appearance on the day specified, the said suit will be heard and determined in your absence

GIVEN under my hand and the seal of the Court, this day of 19

Judge

No. 7.

ORDER FOR TRANSMISSION OF SUMMONS FOR SERVICE IN THE JURISDICTION OF ANOTHER COURT (Or. V, r. 21).

(Title.)

WHEREAS it is stated that

defendant/witness in the above suit is at present residing in

It is ordered that a summons returnable on the day of 19 , be forwarded to the Court of for service on the said defendant/witness with a duplicate of this proceeding

The court-fee of chargeable in respect to the summons has been realized in this Court in stamps

Dated 19 ,

Judge

No. 8.

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PRISONER (Or. V, r. 24).

(Title.)

To

The Superintendent of the Jail at

UNDER the provisions of Order V, rule 24, of the Code of Civil Procedure, 1908, a summons in duplicate is herewith forwarded for service on the defendant who is a prisoner in jail. You are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to this Court signed by the said defendant, with a statement of service endorsed thereon by you.

Judge.

No. 9.

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PUBLIC SERVANT OR SOLDIER (Or. V, rr. 27, 28).

(Title.)

To

UNDER the provisions of Order V, rule 27 (*or 28, as the case may be*), of the Code of Civil Procedure, 1908, a summons in duplicate is herewith forwarded for service on the defendant who is stated to be serving under you. You are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to this Court signed by the said defendant, with a statement of service endorsed thereon by you.

Judge.

No. 10.

TO ACCOMPANY RETURNS OF SUMMONS OF ANOTHER COURT (Or. V, r. 23).

(Title.)

Read ...

CALCUTTA HIGH COURT

VI. *Insert* the words " (or proof of the above having been duly made by the declaration of) " *after* the words " proof of the above having been duly taken by me on the oath of " in Form No 10, Appendix B. (P. 2117)

... process other than summons, the service of which may have to be effected in the same manner.

No. 11.

AFFIDAVIT OF PROCESS-SERVER TO ACCOMPANY RETURN OF A SUMMONS OR NOTICE.

(Or. V, r. 18).

(Title)

The Affidavit of son of

I make oath / affirm

and say as follows :—

(1) I am a process-server of this Court,

(2) On the day of 19 ,

I received a summons / notice issued by the Court of

in Suit No

of 19 , in the said Court, dated the day of , 19

for service on

(3) The said was at the time

personally known to me, and I served the said summons / notice on him / her on the

day of 19 , at about o'clock in the noon at

by tendering a copy thereof to him / her and requiring his / her signature to

the original summons / notice

(*a*)

(*b*)

(*a*) Here state whether the person served signed or refused to sign the process, and in whose presence

(*b*) Signature of process-server.

or,

(3) The said not being personally known to me accompanied to

and pointed out to me a person whom he stated to be the said

, and I served the said summons / notice on him / her on the

day of 19 , at about o'clock in the

noon at by tendering a copy thereof to

him / her and requiring his / her signature to the original summons / notice

(*a*)

(*b*)

(*a*) Here state whether the person served signed or refused to sign the process and in whose presence.

(b) Signature of process-server

or,

(3) The said and the house in which he ordinarily resides being personally known to me, I went to the said house, in and there on the day of 19 , at about o'clock in the noon, I did not find the said

(a)
(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to Or. V, rr. 15 and 17.

(b) Signature of process-server

or,

(3) One accompanied me to and there pointed out to me which he said was the house in which ordinarily resides. I did not find the said there

(a)
(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to Or V, rr 15 and 17.

(b) Signature of process-server

or,

If substituted service has been ordered, state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service

Affirmed / Sworn by the said before me this

day of 19 .

Empowered under section 139 of the Code of Civil Procedure to administer the oath to deponents

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No. 12.

NOTICE TO DEFENDANT (Or. IX, r. 6).

(*Title.*)

To

(*Name, description and place of residence.*)

WHEREAS this day was fixed for the hearing of the above suit and a summons was issued to you and the plaintiff has appeared in this Court and you did not so appear, but from the return of the Nazir it has been proved to the satisfaction of the Court that the said summons was served on you but not in sufficient time to enable you to appear and answer on the day fixed in the said summons;

Notice is hereby given to you that the hearing of the suit is adjourned this day and that the day of 19 , is now fixed for the hearing of the same; in default of your appearance on the day last mentioned the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 13.

SUMMONS TO WITNESS (Or. XVI, rr. 1, 5).

(Title.)

To

(Name, description and place of residence.)

WHEREAS your attendance is required to on behalf of the in the above suit, you are hereby required [personally] to appear before this Court on the day of 19 , at o'clock in the forenoon, and to bring with you [*or* to send to this Court].

A sum of Rs. being your travelling and other expenses and subsistence allowance for one day, is herewith sent. If you fail to comply with this order without lawful excuse, you will be subject to the consequences of non-attendances laid down in rule 12 of Order XVI of the Code of Civil Procedure.

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

NOTICE.—(1) If you are summoned only to produce a document and not to give evidence, you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid

(2) If you are detained beyond the day aforesaid, a sum of Rs will be tendered to you for each day's attendance beyond the day specified.

No. 14.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS (Or. XVI, r. 10).

(Title.)

To

(Name, description and place of residence.)

WHEREAS it appears from the examination on oath of the serving officer that the summons could not be served upon the witness in the manner prescribed by law, and whereas it appears that the evidence of

the witness is material, and he absconds and keeps out of the way for the purpose of evading the service of the summons: This proclamation is therefore, under rule 10 of Order XVI of the Code of Civil Procedure, 1908, issued requiring the attendance of the witness in this Court on the day of 19 , at o'clock in the forenoon, and from day to day until he shall have leave to depart; and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 15.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS.

(Or. XVI, r. 10).

(Title.)

To

(Name, description and place of residence.)

WHEREAS it appears from the examination on oath of the serving officer that the summons has been duly served upon the witness, and whereas it appears that the evidence of the witness is material and he has failed to attend in compliance with such summons This proclamation is therefore, under rule 10 of Order XVI of the Code of Civil Procedure, 1908, issued, requiring the attendance of the witness in this Court on the day of 19 , at o'clock in the forenoon, and from day to day until he shall have leave to depart; and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 16.

WARRANT OF ATTACHMENT OF PROPERTY OF WITNESS.

(Or. XVI, r. 10).

(Title.)

To

The Bailiff of the Court

WHEREAS the witness
cited by
has not, after expiration of the period limited in the proclamation issued for his attendance, appeared in Court, You are hereby directed to hold

under attachment property belonging to the said witness to the value of and to submit a return, accompanied with an inventory thereof, within days.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

No. 17.

WARRANT OF ARREST OF WITNESS. (Or. XVI, r. 10).

(Title.)

To

The Bailiff of the Court.

WHEREAS has been duly served with a summons but has failed to attend [absconds and keeps out of the way for the purpose of avoiding service of a summons]; You are hereby ordered to arrest and bring the said before the Court.

You are further ordered to return this warrant on or before the day of 19 with an endorsement certifying the day on and the manner in which it has been executed or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

No. 18.

WARRANT OF COMMITTAL. (Or. XVI, r. 16).

(Title.)

To

The Officer in charge of the Jail at

WHEREAS the plaintiff (or defendant) in the above-named suit has made application to this Court that security be taken for the appearance of to give evidence (or to produce a document) on the day of 19 ; and whereas the Court has called upon the said to furnish such security which he has failed to do; This is to require you to receive the said into your custody in the civil prison and to produce him before this Court, at on the said day and on such other day or days as may be hereafter ordered.

Given under my hand and the seal of the Court, this day of 19 .

Judge.

No. 19.

WARRANT OF COMMITTAL. (Or. XVI, r. 18).

(Title.)

To

The Officer in charge of the Jail at

WHEREAS , whose attendance is required before this Court in the above-named case to give evidence (*or* to produce a document) has been arrested and brought before the Court in custody; and whereas owing to the absence of the plaintiff (*or* defendant), the said cannot give such evidence (*or* produce such document); and whereas the Court has called upon the said to give security for his appearance on the day of 19 , at which he has failed to do; This is to require you to receive the said into your custody in the civil prison and to produce him before this Court at on the day of 19 .

Given under my hand and the seal of the Court, this day of 19 .

Judge.

APPENDIX C.

DISCOVERY, INSPECTION AND ADMISSION.

No. 1.

ORDER FOR DELIVERY OF INTERROGATORIES. (Or. XI, r. 1).

In the Court
Civil Suit No. of 19 .

A. B. ... ... *Plaintiff,*

against

C. D., E. F. and G. H. ... ... *Defendants.*

Upon hearing and upon reading the affidavit of filed the day of 19 ; It is ordered that the be at liberty to deliver to the interrogatories in writing, and that said do answer the interrogatories as prescribed by Or. XI, r. 8, and that the costs of this application be

No. 2.

INTERROGATORIES. (Or. XI, r. 4).

(Title as in No. 1, supra)

Interrogatories on behalf of the above-named [*plaintiff or defendant C. D.*] for the examination of the above-named [*defendants E. F. and G. H. or plaintiff.*]

1. Did not, etc.

(2) Has not etc.
etc. etc etc.

[*The defendant E. F is required to answer the interrogatories numbered.*]

[*The defendant G. H. is required to answer the interrogatories numbered.*]

No. 3.

ANSWER TO INTERROGATORIES. (Or. XI, r. 9).

(Title as in No. 1, supra.)

The answer of the above-named defendant E. F. to the interrogatories for his examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named E. F., make oath and say as follows:—

1. } Enter answer to interrogatories, in paragraphs numbered conse-
2. } cutively.

3 I object to answer the interrogatories numbered on the ground that [*state ground of objection*].

No. 4.

ORDER FOR AFFIDAVIT AS TO DOCUMENTS. (Or. XI, r. 12).

(*Title as in No. 1, supra.*)

Upon hearing
It is ordered that the do within days from the date of this order, answer on affidavit stating which documents are or have been in his possession or power relating to the matter in question in this suit and that the costs of this application be

---

No. 5.

AFFIDAVIT AS TO DOCUMENTS (Or. XI, r. 13).

(*Title as in No 1, supra*)

I, the above-named defendant C D., make oath and say as follows —

1 I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2 I object to produce the said documents set forth in the second part of the first schedule hereto [*state grounds of objection*]

3. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

4 The last-mentioned documents were last in my possesion or power on [*state when and what has become of them, and in whose possession they now are*]

5 According to the best of my knowledge, information and belief I have not now, and never had in my possession, custody or power, or in the possession, custody or power of my pleader or agent, or in the possession, custody or power of any other person on my behalf, any account, book of account, voucher, receipt, letter, memorandum, paper or writing or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question on this suit or any of them, or wherein any entry has been made relative to such matters or any of them, other than and except the documents set forth in the said first and second schedules hereto.

No. 6.

ORDER TO PRODUCE DOCUMENTS FOR INSPECTION

(Or. XI, r. 14).

(Title as in No. 1, supra.)

Upon hearing and upon reading the affidavit of filed the day of 19 ; *It is ordered* that the do, at all seasonable times, on reasonable notice, produce at situate at , the following documents, namely, , and that the , be at liberty to inspect and peruse the documents so produced, and to make notes of their contents In the meantime it is ordered that all further proceedings be stayed and that the costs of this application be

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No. 7.

NOTICE TO PRODUCE DOCUMENTS (Or. XI, r. 16).

(Title as in No. 1, supra.)

Take notice that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [plaint or written statement or affidavit dated the day of 19].

[*Describe documents required*]

X. Y , *Pleader for the* .

To Z., Pleader for the

No. 8.

NOTICE TO INSPECT DOCUMENTS (Or. XI, r. 17).

(Title as in No. 1, supra.)

Take notice that you can inspect the documents mentioned in your notice of the day of 19 [*except the documents numbered in that notice*] at [*insert place of inspection*] on Thursday next, the instant, between the hours of 12 and 4 o'clock

Or, that the [*plaintiff or defendant*] objects to giving you inspection of documents mentioned in your notice of the day of 19 , on the ground that [*state the ground*]:—

No. 9.

NOTICE TO ADMIT DOCUMENTS (Or. XII, r. 3).

(Title as in No 1, supra)

Take notice that the plaintiff [*or* defendant] in this suit proposes to adduce in evidence the several documents hereunder specified and that the same may be inspected by the defendant [*or plaintiff*], his pleader or agent, at on between the hours of ; and the defendant [*or* plaintiff] is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed or executed, as they purport respectively to have been, that such as are specified as copies are true copies; and such documents as are stated to have been served, sent or delivered were so served, sent or delivered, respectively, saving all just exceptions to the admissibility of all such documents as evidence in this suit

G H., *pleader* [or *agent*] *for plaintiff* [or *defendant*].

To E. F , *pleader* [or *agent*] *for defendant* [or *plaintiff*]

[*Here describe the documents and specify as to each document whether it is original or a copy*]

No. 10.

NOTICE TO ADMIT FACTS (Or. XII, r. 5).

(Title as in No 1, supra.)

Take notice that the plaintiff [*or* defendant] in this suit requires the defendant [or plaintiff] to admit for the purposes of this suit only, the several facts respectively hereunder specified, and the defendant [*or* plaintiff] is hereby required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this suit

G H., *pleader* [or *agent*] *for plaintiff* [or *defendant*]

To E F , *pleader* [or *agent*] *for defendant* [or *plaintiff*]

The facts, the admission of which is required, are—

1 That M. died on the 1st January, 1890

2 That he died intestate

3 That N was his only lawful son

4 That O died on the 1st April, 1896.

5. That O, was never married,

No. 11.

ADMISSION OF FACTS PURSUANT TO NOTICE (Or. XII, r. 5).

(Title as in No. 1, supra.)

The defendant [*or* plaintiff] in this suit, for the purposes of this suit only, hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of any such facts, or any of them, as evidence in this suit:

Provided that this admission is made for the purposes of this suit only, and is not admission to be used against the defendant [*or* plaintiff] on any other occasion or by any one other than the plaintiff [or defendant], *or* party requiring the admission.

E. F., *pleader* [or *agent*] *for defendant* [or *plaintiff*]

To G. H., *pleader* [or *agent*] *for plaintiff* [or *defendant*].

Facts admitted.	Qualifications or limitations, if any subject to which they are admitted.
1. That M died on the 1st January, 1890	1.
2. That he died intestate	2.
3. That N. was his lawful son	3. But not that he was only lawful son
4. That O. died	4. But not that he died on the 1st April 1896.
5. That O. was never married	5.

No. 12.

NOTICE TO PRODUCE (General Form) (Or. XII, r. 8).

(Title as in No. 1, supra.)

Take notice that you are hereby required to produce and show to the Court at the first hearing of this suit all books, papers, letters, copies of letters and other writings and documents in your custody, possession or power, containing any entry, memorandum or minute relating to the matters in question in this suit, and particularly

G. H., *pleader* [or *agent*] *for plaintiff* [or *defendant*]

To E. F., *pleader* [or *agent*] *for defendant* [or *plaintiff*]

APPENDIX D.

DECREES.

No. 1.

DECREE IN ORIGINAL SUIT (Or. XX, rr. 6, 7).

(Title)

Claim for

This suit coming on this day for final disposal before in the presence of for the plaintiff and of for the defendant, it is ordered and decreed that and that the sum of Rs. be paid by the to the on account of the costs of this suit, with interest thereon at the rate of per cent per annum from this date to date of realization.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

Costs of Suit.

Plaintiff.		Rs	A	P.	Defendant.		Rs	A.	P.
1. Stamp for plaint	—				Stamp for power	—			
2. Do. for power	—				Do. for petition	—			
3. Do. for exhibits	—				Pleader's fee —	—			
4. Pleader's fee on Rs.	—				Subsistence for witnesses	—			
5. Subsistence for witnesses	—				Service of process	—			
6. Commissioner's fees	—				Commissioner's fees	—			
7. Service of process	—								
TOTAL	—				TOTAL	—			

No. 2.

SIMPLE MONEY DECREE (Section 34).

(Title.)

Claim for

This suit coming on this day for final disposal before in the presence of for the plaintiff and of for the defendant, it is ordered that the do pay to the

the sum of Rs. with interest thereon at the rate of per cent per annum from to the date of realization of the said sum and do also pay Rs. , the costs of this suit with interest thereon at the rate of per cent. per annum from this date to the date of realization.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

Costs of Suit.

Plaintiff		Rs	A.	P.	Defendant.		Rs	A.	P.
1. Stamp for plaint	—				Stamp for power —	—			
2. Do. for power	—				Do. for petition	—			
3. Do. for exhibits	—				Pleader's fee —	—			
4 Pleader's fee on Rs	—				Subsistence for witnesses	—			
5. Subsistence for witnesses	—				Service of process	—			
6. Commissioner's fee	—				Commissioner's fee	—			
7. Service of process	—								
TOTAL	—				TOTAL	—			

No. 3.

PRELIMINARY DECREE FOR FORECLOSURE (Or. XXXIV, r. 2).

(Title.)

This suit comming on this day, etc.; It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 , is Rs. ; and it is decreed as follows:—

(1) That if the defendant pays into Court the amount so declared due on or before the said day of 19 , the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him [Where the plaintiff claims by derived title add *or by those under whom he claims.*] [Where the plaintiff is in possession add *and shall put the defendant in possession of the property.*]

(2) That if such payment is not made on or before the said day of 19 , the defendant shall be debarred from all right to redeem the property.

Schedule.

Description of the mortgaged property.

No. 4.

PRELIMINARY DECREE FOR SALE. (Or. XXXIV, r. 4).

(Title.)

This suit coming on this day, etc ; It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 , is Rs and that such amount shall carry interest at the rate of per cent per annum until realization, and it is decreed as follows.—

(1) That if the defendant pays into Court the amount so declared due on or before the said day of 19 , the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him [Where the plaintiff claims by derived title add *or by those under whom he claims*] [Where the plaintiff is in possession add *and shall put the defendant in possession of the property.*]

(2) That if such payment is not made on or before the said day of 19 , the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest and subsequent costs, and that the balance, if any, be paid to the defendant.

(3) That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

Schedule.

Description of the mortgaged property.

No. 5.

PRELIMINARY DECREE FOR REDEMPTION. (Or. XXXIV, r. 7).

(Title)

This suit coming on this day, etc.; It is hereby declared that the amount due to the defendant on account of principal, interest and costs calculated up to the day of 19 , is Rs ; and it is decreed as follows.—

(1) That if the plaintiff pays into Court the amount so declared due on or before the said day of 19 , the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him. [Where the defendant claims by derived title add *or by those under whom he claims*.] [Where the defendant is in possession add *and shall put the plaintiff in possession of the property*.]

(2) That if such payment is not made on or before the said day of 19 , the plaintiff shall be debarred from all right, to redeem the property [If the mortgage is *simple* or usufructuary substitute *the property shall be sold*.]

Schedule.

Description of the mortgaged property.

No. 6.

DECREE FOR FORECLOSURE—FIRST MORTGAGEE v. SECOND MORTGAGEE AND MORTGAGOR—SUCCESSIVE PERIODS FOR REDEMPTION.

(Title.)

It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 , (*a*) is Rs. x, and that on the day of 19 , (*b*) there will be due to the plaintiff *for interest* the further sum of Rs , making in all Rs. y; and it *is further* declared that on the day of 19 , (*b*) there will be due to the first defendant on account of principal, interest and costs Rs z;

and it is decreed as follows —

(1) That if the first defendant pays into Court the said sum of Rs. x on or before the said day of 19 , (*a*) the plaintiff shall deliver up, etc. (as in Form No. 3).

(*a*) Insert a day within six months from the date of decree.
(*b*) Insert a day within three months from the date mentioned in (*a*)

(2) That in default of the first defendant paying the said sum on or before the said day he shall be debarred from all right to redeem the property.

(3) That in case of such foreclosure and if the second defendant pays into Court the said sum of Rs. *y*, on or before the day of 19 , (*b*) the plaintiff shall deliver up, etc. (as in Form 3)

(4) That in default of the second defendant paying the said sum on or before the said day he shall be debarred from all right to redeem the property.

(5) That in case the first defendant shall redeem the mortgaged property, if the second defendant pays into Court the said sums of Rs. *y*, and Rs. *z* on or before the day of 19 , (*b*) the first defendant shall deliver up, etc (as in Form No. 3).

(6) That in default of the second defendant paying the said sums on or before the said day he shall be debarred from all right to redeem the property. [Where the second defendant is in possession add *and shall put the first defendant in possession of the property*]

No. 7.

DECREE FOR SALE—FIRST MORTGAGEE v. SECOND MORTGAGEE AND MORTGAGOR—ONE PERIOD FOR REDEMPTION.

(*Title.*)

It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 , is Rs *x*, and that on the said day there will be due to the first defendant on account of principal, interest and costs Rs. *y*, and it is decreed as follows.—

(1) That if the defendants or either of them pay into Court the said sum of Rs. *x* on or before the said day of 19 , the plaintiff shall deliver up, etc (as in Form No. 4)

(2) That if payment of the said sum is not made on or before the day of 19 , the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court to the credit of this suit, and applied, first, in payment to the plaintiff of the said sum of Rs *x* and such subsequent interest and costs as may be allowed by the Court, secondly, in payment to the first defendant of the said sum of Rs *y*, and such subsequent interest and costs as aforesaid; and that the balance, if any, be paid to the second defendant

(*b*) Insert a day within three months from the date mentioned in (*a*) on page 2132

(3) That in case the defendants or either of them shall pay the said sum of Rs. x as aforesaid, he or they shall be at liberty to apply to the Court that the plaintiff's mortgage may be kept alive for the benefit of the person making the said payment or otherwise as he or they may be advised

(4) That if the net proceeds of the sale are insufficient to pay the said sum of Rs. x and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for, the amount of the balance

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No. 8.

DECREE FOR SALE—SECOND MORTGAGEE v. FIRST MORTGAGEE AND MORTGAGOR—ONE PERIOD FOR REDEMPTION.

(Title.)

[Insert declarations of the amounts due to the plaintiff Rs y, and to the first defendant Rs x as in Form No. 7.]

And it is decreed as follows.—

(1) That if the plaintiff or the second defendant pays into Court the said sum of Rs x on or before the said day of 19 the first defendant shall deliver up, etc (as in Form No. 4).

(2) That if payment of the said sum is not made on or before the day of 19 , the first defendant shall be at liberty to apply that the suit be dismissed or for the sale of the mortgaged property, and in case he shall apply for a sale the mortgaged property or a sufficient part thereof shall be sold free from the incumbrances of the plaintiff and first defendant, and the proceeds of the sale (after defraying thereout the expenses of the sale) shall be paid into Court and applied, first, in payment to the first defendant of the said sum of Rs x and such subsequent interest and costs as may be allowed by the Court; secondly, in payment to the plaintiff of the said sum of Rs y and such subsequent interest and costs as aforesaid; and that the balance, if any, be paid to the second defendant.

(3) That if the plaintiff shall pay the said sum of Rs. x into Court on or before the day of 19 , the second defendant shall be at liberty to pay into Court the said sum and the sum of Rs. y on or before the day of 19 , and thereupon the plaintiff shall deliver up, etc. (as in Form No 4).

(4) That if the plaintiff shall pay the said sum as aforesaid but the second defendant shall fail to pay the said sums as aforesaid the mortgaged property or a sufficient part thereof shall be sold, and the proceeds of the sale (after defraying thereout the expenses of the sale) shall be applied in payment to the plaintiff of the said sums of Rs. x and Rs y and such subsequent interest and costs as may be allowed by the Court, and that the balance, if any, be paid to the second defendant.

(5) That if the net proceeds of the sale are insufficient to pay the said sums, interests and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

No. 9.

DECREE FOR SALE—SUB-MORTGAGEE v. MORTGAGEE AND MORTGAGOR, THE AMOUNT OF THE ORIGINAL MORTGAGE EXCEEDING THAT OF THE SUB-MORTGAGE.

(Title.)

[Insert declarations of the amount due to the plaintiff Rs x and to first defendant Rs. y as in Form No 7]

And it is decreed as follows —

(1) The first defendant and the second defendant shall be at liberty to pay into Court the said sums of Rs x and Rs. y respectively on or before the *day of* 19 , *and upon either of* the said payments being made the plaintiff shall deliver up, etc. (as in Form No. 4), and thereupon the sum of Rs. x shall be paid to the plaintiff.

(2) In the event of payment by the second defendant as aforesaid the first defendant shall also deliver up, etc. (as in Form No. 4), and thereupon the residue (after payment to the plaintiff as aforesaid) shall be paid to the first defendant.

(3) In default of payment by the first and second defendants as aforesaid the mortgaged property or a sufficient part thereof shall be sold, and the proceeds of the sale (after deducting thereout the expenses of the sale) shall be paid into Court and applied first in payment to the plaintiff of the said sum of Rs x and such subsequent interest and costs as may be allowed by the Court (but that the aggregate amount of principal and interest shall not exceed the amount of principal and interest due to the first defendant); secondly, in payment to the first defendant of the excess of Rs y over Rs. x and such subsequent interest and costs as aforesaid; and that the balance, if any, be paid to the second defendant.

(4) In the event of payment by the first defendant and in default of payment by the second defendant as aforesaid, the first defendant shall be at liberty to apply for the sale of the mortgaged property, and thereupon the same or a sufficient part thereof shall be sold, and the net sale-proceeds shall be applied in payment to the first defendant of the said sum of Rs y and such further interest and costs as may be allowed by the Court, and the balance, if any, shall be paid to the second defendant

(5) That if the net proceeds of the sale are insufficient to pay the aforesaid sums with further interest and costs the plaintiff or the first defendant, as the case may be, shall be at liberty to apply for a personal decree for the amount of the balance.

No. 10.

FINAL DECREE FOR FORECLOSURE. (Or. XXXIV, r. 3).

(Title.)

Upon reading the decree passed in the above suit on the day of 19 , and the application of the plaintiff dated the day of 19 , and after hearing pleader for the plaintiff and pleader for the defendant, and it appearing that the payment directed by the said decree has not been made

It is hereby decreed as follows —

That the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property set out and described in the schedule hereunto annexed. [Where the defendant is in possession add *and shall put the plaintiff in possession of the said property*]

Schedule.

Description of the mortgaged property.

No. 11.

DECREE AGAINST MORTGAGOR PERSONALLY. (Or. XXXIV, r. 6).

(Title.)

Whereas the net proceeds of the sale held under the final decree for sale passed in this suit on the day of 19 , and now in Court to the credit of this suit, amount to Rs. y, and there is now due to the plaintiff the sum of Rs. x mentioned in the said decree together with the further sum of Rs. interest thereon at the rate of 6 per cent per annum from the day of 19 , to this day, and also the sum of Rs for his costs of this suit subsequent to the decree making a balance due to the plaintiff of Rs. z; And whereas it appears to this Court that the defendant is personally liable for the said balance

It is hereby decreed as follows:—

(1) That the said sum of Rs. y be paid out of Court to the plaintiff

(2) That the defendant do pay to the plaintiff the said sum of Rs z with interest thereon at the rate of 6 per cent. per annum from this day to the date of realization of the said sum.

No. 12.

DECREE FOR RECTIFICATION OF INSTRUMENT.

(Title.)

It is hereby declared that the , dated the day of 19 , and made between and , is void as against the plaintiff and all the other creditors, if any, of the defendant.

No. 13.

DECREE TO SET ASIDE A TRANSFER IN FRAUD OF CREDITORS.

(Title.)

It is hereby declared that the , dated the day of 19 , and made between and , is void as against the plaintiff and all the other creditors, if any, of the defendant

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No. 14.

INJUNCTION AGAINST PRIVATE NUISANCE.

(Title)

Let the defendant , his agents, servants and workmen be perpetually restrained from burning, or causing to be burnt any, bricks on the defendant's plot of land marked B in the annexed plan, so as to occasion a nuisance to the plaintiff as the owner or occupier of the dwelling-house and garden mentioned in the plaint, as belonging to and being occupied by the plaintiff.

No. 15.

INJUNCTION AGAINST BUILDING HIGHER THAN OLD LEVEL.

(Title.)

Let the defendant , his contractors, agents and workmen, be perpetually restrained from continuing to erect upon his premises in any house or building of a greater height than the buildings which formerly stood upon his said premises and which have been recently pulled down, so or in such manner as to darken, injure or obstruct such of the plaintiff's windows in his said premises as are ancient lights

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No. 16.

INJUNCTION RESTRAINING USE OF PRIVATE ROAD.

(Title)

Let the defendant , his agents, servants and workmen, be perpetually restrained from using or permitting to be used any part of the lane at , the soil of which belongs to the plaintiff, as carriage-way for the passage of carts, carriages or other vehicles, either going to or from the land marked B in the annexed plan or for any purpose whatsoever.

No. 17.

PRELIMINARY DECREE IN AN ADMINISTRATION-SUIT.

(Title)

It is ordered that the following accounts and inquiries be taken and made; that is to say.—

In creditor's suit—

1. That an account be taken of what is due to the plaintiff and all the other creditors of the deceased.

In suits by legatees—

2 That an account be taken of the legacies given by the testator's will.

In suits by next-of-kin—

3 That an inquiry be made and account taken of what, or of what share, if any, the plaintiff is entitled to as next-of-kin [*or* one of the next-of-kin] of the intestate.

[After the first paragraph, the decree will, where necessary, order, in a creditor's suit, inquiry and accounts for legatees, heirs-at-law and next-of-kin. In suits by claimants other than creditors, after the first paragraph, in all cases, an order to inquire and take an account of creditors will follow the first paragraph and such of the others as may be necessary will follow, omitting the first formal words. The form is continued as in a creditor's suit.]

4. An account of the funeral and testamentary expenses.

5 An account of the moveable property of the deceased come to the hands of the defendant, or to the hands of any other person by his order or for his use

6. An inquiry what part (if any) of the moveable property of the deceased is outstanding and undisposed of.

7. And it is further ordered that the defendant do, on or before the day of next, pay into Court all sums of money which shall be found to have come to his hands, or to the hands of any person by his order or for his use

8 And that if the *shall find it necessary for carrying out the objects of the suit to sell any part of the moveable property of the deceased, that the same be sold accordingly, and the proceeds paid into Court.

9 And that Mr. E. F be receiver in the suit (*or* proceeding) and receive and get in all outstanding debts of the outstanding moveable property of the deceased, and pay the same into the hands of the *(and shall give security by bond for the due performance of his duties to the amount of rupees).

10 And it is further ordered that if the moveable property of the deceased be found insufficient for carrying out the objects of the suit, then the following further inquiries be made, and accounts taken, that is to say—

(*a*) an inquiry what immoveable property the deceased was seized of or entitled to at the time of his death;

(*b*) an inquiry what are the incumbrances (if any) affecting the immoveable property of the deceased or any part thereof;

*Here insert name of proper officer.

(c) an account, so far as possible, of what is due to the several incumbrancers, and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed

11. And that the immoveable property of the deceased, or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit, be sold with the approbation of the Judge, free from incumbrances (if any) of such incumbrancers as shall consent to the sale and subject to the incumbrances of such of them as shall not consent.

12. And it is ordered that G H. shall have the conduct of the sale of the immoveable property and prepare the conditions and contracts of sale subject to the approval of the * and that in case any doubt or difficulty shall arise the papers shall be submitted to the Judge to settle.

13. And it is further ordered that, for the purpose of the inquiries hereinbefore directed, the *shall advertise in the newspapers according to the practice of the Court, or shall make such inquiries in any other way whch shall appear to the *to give the most useful publicity to such inquiries

14. And it is ordered that the above inquiries and accounts be made and taken, and that all other acts ordered to be done be completed, before the day of , 19 , and that the *do certify the result of the inquiries, and the accounts, and that all other acts ordered are completed and have his certificate in that behalf ready for the inspection of the parties on the day of 19

15. And, lastly, it is ordered that this suit [or proceeding] stand adjourned for making final decree to the day of
[Such part only of this decree is to be used as is applicable to the particular case.]

No. 18.

FINAL DECREE IN AN ADMINISTRATION-SUIT BY A LEGATEE.

(*Title.*)

1 It is ordered that the defendant do, on or before the day of pay into Court the sum of Rs. , the balance by the said certificate found to be due from the said defendant on account of the estate of , the testator, and also the sum of Rs for interest, at the rate of Rs. per cent per annum, from the day of to the day of , amounting together to the sum of Rs

2 Let the *of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said costs, when so taxed

* Here insert name of proper officer

be paid out of the said sum of Rs ordered to be paid into Court as aforesaid, as follows:—

(a) The costs of the plaintiff to Mr. , his attorney [or pleader] or, and the costs of the defendant to Mr. his attorney [or pleader].

(b) And (if any debts are due) with the residue of said sum of Rs. after payment of the plaintiff's and defendant's costs as aforesaid, let the sums, found to be owing to the several creditors mentioned in the schedule to the certificate, of the *together with subsequent interest on such of the debts as bear interest, be paid; and, after making such payments, let the amount coming to the several legatees mentioned in the schedule, together with subsequent interest (to be verified as aforesaid), be paid to them

2. And if there should then be any residue, let the same be paid to the residuary legatee.

No. 19.

PRELIMINARY DECREE IN AN ADMINISTRATION-SUIT BY A LEGATEE, WHERE AN EXECUTOR IS HELD PERSONALLY LIABLE FOR THE PAYMENT OF LEGACIES.

(*Title.*)

1 It is declared that the defendant is personally liable to pay the legacy of Rs bequeathed to the plaintiff;

2 And it is ordered that an account be taken of what is due for principal and interest on the said legacy,

3 And it is also ordered that defendant do, within weeks after the date of the certificate of the *pay to the plaintiff the amount of what the *shall certify to be due for principal and interest;

4 And it is ordered that the defendant do pay the plaintiff his costs of suit, the same to be taxed in case the parties differ.

No. 20.

FINAL DECREE IN AN ADMINISTRATION-SUIT BY NEXT-OF-KIN.

(*Title.*)

1. Let the * of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said plaintiff's costs, when so taxed, be paid by the defendant to the plaintiff out of the sum

* Here insert name of proper officer.

of Rs. , the balance by the said certificate found to be due from the said defendant on account of the personal estate of E F., the intestate within one week after the taxation of the said costs by the said * and let the defendant retain for her own use out of such sum her costs, when taxed.

2. And it is ordered that the residue of the said sum of Rs after payment of the plaintiff's and defendant's costs as aforesaid, be paid and applied by defendant as follows:—

(a) Let the defendant, within one week after the taxation of the said costs by the * as aforesaid, pay one-third share of the said residue to the plaintiffs A. B, and C D, his wife, in her right as the sister and one of the next-of-kin of the said E. F., the intestate.

(b) Let the defendant retain for her own use one other third share of the said residue, as the mother and one of the next-of-kin of the said E F, the intestate

(c) And let the defendant, within one week after the taxation of the said costs by the * as aforesaid, pay the remaining one-third share of the said residue to G. H., as the brother and the other next-of-kin of the said E F, the intestate.

No. 21.

PRELIMINARY DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND THE TAKING OF PARTNERSHIP ACCOUNTS.

(Title)

It is declared that the proportionate shares of the parties in the partnership are as follows.—

It is declared that this partnership shall stand dissolved [*or* shall be deemed to have been dissolved] as from the day of , and it is ordered that the dissolution thereof as from that day be advertised in the *Gazette*, etc

And it is ordered that be the receiver of the partnership estate and effects in this suit and do get in all the outstanding book-debts and claims of the partnership.

And it is ordered that the following accounts be taken —

1. An account of the credits, property and effects now belonging to the said partnership,

2 An account of the debts and liabilities of the said partnership,

3 An account of all dealings and transactions between the plaintiff and defendant, from the foot of the settled account exhibited in this suit and marked (A), and not disturbing any subsequent settled accounts

* Here insert name of proper officer

And it is ordered that the good-will of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned, and the stock-in-trade, be sold on the premises, and that the * may on the application of any of the parties, fix a reserved bidding for all or any of the lots at such sale, and that either of the parties is to be at liberty to bid at the sale.

And it is ordered that the above accounts be taken, and all the other acts required to be done be completed, before the day of , and that the * do certify the result of the accounts, and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of .

And lastly, it is ordered that this suit stand adjourned for making a final decree to the day of .

No. 22.

FINAL DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND THE TAKING OF PARTNERSHIP ACCOUNTS.

(Title.)

It is ordered that the fund now in Court, amounting to the sum of Rs. , be applied as follows:—

1. In payment of the debts due by the partnership set forth in the certificate of the * amounting the whole to Rs .

2. In payment of the costs of all parties in this suit, amounting to Rs.

[*These costs must be ascertained before the decree is drawn up.*]

3. In payment of the sum of Rs to the plaintiff as his share of the partnership-assets, of the sum of Rs. , being the residue of the said sum of Rs. now in Court, to the defendant as his share of the partnership assets

[*Or*, And that the remainder of the said sum of Rs. be paid to the said plaintiff (*or* defendant) in part payment of the sum of Rs. certified to be due to him in respect of the partnership-accounts.]

4. And that the defendant [*or* plaintiff] do on or before the day of pay to the plaintiff [*or defendant*] the sum of Rs. being the balance of the said sum of Rs. due to him, which will then remain due.

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* Here insert name of proper officer.

No. 23.

DECREE FOR RECOVERY OF MESNE PROFITS OF LAND.

(Title.)

It is hereby decreed as follows:—

(1) That the defendant do pay to the plaintiff in possession of the property specified in the schedule hereunto annexed.

(2) That the defendant do pay to the plaintiff the sum of Rs. with interest thereon at the rate of per cent. per annum to the date of realization on account of mesne profits which have accrued due prior to the institution of the suit.

Or

(2) That an inquiry be made as to the amount of mesne profits which have accrued due prior to the institution of the suit

(3) That an inquiry be made as to the amount of mesne profits from the institution of the suit until [the delivery of possession to the decree-holder] [the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court] [the expiration of three years from the date of the decree]

Schedule.

APPENDIX E.

EXECUTION.

No. 1.

NOTICE TO SHOW CAUSE WHY A PAYMENT OR ADJUSTMENT SHOULD NOT BE RECORDED AS CERTIFIED (Or. XXI, r. 2).

(Title.)

To

WHEREAS in execution of the decree in the above-named suit has applied to this Court that the sum of Rs recoverable under the decree has been paid/adjusted and should be recorded as certified, this is to give you notice that you are to appear before this Court on the day of 19 , to show cause why the payment/adjustment aforesaid should not be recorded as certified.

GIVEN under my hand and the seal of the Court, this day of . 19 .

Judge.

No. 2.

PRECEPT (Section 46).

(Title.)

UPON hearing the decree-holder it is ordered that this precept be sent to the Court of at under s. 46 of the Code of Civil Procedure, 1908, with directions to attach the property specified in the annexed schedule and to hold the same pending any application which may be made by the decree-holder for execution of the decree.

Schedule

Dated the day of 19 .

Judge.

No. 3.

ORDER SENDING DECREE FOR EXECUTION TO ANOTHER COURT (Or. XXI, r. 6).

(Title.)

WHEREAS the decree-holder in the above suit has applied to this Court for a certificate to be sent to the Court of at for execution of the decree in the above suit by the said Court, alleging that the judgment-debtor resides or has property within the local limits of the jurisdiction of the said Court, and it is deemed necessary and proper to send a certificate to the said Court under Order XXI, rule 6, of the Code of Civil Procedure, 1908, it is

Ordered:

That a copy of this order be sent to with a copy of the decree and of any order which may have been made for execution of the same and a certificate of non-satisfaction.

Dated the day of 19 .

Judge

No. 4.

CERTIFICATE OF NON-SATISFACTION OF DECREE (Or. XXI, r. 6).

(Title.)

Certified that no * satisfaction of the decree of this Court in Suit No. of 19 , a copy which is hereunto attached, has been obtained by execution within the jurisdiction of this Court

Dated the day of 19 .

Judge.

*If partial, strike out "no," and state to what extent.

No. 5.

CERTIFICATE OF EXECUTION OF DECREE TRANSFERRED TO ANOTHER COURT (Or. XXI, r. 6).

(Title.)

Number of suit and the Court by which the decree was passed	Name of parties.	Date of application for execution.	Number of the execution case.	Processes issued and dates of service thereof.	Costs of execution.	Amount realized	How the case is disposed of.	REMARKS.
1	2	3	4	5	6	7	8	9
					Rs. A. P.	Rs A. P.		

Signature of Muharrir in charge. *Signature of Judge.*

No. 6.

APPLICATION FOR EXECUTION OF DECREE (Or. XXI, r. 11).

In the Court of

I , decree-holder, hereby apply for execution of the decree hereinbelow set forth.—

No. of suit	Names of parties.	Date of decree.	Whether any appeal preferred from decree.	Payment or adjustment made, if any	Previous application, if any, with date and result.	Amount with interest due upon the decree or other relief granted thereby together with particulars of any cross-decree.	Amount of cost if any, awarded.	Against whom to be executed	Mode in which the assistance of the Court is required.
1	2	3	4	5	6	7	8	9	10
789 of 1897.	A.B.—Plaintiff ... C.D.—Defendant ..	October 11th, 1897	No.	None	Rs. 72-4 recorded on application, dated the 4th March, 1899.	Rs. 314-8-2 principal [interest at 6 per cent. per annum, from date of decree till payment].	Rs. A. P. As awarded in the decree — — — 47 10 4 Subsequently incurred — — — 8 2 3 TOTAL — 55 12 7	Against the defendant C.D.	[When attachment and sale of moveable property is sought.] I pray that the total amount of Rs. [together with interest on the principal sum up-to-date of payment] and the costs of taking out this execution be realized by attachment and sale of defendant's moveable property as per annexed list and paid to me. [When attachment and sale of immoveable property is sought.] I pray that the total amount of Rs. [together with interest on the principal sum up-to-date of payment] and the cost of taking out this execution be realized by the attachment and sale of defendant's immoveable property specified at the foot of this application and paid to me.

I declare that what is stated herein is true to the best of my knowledge and belief.

Signed , *Decree-holder.*

Dated the of 19 .

[WHEN THE ATTACHMENT AND SALE OF IMMOVEABLE PROPERTY IS SOUGHT.]

Description and Specification of Property.

The undivided one-third share of the judgment-debtor in a house situated in the village of value Rs 40 and bounded as follows:—

East by G's house; west by H's house; south by public road, north by private lane and J's house.

I declare that what is stated in the above description is true to the best of my knowledge and belief, and so far as I have been able to ascertain the interest of the defendant in the property therein specified

Signed , *Decree-holder.*

No. 7.

NOTICE TO SHOW CAUSE WHY EXECUTION SHOULD NOT ISSUE (Or. XXI, r. 22).

(Title.)

To

WHEREAS
has made application to this Court for execution of decree in Suit No. of 19 on the allegation that the said decree has been transferred to him by assignment, this is to give you notice that you are to appear before this Court on the day of 19 , to show cause why execution should not be granted.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 8.

WARRANT OF ATTACHMENT OF MOVEABLE PROPERTY IN EXECUTION OF A DECREE FOR MONEY. (Or. XXI, r. 30).

(Title)

To

The Bailiff of the Court.

WHEREAS was ordered by decree of this Court passed on the day of 19 , in Suit No of 19 , to pay to the plaintiff the sum of Rs. as noted in the margin; and whereas the said sum of Rs. has not been paid; These are to command you to attach the moveable property of the said as set forth in the schedule hereunto annexed, or which shall be pointed out to you by the said , and unless the said shall pay to you the said sum of Rs. together with Rs. the costs of this attachment, to hold the same until further orders from this Court.

DECREE.			
Principal — —			
Interest — —			
Costs — —			
Costs of execution — —			
Further interest — —			
TOTAL —			

You are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the day on which and manner in which it has been executed, or why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

Schedule.

No. 9.

WARRANT FOR SEIZURE OF SPECIFIC MOVEABLE PROPERTY ADJUDGED BY DECREE. (Or. XXI, r. 31).

(Title.)

To

The Bailiff of the Court.

WHEREAS was order by decree of this Court passed on the day of 19 , in Suit No of 19 , to deliver to the plaintiff the moveable property (or a share in the moveable property) specified in the schedule hereunto annexed, and whereas the said property (or share) has not been delivered;

These are to command you to seize the said moveable property (or a share of the said moveable property) and to deliver it to the plaintiff or to such person as he may appoint in his behalf

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

Schedule.

No. 10.

NOTICE TO STATE OBJECTIONS TO DRAFT OF DOCUMENT. (Or. XXI, r. 34).

(Title.)

To

(Name, description and place of residence.)

TAKE notice that on the day of 19 , the decree-holder in the above suit presented an application to this Court that the Court may execute on your behalf a deed of , whereof

a draft is hereunto annexed, of the immoveable property specified hereunder, and that the day of 19 , is appointed for the hearing of the said application; and that you are at liberty to appear on the said day and to state in writing any objections to the said draft.

Description of Property.

Given under my hand and the seal of the Court, this day of 19 .

Judge.

No. 11.

WARRANT TO THE BAILIFF TO GIVE POSSESSION OF LAND, ETC. (*Or. XXI, r. 35*).

(*Title.*)

To

The Bailiff of the Court.

Whereas the undermentioned property in the occupancy of has been decreed to the plaintiff in this suit; You are hereby directed to put the said in possession of the same, and you are hereby authorized to remove any person bound by the decree who may refuse to vacate the same.

Given under my hand and the seal of the Court, this day of 19 .

Judge.

Schedule

No. 12.

NOTICE TO SHOW CAUSE WHY WARRANT OF ARREST SHOULD NOT ISSUE. (Or. XXI, r. 37).

(*Title.*)

To

(*Name, description and place of residence.*)

Whereas has made application to this Court for execution of decree in suit No of 19 by arrest and imprisonment of your person, you are hereby required to appear before this Court on the day of 19 , to show cause why you should not be committed to the Civil prison in execution of the said decree.

Given under my hand and the seal of the Court, this day of 19 .

Judge.

No. 13.

WARRANT OF ARREST IN EXECUTION. (Or. XXI, r. 38).

(*Title.*)

To

The Bailiff of the Court

WHEREAS was adjudged by a decree of the Court in Suit No 19 , dated the day of 19 , to pay to the decree-holder the sum of Rs as noted in the margin and whereas the said sum of Rs. has not been paid to the said decree-holder in satisfaction of the said decree, these are to command you to arrest the said judgment-debtor and unless the said judgment-debtor shall pay to you the said sum of Rs , together with Rs for the costs of executing this process, to bring the said defendant before the Court with all convenient speed You are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the day on which and manner in which it has been executed, or the reason why it has not been executed.

Principal	—	—	
Interest	—	—	
Costs	—	—	
Execution	—	—	
TOTAL	—		

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

No. 14.

WARRANT OF COMMITTAL OF JUDGMENT-DEBTOR TO JAIL. (Or. XXI, r. 40).

(*Title*)

To

The Officer in charge of the Jail at

WHEREAS has been brought before this Court this day of 19 , under a warrant in execution of a decree which was made and pronounced by the said Court on the day of 19 , and by which decree it was ordered that the said should pay , And whereas the said has not obeyed the decree, nor satisfied the Court that he is entitled to be discharged from custody, You are hereby, in the name of the King-Emperor of India,

commanded and required to take and receive the said into the Civil prison and keep him imprisoned therein for a period not exceeding or until the said decree shall be fully satisfied, or the said shall be otherwise entitled to be released according to the terms and provisions of section 58 of the Code of Civil Procedure, 1908; and the Court does hereby fix annas per diem as the rate of the monthly allowance for the subsistence of the said during his confinement under this warrant of committal.

Given under my signature and the seal of this Court, this day of 19 .

Judge.

No. 15.

ORDER FOR THE RELEASE OF A PERSON IMPRISONED IN EXECUTION OF A DECREE (ss. 58, 59).

(Title.)

To

The Officer in charge of the Jail at

Under orders passed this day, you are hereby directed to set free judgment-debtor now in your custody.

Dated

Judge.

No. 16.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF MOVEABLE PROPERTY TO WHICH THE DEFENDANT IS ENTITLED SUBJECT TO A LIEN OR RIGHT OF SOME OTHER PERSON TO THE IMMEDIATE POSSESSION THEREOF (Or. XXI, r. 46).

(Title)

To

(Name, description and place of residence)

Whereas has failed to satisfy a decree passed against on the day of 19 , in Suit No of 19 , in favour of for Rs It is ordered that the defendant be, and hereby, prohibited and restrained, until the further order of this Court, from receiving from the following property in the possession of the said that is to say, , to which the defendant is entitled, subject to any claim of the said , and the said is hereby prohibited and restrained, until the further order of this Court, from delivering the said property to any person or persons whomsoever

Given under my hand and the seal of the Court this day of 19

Judge.

No. 17.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF DEBTS OR IS SECURED BY NEGOTIABLE INSTRUMENTS, (Or. XXI, r. 46).

(*Title.*)

To

WHEREAS has failed to satisfy a decree passed against on the day of 19 in Suit No. of 19 , in favour of , for Rs. ; It is ordered that the defendant be and is hereby, prohibited and restrained, until the further order of this Court, from receiving from you a certain debt alleged now to be due from you to the said defendant, namely, and that you, the said , be, and you are hereby, prohibited and restrained, until the further order of this Court, from making payment of the said debt, or any part thereof, to any person whomsoever or otherwise than into this Court.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

No. 18.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF SHARES IN THE CAPITAL OF A CORPORATION (Or. XXI, r. 46).

(*Title.*)

To Defendant, and to

Secretary of Corporation.

WHEREAS has failed to satisfy a decree passed against on the day of 19 , in Suit No. of 19 , in favour of , for Rs. , It is ordered that you, defendant, be, and you are hereby, prohibited and restrained, until the further order of this Court, from making any transfer of shares in the aforesaid Corporation, namely, , or from receiving payment of any dividends thereon; and you, , the Secretary of the said Corporation, are hereby prohibited and restrained from permitting any such transfer or making any such payment

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 19.

ATTACHMENT IN EXECUTION.

ORDER TO ATTACH SALARY OF PUBLIC OFFICER OR SERVANT OF RAILWAY COMPANY OR LOCAL AUTHORITY (Or. XXI, r. 48).

(*Title.*)

To

(*Name, description and place of residence.*)

WHEREAS , judgment-debtor in the above-named case is a (*describe office of judgment-debtor*) receiving his salary (*or* allowances) at your hands; and whereas , decree-holder in the said case has applied in this Court for the attachment of the salary (*or* allowances) of the said to the extent of due to him under the decree, You are hereby required to withhold the said sum of from the salary of the said in monthly instalments of and to remit the said sum (*or* monthly instalments) to this Court.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 20.

ATTACHMENT IN EXECUTION.

ORDER OF ATTACHMENT OF NEGOTIABLE INSTRUMENT (Or. XXI, r. 51).

(*Title.*)

To

The Bailiff of the Court

WHEREAS an order has been passed by this Court on the day of 19 , for the attachment of You are hereby directed to seize the said and bring the same into Court.

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

No. 21.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY OR OF ANY SECURITY IN THE CUSTODY OF A COURT OF JUSTICE OR OFFICER OF GOVERNMENT (Or. XXI, r. 52).

(Title.)

To

(Name, description and place of residence.)

SIR

The plaintiff having applied, under rule 52 of Order XXI of the Code of Civil Procedure, 1908, for an attachment of certain money now in your hands (*here state how the money is supposed to be in the hands of the person addressed, on what account, etc.*), I request that you will hold the said money, subject to the further order of this Court.

I have the honour to be,

SIR,

Your most obedient Servant,

Judge.

Dated the day of 19

No. 22.

ATTACHMENT IN EXECUTION.

NOTICE OF ATTACHMENT OF A DECREE TO THE COURT WHICH PASSED IT (Or. XXI, r. 53).

(Title.)

To

The Judge of the Court of

SIR,

I have the honour to inform you that the decree obtained in your Court on the day of 19 , by in Suit No of 19 , in which he was and was the has been attached by this Court on the application of in the suit specified above. You are therefore requested to stay the execution of the decree of your Court until you receive an intimation from this Court that the present notice has been cancelled or until

execution of the said decree is applied for by the holder of the decree now sought to be executed or by his judgment-debtor.

I have the honour, etc.

Dated the day of 19

Judge.

No. 23.

ATTACHMENT IN EXECUTION.

NOTICE OF ATTACHMENT OF A DECREE TO THE HOLDER OF THE DECREE (Or. XXI, r. 53).

(Title.)

To

(Name, description and place of residence.)

WHEREAS an application has been made in this Court by the decree-holder in the above suit for the attachment of a decree obtained by you on the day of 19 , in the Court of in Suit No. of 19 , in which was and was ; It is ordered that you, the said be, and you are hereby prohibited and restrained, until the further order of this Court, from transferring or charging the same in any way

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

No. 24.

ATTACHMENT IN EXCUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF IMMOVEABLE PROPERTY (Or. XXI, r. 54).

(Title)

To

Defendant

WHEREAS you have failed to satisfy a decree passed against you on the day of 19 , in Suit No of 19 , in favour of for Rs . It is ordered that you, the said , be, and you are hereby, prohibited and restrained until the further order of this Court, from transferring or charging the property specified in the schedule hereunto

annexed by sale, gift or otherwise, and that all persons be, and that they are hereby, prohibited from receiving the same by purchase gift or otherwise.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

Schedule.

No. 25.

ORDER FOR PAYMENT TO THE PLAINTIFF, ETC., OF MONEY, ETC., IN THE HANDS OF A THIRD PARTY (Or. XXI, r. 56.)

(Title.)

To

(Name, description and place of residence.)

WHEREAS the following property has been attached in execution of a decree in Suit No. of 19 , passed on the day of 19 , in favour of , for Rs ; It is ordered that the property so attached consisting of Rs. in money and Rs in currency-notes, or a sufficient part thereof to satisfy the said decree, shall be paid over by you the said , to .

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 26.

NOTICE TO ATTACHING CREDITOR (Or. XXI, r. 58).

(Title.)

To

(Name, description and place of residence.)

WHEREAS has made an application to this Court for the removal of attachment on placed at your instance in execution of the decree in Suit No. of 19 , this is to give you notice to appear before this Court on , the day of 19 , either in person or by a pleader of the Court duly instructed to support your claim, as attaching creditor.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 27.

WARRANT OR SALE OF PROPERTY IN EXECUTION OF A DECREE FOR MONEY (Or. XXI, r. 66).

(*Title.*)

To

The *Bailiff of the Court.*

THESE are to command you to sell by auction, after giving days previous notice, by affixing the same in this Court-house, and after making due proclamation the property attached under a warrant from this Court, dated the day of 19 , in execution of a decree in favour of in Suit No. of 19 , or so much of the said property as shall realize the sum of Rs. , being the of the said decree and costs still remaining unsatisfied.

You are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the manner in which it has been executed, or the reason why it has not been executed

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 28.

NOTICE OF THE DAY FIXED FOR SETTLING A SALE PROCLAMATION (Or. XXI, r. 66).

(*Title*)

To

(*Name, description and place of residence.*)

Judgment-debtor.

WHEREAS in the above-named suit the decree-holder has applied for the sale of ; You are hereby informed that the day of 19 has been fixed for settling the terms of the proclamation of sale.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

No. 29.

PROCLAMATION OF SALE (Or. XXI, r. 66).

(*Title.*)

Suit No of 19
decided by the
of in which
was plaintiff and
was defendant

Notice is hereby given that, under rule 64 of Order XXI of the Code of Civil Procedure, 1908, an order has been passed by this Court for the sale of the attached property mentioned in the annexed schedule, in satisfaction of the claim of the decree-holder in the suit (1) mentioned in the margin, amounting with costs and interest up to date of sale to the sum of

The sale will be by public auction, and the property will be put up for sale in the lots specified in the schedule The sale will be of the property of the judgment-debtors above-named as mentioned in the schedule below; and the liabilities and claims attaching to the said property, so far as they have been ascertained, are those specified in the schedule against each lot

In the absence of any order of postponement, the sale will be held by at the monthly sale commencing at o'clock on the at In the event, however, of the debt above specified and of the costs of the sale being tendered or paid before the knocking down of any lot, the sale will be stopped

At the sale the public generally are invited to bid, either personally or by duly authorized agent No bid by, or on behalf of, the judgment-creditors above-mentioned, however, will be accepted nor will any sale to them be valid without the express permission of the Court previously given. The following are the further

Conditions of Sale.

1 The particulars specified in the schedule below have been stated to the best of the information of the Court, but the Court will not be answerable for any error, mis-statement or omission in this proclamation

2 The amount by which the biddings are to be increased shall be determined by the officer conducting the sale. In the event of any dispute arising as to the amount bid, or as to the bidder, the lot shall at once be again put up to auction.

3. The highest bidder shall be declared to be the purchaser of any lot, provided always that he is legally qualified to bid, and provided that it shall be in the discretion of the Court or officer holding the sale to decline acceptance of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so.

4. For reasons recorded, it shall be in the discretion of the officer conducting the sale to adjourn it subject always to the provision of rule 69 of Order XXI.

5. In the case of moveable property, the price of each lot shall be paid at the time of sale or as soon after as the officer holding the sale

directs, and in default of payment shall forthwith be again put up and re-sold.

6. In the case of immoveable property, the person declared to be the purchaser shall pay immediately after such declaration a deposit of 25 per cent. on the amount of his purchase-money to the officer conducting the sale, and in default of such deposit the property shall forthwith be put up again and re-sold.

7. The full amount of the purchase-money shall be paid by the purchaser before the Court closes on the fifteenth day after the sale of the property, exclusive of such day, or if the fifteenth day be a Sunday or other holiday, then on the first office day after the fifteenth day.

8 In default of payment of the balance of purchase-money within the period allowed, the property shall be re-sold after the issue of a fresh notification of sale. The deposit, after defraying the expenses of the sale, may, if the Court thinks fit, be forfeited to Government and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

Schedule of Property

Number of lot.	Description of property to be sold with the name of each owner where there are more Judgment-debtors than one.	[illegible] or a part of an estate paying revenue to Government.	[illegible] property is liable.	[illegible] known particulars bearing on its nature and value

No. 30.

ORDER ON THE NAZIR FOR CAUSING SERVICE OF PROCLAMATION OF SALE (Or. XXI, r. 66).

(Title)

To

The Nazir of the Court

WHEREAS an order has been made for the sale of the property of the judgment-debtor specified in the schedule hereunder annexed, and whereas the day of 19 , has been fixed for the sale of the said property, copies of the proclamation of sale are by this warrant made over to you, and you are hereby ordered to have the proclamation published by beat of drum within each

of the properties specified in the said schedule, to affix a copy of said proclamation on a conspicuous part of each of the said properties and afterwards on the Court-house, and then to submit to this Court a report showing the dates on which and the manner in which the proclamations have been published.

Dated the day of 19 .

Schedule.

Judge

No. 31.

CERTIFICATE BY OFFICER HOLDING A SALE OF THE DEFICIENCY OF PRICE ON A RE-SALE OF PROPERTY BY REASON OF THE PURCHASER'S DEFAULT (Or. XXI, r. 71).

(Title.)

CERTIFIED that at the re-sale of the property in execution of the decree in the above-named suit, in consequence of default on the part of purchaser there was a deficiency in the price of the said property amounting to Rs. and that the expenses attending such re-sale amounted to Rs. , making a total of Rs. , which sum is recoverable from the defaulter.

Dated the day of 19 .

Officer Holding the Sale

No. 32.

NOTICE TO PERSON IN POSSESSION OF MOVEABLE PROPERTY SOLD IN EXECUTION (Or. XXI, r. 79).

(Title.)

To

(Name, description and place of residence.)

WHEREAS

has become the purchaser at a public sale in execution of the decree in the above suit of now in your possession, you are hereby prohibited from delivering possession of the said to any person except the said

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 33.

PROHIBITORY ORDER AGAINST PAYMENT OF DEBTS SOLD IN EXECUTION TO ANY OTHER THAN THE PURCHASER (Or. XXI, r. 79).

(Title.)

To

and to

WHEREAS has become the purchaser at a public sale in execution of the decree in the above suit of being debts due from you to you , It is ordered that you be, and you are hereby, prohibited from receiving, and you from making payment of, the said debt to any person or persons except the said

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 34.

PROHIBITORY ORDER AGAINST THE TRANSFER OF SHARES SOLD IN EXECUTION (Or. XXI, r. 79).

(Title.)

To

and , Secretary of Corporation

WHEREAS has become the purchaser at a public sale in execution of the decree, in the above suit, of certain shares in the above Corporation, that is to say, of standing in the name of you , It is ordered that you be, and you are hereby, prohibited from making any transfer of the said shares to any person except the said , the purchaser aforesaid, or from receiving any dividends thereon and you Secretary of the said Corporation, from permitting any such transfer or making any such payment to any person except the said , the purchaser aforesaid.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 35.

CERTIFICATE TO JUDGMENT-DEBTOR AUTHORISING HIM TO MORTGAGE, LEASE OR SELL PROPERTY (Or. XXI, r. 83).

(Title.)

To

(Name, description and place of residence.)

WHEREAS in execution of the decree passed in the above suit an order was made on the day of 19 , for the sale of the under-mentioned property of the judgment-debtor , and whereas the Court has, on the application of the said judgment-debtor, postponed the said sale to enable him to raise the amount of the decree by mortgage, lease or private sale of the said property or of some part thereof; This is to certify that the Court doth hereby authorize the said judgment-debtor to make the proposed mortgage, lease or sale within a period of from the date of this certificate; provided that all monies payable under such mortgage, lease or sale shall be paid into this Court and not to the said judgment-debtor.

Description of Property.

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

No. 36.

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE (Or. XXI, rr. 91, 92).

To

[Name, description and place of residence.]

WHEREAS the under-mentioned property was sold on the day of 19 in execution of the decree passed in the above-named suit, and whereas the decree-holder [or] judgment-debtor] has applied to this Court to set aside the sale of the said property on the ground of a material irregularity [or fraud] in publishing [or conducting] the sale, namely that
Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the day of 19 , when the said application will be heard and determined

GIVEN under my hand and the seal of the Court, this day of 19

Description of Property.

Judge.

No. 37.

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE (Or. XXI, rr. 91, 93).

(Title.)

To

[Name, description and place of residence.]

WHEREAS , the purchaser of the under-mentioned property sold on the day of 19 , in execution of the decree passed in the above-named suit, has applied to this Court to set aside the sale of the said property on the ground that , the judgment-debtor, had no saleable interest therein:

Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the day of 19 when the said application will be heard and determined

GIVEN under my hand and the seal of the Court, this day of 19 .

Description of Property.

Judge.

No. 38.

CERTIFICATE OF SALE OF LAND (Or. XXI, r. 94).

(Title.)

THIS is to certify that has been declared the purchaser at a sale by public auction on the day of 19 of in execution of decree in this suit, and that the said sale has been duly confirmed by this Court.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

No. 39.

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A SALE IN EXECUTION (Or. XXI, r. 95).

(Title.)

To

The Bailiff of the Court.

WHEREAS has become the certified purchaser of at a sale in execution of decree in Suit No. of

19 ; You are hereby ordered to put the said
, the certified purchaser, as aforesaid, in possession of the same

GIVEN under my hand and the seal of the Court, this day of
19 .

Judge.

No. 40.

SUMMONS TO APPEAR AND ANSWER CHARGE OF OBSTRUCTING EXECUTION OF DECREE (Or. XXI, r. 97).

(Title.)

To

[*Name, description and place of residence.*]

WHEREAS , the decree-holder in the above suit, has complained to this Court that you have resisted (or obstructed) the officer charged with the execution of the warrant for possession

You are hereby summoned to appear in this Court on the day of 19 at A.M., to answer the said complaint

GIVEN under my hand and the seal of the Court, this day of
19 .

Judge.

No. 41.

WARRANT OF COMMITTAL (Or. XXI, r. 98).

(Title.)

To

The Officer in Charge of the Jail at

WHEREAS the undermentioned property has been decreed to , the plaintiff in this suit, and whereas the Court is satisfied that without any just cause resisted [*or* obstructed] and is still resisting [*or* obstructing] the said in *obtaining* possession of the property, and whereas the said *has made* application to this Court that the said be committed to the civil prison;

You are hereby commanded and required to take and receive the said into the civil prison and to keep him imprisoned *therein* for the period of days.

GIVEN under my hand and the seal of the Court, this day of
19 .

Judge.

No. 42.

AUTHORITY OF THE COLLECTOR TO STAY PUBLIC SALE OF LAND (Section 72).

(Title)

Collector of

R,

In answer to your communication No dated , representing that the sale in execution of the decree in this suit of land situate within your district is objectionable, I have e honour to inform you that you are authorized to make provisions for e satisfaction of the said decree in the manner recommended by you

I have the honour to be,

Sir,

Your obedient Servant,

Judge.

APPENDIX F.

SUPPLEMENTAL PROCEEDINGS.

No. 1.

WARRANT OF ARREST BEFORE JUDGMENT (Or. XXXVIII, r. 1).

(Title.)

To

The Bailiff of the Court

WHEREAS , the plaintiff in the above suit, claims the sum of Rs. as noted in the margin and has proved to the satisfaction of the Court that there is probable cause for believing that the defendant is about to

Principal	—		
Interest	—		
Costs	—		
TOTAL	—		

These are to command you to demand and receive from the said the sum of Rs. as sufficient to satisfy the plaintiff's claim, and unless the said sum of Rs. is forthwith delivered to you by or on behalf of the said , to take the said into custody, and to bring him before this Court, in order that he may show cause why he should not furnish security to the amount of Rs. for his personal appearance before the Court, until such time as the said suit shall be fully and finally disposed of and until satisfaction of any decree that may be passed against him in the suit.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

No. 2.

SECURITY FOR APPEARANCE OF DEFENDANT ARRESTED BEFORE JUDGMENT (Or. XXXVIII, r. 2.)

(Title.)

WHEREAS at the instance of , the plaintiff in the above suit, the defendant, has been arrested and brought before the Court;

And whereas on the failure of the said defendant to show cause why he should not furnish security for his appearance, the Court has ordered him to furnish such security:

Therefore I have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall appear at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the said suit; and in default of such appearance I bind myself, my heirs and executors, to pay to the said Court, at its order, any sum of money that may be adjudged against the said defendant in the said suit.

Witness my hand at this day of 19 .

(*Signed*)

Witnesses:—

1.

2.

No. 3.

SUMMONS TO DEFENDANT TO APPEAR ON SURETY'S APPLICATION FOR DISCHARGE (Or. XXXVIII, r. 3).

(Title.)

To

[*Name, description and place of residence*]

WHEREAS who became surety on the day of 19 for your appearance in the above suit, has applied to this Court to be discharged from his obligation

You are hereby summoned to appear in this Court in person on the day of 19 , at A.M., when the said application will be heard and determined

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 4.

ORDER FOR COMMITTAL (Or. XXXVIII, r. 4).

(Title.)

To

[*Name, description and place of residence*]

WHEREAS , plaintiff in this suit, has made an application to the Court that security be taken for the appearance of , the defendant, to answer any judgment that may

be passed against him in the suit, and whereas the Court has called upon the defendant to furnish such security, or to offer a sufficient deposit in lieu of security, which he had failed to do; It is ordered that the said defendant be committed to the civil prison until the decision of the suit; or if judgment be pronounced against him, until satisfaction of the decree.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

No. 5.

ATTACHMENT BEFORE JUDGMENT, WITH ORDER TO CALL FOR SECURITY FOR FULFILMENT OF DECREE (Or. XXXVIII, r. 5).

(Title.)

To

The Bailiff of the Court

WHEREAS has proved to the satisfaction of the Court that the defendant in the above suit These are to command you to call upon the said defendant on or before the day of 19 , either to furnish security for the sum of rupees or to produce and place at the disposal of this Court when required or the value thereof, or such portion of the value as may be sufficient to satisfy any decree that may be passed against him; or to appear and show cause why he should not furnish security, and you are further ordered to attach the said and keep the same under safe and secure custody until the further order of the Court; and you are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the date on which and the manner in which it has been executed, or the reason why it has not been executed

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

No. 6.

SECURITY FOR THE PRODUCTION OF PROPERTY (Or. XXXVIII, r. 5).

(Title.)

WHEREAS at the instance of , the plaintiff in the above suit, the defendant, has been directed by the Court to furnish security in the sum of Rs . to produce

and place at the disposal of the Court the property specified in the schedule hereunto annexed;

Therefore I have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall produce and place at the disposal of the Court, when required, the property specified in the said schedule, or the value of the same, or such portion thereof as may be sufficient to satisfy the decree; and in default of his so doing, I bind myself, my heirs and executors, to pay to the said Court, at its order, the said sum of Rs. or such sum not exceeding the said sum as the said Court may adjudge.

Schedule.

Witness my hand at this day of 19 .

(Signed)

Witnesses:—

1.
2.

No. 7.

ATTACHMENT BEFORE JUDGMENT ON PROOF OF FAILURE TO FURNISH SECURITY (Or. XXXVIII, r. 6).

(Title.)

To

The Bailiff of the Court

WHEREAS , the plaintiff in this suit, has applied to the Court to call upon , the defendant to furnish security to fulfil any decree that may be passed against him in the suit, and whereas the Court has called upon the said to furnish such security, which he has failed to do, These are to command you to attach the property of the said and keep the same under safe and secure custody until the further order of the Court, and you are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the date on which and the manner in which it has been executed or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 8.

TEMPORARY INJUNCTIONS (Or. XXXIX, r. 1).

(Title.)

Upon motion made unto this Court by , Pleader of [or Counsel for] the plaintiff A B., and upon reading the petition of the

said plaintiff in this matter filed [this day] [or the plaint filed in this suit] on the day of , *or* the written statement of the said plaintiff filed on the day of and upon hearing the evidence of and in support thereof [*if after notice and defendant not appearing, add,* and also the evidence of as to service of notice of this motion upon the defendant C. D.] This Court doth order that an injunction be awarded to restrain the defendant C. D., his servants, agents and workmen, from pulling down, or suffering to be pulled down, the house in the plaint in the said suit of the plaintiff mentioned [*or*, in the written statement, *or* petition, of the plaintiff and evidence at the hearing of this motion mentioned] being No. 9, Oilmongers Street, Hindupur, in the Taluk of , and from selling the materials whereof the said house is composed, until the hearing of this suit or until the further order of this Court.

Dated this day of 19 .

Judge.

[*Where the injunction is sought to restrain the negotiation of a note or bill the ordering part of the order may run thus:—*]

to restrain the defendants and from parting with the custody of them or any of them or endorsing, assigning or negotiating the promissory note [*or* bill of exchange] in question, dated on or about the , etc., mentioned in the plaintiff's plaint [*or* petition] and the evidence heard at this motion until the hearing of this suit, or until the further order of this Court.

[*In Copyright cases*] to restrain the defendant C. D., his servants, agents or workmen, from printing, publishing or vending a book, called , or any part thereof, until the, etc.

[*Where part only of a book is to be restrained.*] to restrain the defendant C. D., his servants, agents or workmen, from printing, publishing, selling or otherwise disposing of such parts of the book in the plaint [*or* petition and evidence, etc.] mentioned to have been published by the defendant as hereinafter specified, namely, that part of *the said book which is entitled* and also that part which is entitled [*or* which is contained in page to page both inclusive] until , etc.

[*In Patent cases*] to resrain the defendant C. D., his agents, servants and workmen, from making or vending any perforated bricks [or as the case may be] upon the principle of the inventions in the plaintiff's plaint [*or* petition, etc., *or* written statement, etc.] mentioned, belonging to the plaintiffs, or either of them, during the remainder of the respective terms of the patents in the plaintiff's plaint [*or* as the case may be] mentioned, and from counterfeiting imitating or resembling the same inventions, or either of them or making any addition thereto, or subtraction therefrom, until the hearing, etc.

[*In cases of Trade-marks*] to restrain the defendant C. D., his servants, agents or workmen, from selling, or exposing for sale, or procuring to be sold, any composition or blacking [*or as the case may be*] described as or purporting to be blacking manufactured by

the plaintiff A. B., in bottles having affixed thereto such labels as in the plaintiff's plaint [or petition, etc] mentioned, or any other labels so contrived or expressed as, by colourable imitation or otherwise, to represent the composition or blacking sold by the defendant to be the same as the composition or blacking manufactured and sold by the plaintiff A. B., and from using trade-cards so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by the plaintiff A. B., until the, etc

[*To restrain a partner from in any way interfering in the business*]

to restrain the defendant C. D., his servants and agents, from entering into any contract, and from accepting, drawing, endorsing or negotiating any bill of exchange, note or written security in the name of the partnership firm of B. and D , and from contracting any debt, buying and selling any goods, and from making or entering into any verbal or written promise, agreement or undertaking, and from doing, or causing to be done, any act, in the name or on the credit of the said partnership-firm of B and D, or whereby the said partnership-firm can or may in any manner become or be made liable to or for the payment of any sum of money, or for the performance of any contract, promise or undertaking until the, etc.

No. 9.

APPOINTMENT OF A RECEIVER (Or. XL, r. 1).

(*Title.*)

To

[*Name, description and place of residence*]

WHEREAS has been attached in execution of a decree passed in the above suit on the day of 19 , in favour of , You are hereby (subject to your giving security to the satisfaction of the Court) appointed receiver of the said property under Order XL of the Code of Civil Procedure, 1908, with full powers under the provisions of that Order.

You are required to render a due and proper account of your receipts and disbursements in respect of the said property on . You will be entitled to remuneration at the rate of per cent. upon your receipts under the authority of this appointment.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 10.

BOND TO BE GIVEN BY RECEIVER (Or. XL, r. 3).

(*Title.*)

KNOW all men by these presents, that we and and are jointly and severally bound to of the

Court of in Rs. to be paid to the said or his successor in office for the time being. For which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this day of 19 .

Whereas a plaint has been filed in this Court by against for the purpose of [*here insert the object of suit*]

And whereas the said has been appointed, by order of the above-mentioned Court, to receive the rents and profits of the immoveable property and to get in the outstanding moveable property of in the said plaint named:

Now the condition of this obligation is such, that if the above-bounden shall duly account for all and every sum and sums of money which he shall so receive on account of the rents and profits of the immoveable property, and in respect of the moveable property, of the said at such periods as the said Court shall appoint, and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court hath directed or shall hereafter direct, then this obligation shall be void, otherwise it shall remain in full force.

Signed and delivered by the above-bounden in the presence of

Note.—If deposit of money is made, the memorandum thereof should follow the terms of the condition of the bond.

APPENDIX G.

APPEAL, REFERENCE AND REVIEW.

No. 1.

MEMORANDUM OF APPEAL (Or. XLI, r. 1).

(*Title*)

The above-named appeals to the Court at from the decree of in Suit No. of 19 , dated the day of 19 , and sets forth the following grounds of objection to the decree appealed from namely:—

[*Here enter the grounds of objection.*]

No. 2.

SECURITY BOND TO BE GIVEN ON ORDER BEING MADE TO STAY EXECUTION OF DECREE (Or. XLI, r. 5).

(*Title.*)

[*Name, description and place of residence.*]

To

This security bond on stay of execution of decree executed by witnesseth —

That , the plaintiff in Suit No. of 19 , having sued , the defendant, in this Court and a decree having been passed on the day of 19 in favour of the plaintiff, and the defendant having preferred an appeal from the said decree in the Court, the said appeal is still pending.

Now the plaintiff decree-holder having applied to execute the decree, the defendant has made an application praying for stay of execution and has been called upon to furnish security. Accordingly I, of my own free will, stand security to the extent of Rs , mortgaging the properties specified in the schedule hereunto annexed, and covenant that if the decree of the first Court be confirmed or varied by the Appellate Court the said defendant shall duly act in accordance with the decree of the Appellate Court and shall pay whatever may be payable by him thereunder, and if

he should fail therein then any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this day of 19 .

Schedule.

(Signed.)

Witnessed by:—

1.

2

No. 3.

SECURITY BOND TO BE GIVEN DURING THE PENDENCY OF APPEAL (Or. XLI, r. 6).

(Title.)

[*Name, description and place of residence.*]

To

This security bond on stay of execution of decree executed by witnesseth —

That , the plaintiff in Suit No. of 19 having sued , the defendant in this Court and a decree having been passed on the day of 19 in favour of the plaintiff, and the defendant having preferred an appeal from the said decree in the Court, the said appeal is still pending.

Now the plaintiff decree-holder has applied for execution of the said decree and has been called upon to furnish security. Accordingly I, of my own free will, stand security to the extent of Rs. mortgaging the properties specified in the schedule hereunto annexed, and covenant that if the decree of the first Court be reversed or varied by the Appellate Court, the plaintiff shall restore any property which may be or has been taken in execution of the said decree and shall duly act in accordance with the decree of the Appellate Court and shall pay whatever may be payable by him thereunder, and if he should fail therein then any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this day of 19 .

Schedule.

(Signed.)

Witnessed by:—

1.

2.

No. 4.

SECURITY FOR COSTS OF APPEAL (Or. XLI, r. 10).

(Title.)

To

[Name, description and place of residence.]

This security bond for costs of appeal executed by witnesseth:—

This appellant has preferred an appeal from the decree in Suit No. of 19 , against the respondent, and has been called upon to furnish security. Accordingly I, of my own free will, stand security for the costs of the appeal, mortgaging the properties specified in the schedule hereunto annexed I shall not transfer the said properties or any part thereof, and in the event of any default on the part of the appellant I shall duly carry out any order that may be made against me with regard to payment of the costs of appeal Any amount so payable shall be realized from the properties hereby mortgaged and if the proceeds of the sale of the said properties are insufficient to pay the amount due I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this day of

Schedule.

(Signed.)

Witnessed by:—
1.
2.

No. 5.

INTIMATION TO LOWER COURT OF ADMISSION OF APPEAL (Or. XLI, r. 13.)

(Title.)

To

[Name, description and place of residence]

You are hereby directed to take notice that the in the above suit, has preferred an appeal to this Court from the decree passed by you therein on the day of 19 .

You are requested to send with all practicable despatch all material papers in the suit

Dated the day of 19 .

Judge

No. 6.

NOTICE TO RESPONDENT OF THE DAY FIXED FOR THE HEARING OF THE APPEAL (Or. XLI, r. 14).

(Title.)

Appeal from the of the Court of
dated the day of 19

To Respondent.

TAKE notice that an appeal from the decree of in this case has been presented by and registered in this Court, and that the day of 19 has been fixed by this Court for the hearing of this appeal

If no appearance is made on your behalf by yourself, your pleader, or by some one by law authorized to act for you in this appeal, it will be heard and decided in your absence

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

[*Note* —If a stay of execution has been ordered, intimation *should be* given of the fact on this notice]

No. 7.

NOTICE TO A PARTY TO A SUIT NOT MADE A PARTY TO THE APPEAL BUT JOINED BY THE COURT AS A RESPONDENT (Or. XLI, r. 20.)

(Title.)

WHEREAS you were a party in suit No of 19 , in the Court of , and whereas the has preferred an appeal to this Court from the decree passed against him in the said suit and it appears to this Court that you are interested in the result of the said appeal

This is to give you notice that this Court has directed you to be made a respondent in the said appeal and has adjourned the hearing thereof till the day of 19 , at A M If no appearance is made on your behalf on the said day and at the said hour, the appeal will be heard and decided in your absence.

GIVEN under my hand and the seal of the Court, this day of ________ 19________

Judge.

No. 8.

MEMORANDUM OF CROSS OBJECTION (Or. XLI, r. 22).

(Title.)

WHEREAS the has preferred an appeal to the Court at from the decree of in Suit No of 19 , dated the day of 19 , and whereas notice of the day fixed for hearing the appeal was served on the on the day of 19 the files this memorandum of cross objection under rule 22 of Order XLI of the Code of Civil Procedure, 1908, and sets forth the following grounds of objection to the decree appealed from; namely:—

[Here enter the grounds of objection.]

No. 9.

DECREE IN APPEAL (Or. XLI, r. 35).

(Title.)

Appeal No of 19 from the decree of the Court of dated the day of 19 .

Memorandum of Appeal

Plaintiff.

Defendant.

The above-named appeals to the Court at from the decree of in the above suit, dated the day of 19 , for the following reasons, namely:—

This appeal coming on for hearing on the day of 19 before , in the presence of for the appellant and of for the respondent, it is ordered—

The costs of this appeal, as detailed below, amounting to Rs are to be paid by .

The costs of the original suit are to be paid by .

GIVEN under my hand this day of 19 .

Judge.

Costs of Appeal.

Appellant.	Amount.			Respondent.	Am		
	Rs.	A.	P.		Rs.		
1. Stamp for memorandum of appeal.				Stamp for power ..			
2. Do. for power				Do. for petition ..			
3. Service of processes				Service of processes ..			
4. Pleader's fee on Rs.				Pleader's fee on Rs			
TOTAL ..				TOTAL ..			

No. 10.

APPLICATION TO APPEAL IN FORMA PAUPERIS (Or. XLIV, r. 1).

(Title.)

I the above-named, present the accompanying memorandum of appeal from the decree in the above suit and apply to be allowed to appeal as a pauper.

Annexed is a full and true schedule of all the moveable and immoveable property belonging to me with the estimated value thereof.

Dated the day of 19 .

(Signed.)

Note —Where the application is by the plaintiff he should state whether he applied and was allowed to sue in the Court of first instance as a pauper.

No. 11.

NOTICE OF APPEAL IN FORMA PAUPERIS (Or. XLIV, r. 1).

(Title.)

WHEREAS the above-named has applied to be allowed to appeal as a pauper from the decree in the above suit dated the day of 19 and whereas the day of 19 has been fixed for hearing the application, notice is hereby given to you that if you desire to show cause

why the applicant should not be allowed to appeal as a pauper an opportunity will be given to you of doing so on the afore-mentioned date.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 12.

NOTICE TO SHOW CAUSE WHY A CERTIFICATE OF APPEAL TO THE KING IN COUNCIL SHOULD NOT BE GRANTED (Or. XLV, r. 3).

(Title.)

To

[*Name, description and place of residence.*]

TAKE notice that has applied to this Court for a certificate that as regards amount or value and nature the above case fulfils the requirements of section 110 of the Code of the Civil Procedure, 1908, or that it is otherwise a fit one for appeal to His Majesty in Council

The day of 19 is fixed for you to show cause why the Court should not grant the certificate asked for

GIVEN under my hand and the seal of the Court, this day of 19 .

Registrar

No. 13.

NOTICE TO RESPONDENT OF ADMISSION OF APPEAL TO THE KING IN COUNCIL (Or. XLV, r. 8).

(Title)

To

[*Name, description and place of residence*]

WHEREAS , the in the above case, has furnished the security and made the deposit required by Order XLV, rule 7, of the Code of Civil Procedure 1908

Take notice that the appeal of the said to His Majesty in Council has been admitted on the day of 19

GIVEN under my hand and the seal of the Court, this day of 19 .

Registrar.

No. 14.

NOTICE TO SHOW CAUSE WHY A REVIEW SHOULD NOT BE GRANTED (Or. XLVII, r. 4).

(Title.)

To

[*Name, description and place of residence.*]

TAKE notice that has applied to this Court for a review of its decree passed on the day of 19 in the above case. The day of 19 is fixed for you to show cause why the Court should not grant a review of its decree in this case.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

APPENDIX H.

MISCELLANEOUS.

No. 1.

AGREEMENT OF PARTIES AS TO ISSUE TO BE TRIED (Or. XIV, r. 6).

(Title.)

WHEREAS we, the parties in the above suit, are agreed as to the question of fact [or of law] to be decided between us and the point at issue between us is whether a claim founded on a bond, dated the day of 19 and filed as Exhibit in the said suit is or is not beyond the statute of limitation (*or state the point at issue whatever it may be*):

We therefore severally bind ourselves that, upon the finding of the Court in the negative [*or* affirmative] of such issue will pay to the said the sum of Rupees (*or* such sum as the Court shall hold to be due thereon) and I the said will accept the said sum of Rupees (*or* such sum as the Court shall hold to be due) in full satisfaction of my claim on the bond aforesaid [*or*, that upon such finding I, the said will do or abstain from doing, etc., etc.]

Plaintiff

Defendant

Witnesses —

1.

2.

Dated the *day of* 19

Judges

No. 2.

NOTICE OF APPLICATION FOR THE TRANSFER OF A SUIT TO ANOTHER COURT FOR TRIAL (Section 24).

In the Court of the District Judge of
No of 19 .

To

[*Name, description and place of residence.*]

WHEREAS an application dated the day of 19 , has been made to this Court by the

in Suit No. / of 19 now pending in the Court of the at in which is plaintiff and is defendant, for the transfer of the suit for trial to the Court of the at .

You are hereby informed that the day of 19 has been fixed for the hearing of the application, when you will be heard if you desire to offer any objection to it.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

No. 3.

NOTICE OF PAYMENT INTO COURT (Or. XXIV, r. 2).

(Title.)

Take notice that the defendant has paid into Court Rs and says that that sum is sufficient to satisfy the plaintiff's claim in full

XY, Pleader for the defendant.

To *Z*, Pleader for the plaintiff.

No. 4.

NOTICE TO SHOW CAUSE (General Form).

(Title.)

To

[Name, description and place of residence.]

WHEREAS the above-named has made an application to this Court that

You are hereby warned to appear in this Court in person or by a pleader duly instructed on the day of 19 , at o'clock in the forenoon, to show cause against the application, failing wherein, the said application will be heard and determined *ex parte*

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 5.

LIST OF DOCUMENTS PRODUCED BY PLAINTIFF/DEFENDANT (Or. XIII, r. 1).

(Title.)

No.	Description of document.	Date, if any, which the document bears.	Signature of party or pleader.
1	2	3	4

No. 6.

NOTICE TO PARTIES OF THE DAY FIXED FOR EXAMINATION OF A WITNESS ABOUT TO LEAVE THE JURISDICTION (Or. XVIII, r. 16).

(Title.)

To

Plaintiff (*or* Defendant).

WHEREAS in the above suit an application has been made to the Court by that the examination of , a witness required by the said in the said suit, may be taken immediately; and it has been shown to the Court's satisfaction that the said witness is about to leave the Court's jurisdiction (*or any other good and sufficient cause, to be stated*):

Take notice that the examination of the said witness will be taken by the Court on the day of 19 .

Dated the day of 19

Judge

No. 7.

COMMISSION TO EXAMINE ABSENT WITNESS (Or. XXVI, rr. 4, 18).

(Title.)

To

[*Name, description and place of residence.*]

WHEREAS the evidence of is required by the in the above suit, and whereas

; you are requested to take the evidence on interrogatories [*or viva voce*] of such witness and you are hereby appointed Commissioner for that purpose. The evidence will be taken in the presence of the parties or their agents if in attendance, who will be at liberty to qusetion the witness on the points specified; and you are further requested to make return of such evidence as soon as it may be taken.

Process to compel the attendance of the witness will be issued by any Court having jurisdiction on your application

A sum of Rs , being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

No. 8.

LETTER OF REQUEST (Or. XXVI, r. 5).

(Title.)

(*Heading*—To the President and Judges of, etc., etc., *or as the case may be*)

WHEREAS a suit is now pending in the in which *A. B.* is plaintiff and *C. D.* is defendant; And in the said suit the plaintiff claims —

(*Abstract of Claim*);

And whereas it has been represented to the said Court that it is necessary for the purposes of justice and for the due determination of the matters in dispute between the parties, that the following persons should be examined as witnesses upon oath touching such matters, that is to say —

E. F., of
G. H., of and
I. J., of

And it appearing that such witnesses are resident within the jurisdiction of your honourable Court;

Now I , as the of the said Court have the honour to request, and do hereby request, that for the reasons aforesaid and for the assistance of the said Court, you, as the President and Judges of the said ; or some one or more of you, will be pleased to summon the said witness (and such other witnesses as the agents of the said plaintiff and defendant shall humbly request you in writing so to summon) to attend at such time and place as you shall appoint before some one or more of you or such other person as according to the procedure of your Court is competent to take the examination of witnesses, and that you will cause such witnesses to be examined upon the

interrogatories which accompany this letter of request (or *viva voce*) touching the said matters in question in the presence of the agents of the plaintiff and defendant, or such of them as shall, on due notice given, attend such examination.

And I further have the honour to request that you will be pleased to cause the answers of the said witnesses to be reduced into writing, and all books, letters, papers and documents produced upon such examination to be duly marked for identification, and that you will be further pleased to authenticate such examination by the seal of your tribunal, or in such other way as is in accordance with your procedure, and to return the same, together with such request in writing, if any, for the examination of other witnesses to the said Court.

(*Note*.—If the Request is directed to a Foreign Court, the words "through His Majesty's Secretary of State for Foreign Affairs for transmission" should be inserted after the words "other witnesses" in the penultimate line of this form.)

No. 9.

COMMISSION FOR A LOCAL INVESTIGATION, OR TO EXAMINE ACCOUNTS (Or. XXVI, rr. 9, 11).

(*Title.*)

To

[*Name, description and place of residence.*]

WHEREAS it is deemed requisite, for the purposes of this suit, that a commission for
should be issued; You are hereby appointed Commissioner for the purpose of

Process to compel the attendance before you of any witnesses or for the production of any documents, whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs , being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 10.

COMMISSION TO MAKE A PARTITION (Or. XXVI, r. 33).

(Title.)

To

[*Name, description and place of residence.*]

WHEREAS it is deemed requisite for the purposes of this suit that a commission should be issued to make the partition or separation of the property specified in, and according to the rights as declared in, the decree of this Court, dated the day of 19 , You are hereby appointed Commissioner for the said purpose and are directed to make such inquiry as may be necessary, to divide the said property according to the best of your skill and judgment in the shares set out in the said decree, and to allot such shares to the several parties. You are hereby authorised to award sums to be paid to any party by any other party for the purpose of equalizing the value of the shares

Process to compel the attendance before you of any witness, or for the production of any documents whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application

A sum of Rs , being your fee in the above, is herewith forwarded

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 11.

NOTICE TO MINOR DEFENDANT AND GUARDIAN (Or. XXXII, r. 3).

(Title.)

To

Minor Defendant.

Natural Guardian.

WHEREAS an application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant, you the said minor and you* are hereby required to take notice that unless within days from the service upon you of this notice, an application is made to this Court for the appointment of you* or of some friend of you, the minor, to act as guardian for the suit, the Court will proceed to appoint some other person to act as a guardian to the minor for the purposes of the said suit.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

*Here insert the name of guardian

No. 12.

NOTICE TO OPPOSITE PARTY OF DAY FIXED FOR HEARING EVIDENCE OF PAUPERISM (Or. XXXIII, r. 6).

(Title.)

To

[*Name, description and place of residence.*]

WHEREAS has applied to this Court for permission to institute a suit against *in forma pauperis* under Order XXXIII of the Code of Civil Procedure, 1908; and whereas the Court sees no reason to reject the application; and whereas the day of 19 , has been fixed for receiving such evidence as the applicant may adduce in proof of his pauperism and for hearing any evidence which may be adduced in disproof thereof:

Notice is hereby given to you under rule 6 of Order XXXIII that in case you may wish to offer any evidence to disprove the pauperism of the applicant, you may do so on appearing in this Court on the said day of , 19 .

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 13.

NOTICE TO SURETY OF HIS LIABILITY UNDER A DECREE (Section 145).

(Title.)

To

[*Name, description and place of residence.*]

WHEREAS you did on become liable as surety for the performance of any decree which might be passed against the said , defendant in the above suit; and whereas a decree was passed on the day of 19 , against the said defendant for the payment of , and whereas an application has been made for execution of the said decree against you,

Take notice that you are hereby required on or before the day of 19 , to show cause why the said decree should not be executed against you, and if no sufficient cause shall be, within the time specified, shown to the satisfaction of the Court, an order for its execution will be forthwith issued in the terms of the said application.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 14.
REGISTER OF CIVIL SUITS (Or. IV, r. 2).

Court of the of at

REGISTER OF CIVIL SUITS IN THE YEAR 19

		Plaintiff.			Defendant.			Claim			Appearance			Judgment			Appeal.		Execution.					Return of Execution.		
of plaint.	No. of suit.	Name.	Description.	Place of residence.	Name.	Description.	Place of residence.	Particulars.	Amount of value.	When the cause of action accrued.	Day for parties to appear.	Plaintiff	Defendant.	Date.	For whom	For what, or amount.	Date of decision of appeal.	Judgment in appeal.	Date of application	Date of order.	Against whom.	For what, and amount if money.	Amount of costs.	Amount paid into Court	Arrested	Minute or other Return than Payment of Arrest, and date of every return.

Note.—Where there are numerous plaintiffs or numerous defendants, the name of the first plaintiff only, or the first defendant only, as the case may be, need be
red in the register.

No. 16.
REGISTER OF APPEALS (Or. XLI, r. 9).

COURT (*OR* HIGH COURT) AT

REGISTER OF APPEALS FROM DECREES IN THE YEAR 19

	Appellant.			Respondent.			Decree Appealed from.				Appearance.			Judgment.		
No. of appeal.	Name.	Description.	Place of residence.	Name.	Description.	Place of residence.	Of what Court.	No. of Original Suit.	Particulars	Amount or value.	Day for parties to appear.	Appellant.	Respondent.	Date.	Confirmed, reversed or varied.	For what or amount.

THE SECOND SCHEDULE.

ARBITRATION.

ARBITRATION IN SUITS.

Parties to suit may apply for order of reference.

1. (1) Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference.

(2) Every such application shall be in writing and shall state the matter sought to be referred. [S. 506, para. 1.]

COMMENTARY.

Two questions of importance have arisen in connection with this subject. (1) Should any of the sections of the Arbitration Act of 1899, be incorporated in the Code; (2) should the right of appeal as now existing be altered, and if so, in what direction? We are of opinion that the best course would undoubtedly be to eliminate from the Code all the clauses as to arbitration, and insert them in a new and comprehensive Arbitration Act. There are perhaps difficulties as to this at present We have determined therefore to leave the arbitration clauses much as they are in the present Code, but we have placed them in a Schedule in the hope that at no distant date, they may be transferred into a comprehensive Arbitration Act —*See the Report of the Special Committee*

This *para* corresponds to para 1 of section 506, C P Code of 1882 with some modifications The words "*where in any suit all the parties interested agree*" have been substituted for the words "if all the parties to a suit desire," which occurred in the old section, the words "*in the suit*" which followed the words "between them" in the old section, and the words "*in person or by their respective pleaders specially authorized in writing in this behalf,*" which stood after the words, "before the judgment is pronounced" in the old section, have been omitted

Sub-rule (2) is almost similar to para 2 of s 506 of the old Code, with the omission of the adjective "*particular,*" which stood before the word "matter" in the old section

The reason for the substitution of the words "*all the parties interested*" for the words "all the parties to a suit" which occurred in the old section is that the words in the old section gave rise to much discussion as will appear from the cases reported in 21 A 229, 33 C 899 and 11 C W N 1152, in those cases it has been held that the expression "all the parties to a suit" in s. 506, C P Code, 1882, does not include defendants

who never appeared and between whom and the plaintiff, there was not any matter of difference. Thus a *pro forma* defendant, who never enters appearance and against whom no relief is asked by the plaintiff, is not a party "interested" within the meaning of the present rule, although he is made a defendant as a matter of form. It would thus appear that the word *interested* refers only to parties who are interested and not to the parties who are formal parties and not interested in the result of the suit. This would explain the object of the change.

The reason for the omission of the words "in person, or by their respective pleaders specially authorized in writing in this behalf" seems to be, that those words are quite unnecessary, when this rule is read with the rule 1 of Order III, which provides that any appearance, application, etc., etc., required or authorized by law to be made or done by any party, may be made or done by a pleader duly appointed to act on his behalf.

The other changes introduced in this rule, are not material.

S. 506 and the following sections, up to section 522, C. P. Code, 1882 (r. 16), deal with cases in which the parties to a suit desire to leave the matters in difference between them to arbitration and apply to the Court for an order of reference.—*Sheo Dat v. Sheo Shankar*, 27 A. 53.

Reference to be Made by All the Parties Interested.—In the case of a reference under this rule the agreement to refer and the application to the Court must have the concurrence of all parties and the actual reference is the order of the Court, so that no question can arise as to the regularity of the proceedings up to the order of reference by the Court.—*Ghulam Jilani v. Muhammad Ahmed*, 6 C. W. N. 226, P. C.: 29 C. 167.

An application for reference was signed by some of the defendants personally, and on behalf of others by a pleader; but the *vakalutnama* was not signed by one of the defendants on whose behalf the pleader had signed it. *Held*, that the reference and the subsequent proceedings were invalid. —*Kadhu Singh v. Baljit Singh*, 29 A. 423. 4 A. L. J. 347 (24 A. 229 *distinguished*).

According to the Allahabad High Court, a defendant who *does not put in an appearance and does not contest the suit* is not a "party" within the meaning of this rule. The mere fact, therefore that such a defendant has not joined in the application for an order of reference will not invalidate an award.—*Ishardas v. Keshub Deo*, 32 A. 657; *Ajudhia Prasad v. Badarul Husani*, 39 A. 489, 495.—*Contra* in *Haswa v. Madhub*, 8 A. L. J. 645; *Sabta v. Dharam*, 35 A. 107. The Calcutta and the Madras High Courts have taken a contrary view and held that the mere fact that the defendant has not put in an appearance and does not contest the suit is no ground for holding that he is not a party "interested" within the meaning of this rule.—*Girija v. Kanai*, 27 C. L. J. 939; *Seth Duli Chand v. Mamuji*, 25 C. L. J. 339; *Laduram v. Nandlal*, 47 C. 553: 55 I. C. 747 F. B.; *Patita v. Narasinga*, 42 M. 632, (*Contra* in *Vaithianatha v. Viathialinga*, 18 Mad. L. T. 374). A party may be interested, though no relief is claimed against him.—*Subbarao v. Appadurai*, 48 M. L. J. 142: 86 I. C. 839: A. I. R. 1925 Mad. 621.

To constitute a valid reference to arbitration it is enough if all the parties to suit interested in the subject matter agree to the reference.

From the mere fact that certain defendants did not appear and the suit proceeded *ex parte* so far as they were concerned it could not be assumed that they were not interested parties —*Bhagavanulu* v. *Seetharamaswami*, 44 M. L. J. 539; (1923) M W. N 296; *Raghunath* v *Ramrup*, 2 Pat. 777; 1924 Pat. 33.

A defendant who is *ex parte* may be a party " interested " within the meaning of Sch. II, Part 1, C P Code —*Patita* v. *Narasinga*, 42 M. 632: 36 M. L J. 538.

A person who is not a necessary party to a suit is not a party " interested " within the meaning of this para.—*Sabta* v *Dhram*, 35 A. 107: 18 I. C. 609 —*Ajudhia Prasad* v. *Badar-ul-Husain*, 39 A 489: 41 I. C. 357.

The words " all the parties interested " in para 1 of Sch. II of the C. P. Code mean that all the parties interested in the litigation only need be parties to the application for reference to arbitration It is a question of fact in each case as to who are the parties interested in the litigation —*Jaipal Tewary* v. *Tapeswari*, 45 I C 321.

As to the meaning of the " person interested " *see* also, *Vythinatha Aiyar* v *Vaithilinga Mudaliar*, 18 M. L. T. 375 (1915) M W. N 817.

All the parties interested in a suit must join in the reference to arbitration and where only some of the parties agree to refer, the award on such reference is void —*Debendra Nath* v *Jogendra Nath*, 64 I C. 221.

The words " all the parties to a suit " in s 506, C P. Code, 1882 (this para.) refer to the succeeding words of the same section " any matter in difference between them in the suit," and would not necessarily include parties who never put in any appearance in the Court, and between whom and any of the parties to the submission there was not in fact any matter in difference in the suit —*Pitam Mal* v. *Sadiq Ali*, 24 A. 229 *See* also, *Lal Mohan* v. *Surja Kumar*, 11 C. W. N 1152 and *Chairman of Purnea Municipality* v. *Siva Sankar*, 33 C 899.

Section 506, C P Code, 1882 (this para), contemplates an application to the Court in which all the parties join as applicants or parties consenting to the application. There is no provision made for giving an opportunity to an objecting party to be heard —*Tincoury Dey* v *Fakir Chand*, 30 Cal. 218. 7 C. W. N 180

In a suit for partnership accounts two out of three defendants petitioned the Court to refer the matters in dispute to arbitration The representatives of the third defendant (who was then deceased) were not parties to the application *Held*, that the reference was illegal and the award was void —*Indur Subbarami* v *Kandadai Rajmannar*, 26 M 47

An application for arbitration must be made by all the parties who are materially interested, otherwise it is liable to be declared invalid by the Court, and to be set aside —*Baikantha Nath* v *Nasiruddin*, 1 B L R S N. 11; 10 W R. 171

Where in a suit against the members of a partnership an order was made under para 1 of Sch II of the C P Code, referring all the matters in difference between the parties to the suit to arbitration with the consent

of all the parties, with the exception of two of the defendants who did not enter appearance and an award was made thereon, *held*, that the order of reference was invalid not only against the parties who did not agree to the order of reference but also against those who had agreed and the award must be set aside (9 C W. N. 873 *folld*; 11 C. W. N *dissented from*; 25 C. 167 *refd. to*); *Seth Dooly Chand* v. *Mamuji Musaji*, 21 C. W N 387; 25 C. L. J 339. (Relied on in *Hera Prasanna* v. *Arabali*, 71 I. C. 326.)

An application for arbitration on behalf of an absent plaintiff is not allowable without special authority.—*Goor Chunder* v. *Joogul Chunder*, 1 W. R. 80 *See also*, *Bhuguan Dass* v *Nund Lal*, 12 C 173 (178)

One partner has no power, in the absence of special authority, to bind the firm by a submission to arbitration.—*Ram Bharasi* v *Kallu Mal*, 22 A. 135

A manager of a joint Hindu family has the power to bind the family by reference of a dispute with any outsider regarding the family property, to arbitration, provided such reference be for the benefit of the family. Minors in the family are bound by the reference —*Balaji* v. *Nana*, 27 B 287; *Hardeo Sahai* v *Gouri Shankar*, 28 A. 35: 2 A. L. J. 493 (27 C. 229, 12 M 483 *followed*), *Annanda Krishna* v. *Jogendra Nath*, 8 C L J. 294; *Guran Ditta* v *Pokhar Ram*, A I R. 1927 Lah. 362.

The Judge intimated that he should refer the suit to arbitration, and allowed a certain time to the parties to object to that course No objection was made within such time, and thereupon the Judge referred the cause to arbitrators named by him. *Held*, that the reference was not warranted, there having been no express consent by the parties —*Degumbur* v *Ram Prea*, Marsh. 715. 2 Hay. 583 *Referred* to *Beni Madhub* v *Preo Nath*, 28 C. 303 5 C W. N. 343.

Where a claimant objects to the attachment of property in execution of a decree and the matter is referred to arbitration, the judgment-debtor is a necessary party to the reference —*Basdeo* v *Must Saraswati*, 64 I. C. 469.

"**Apply.**"—This para requires that all the parties interested should not only agree to a reference, but that they should all apply to the Court for an order of reference.—*Dooly Chand* v *Mamuji Musaji*, 21 C W. N 387 41 I C 295. Therefore, if one of the parties interested agrees to a reference, but changes his mind subsequently and does not join in the application, the application for an order of reference should be refused —*Miran Bakhsh* v *Sher Muhammad*, 17 P R, 39· 9 I. C. 195

Application for Reference by Pleader.—A pleader unless specially authorized cannot apply for reference to arbitration; and if there is nothing to show that the reference was acquiesced in by the subsequent conduct of the parties the reference is invalid.—*Sheo Das Misser* v. *Nandan*, 7 C W. N. 343, *Azizdin* v *Motiram*, 96 I. C. 277. A *Vakalatnama* in general terms is wholly insufficient —*Ram Juwan* v. *Kali Charan*, 29 A 429, 4 A. L. J. 342

The application for a reference to arbitration must be made in Court by an instrument in writing by the parties in person or their pleaders

specially authorized in that behalf.—*Bhrigoo Roy* v *Bhagruth*, W. R. (1864), Act X, 41; *Gazee* v. *Hamid Buksh*, 16 W. R. 160.

Effect of Acquiescence and Tacit Consent.—Where a party after signing a petition for reference to arbitration does not make any objection to the appointment of the arbitrator, on the day when the order of reference is made, he must be taken to have tacitly acquiesced in the course adopted by the Court, and such acquiescence amounts to a fresh submission.—*Halimbhai* v *Shankar Sai*, 10 B 381 (9 Bom H C 117 and 8 W. R. 171 *followed*). *See* also, *Dharnidhar* v *Sakharam*, 71 I C 860.

When a party authorized his agent to conduct a suit, and the agent consented to the case being referred to arbitration, which was carried on with the assent and knowledge of the party, he cannot afterwards apply to set aside the award on the ground that his pleader had no authority in writing to refer the matter to arbitration.—*Unniraman* v. *Chattan*, 9 M. 451. Followed in *Saturjit Pertap Bahadur* v *Dulhin Gulap Koer*, 24 C. 469, which has been distinguished in *Sheo Das Misser* v. *Brij Nandan*, 7 C. W. N. 343. *See* also, *Abdul Hamed* v. *Raizuddin*, 30 A. 32 and *Luxmibai* v. *Hajee Widina*, 23 B. 629, where it has been held that the absence of a written authority did not invalidate the order of reference. These cases have been distinguished in *Beni Madhub* v. *Preo Nath*, 28 C. 303: 5 C. W. N. 268, where it has been held that a mere silence on the part of a person, not a party to an order of reference to arbitration, and his omission to inform the arbitrators that he was not a party to the reference, cannot make the award binding on him, even though, during the arbitration, he produced through a servant a document before the arbitrators in obedience to a summons, and declined to produce others.

In a suit pending before arbitrators, a person who is made a co-plaintiff on application, and makes no objection to the arbitration, is bound by the award.—*Shita Nath* v. *Kishen Mohan*, 5 W R 130.

Effect of Award Made Without All Parties Joining.—An arbitration award, not being one which has been made upon a reference by all the parties to the suit, is not capable of being converted into a final decree, though it is evidence against any party who agreed to the reference.—*Beejoy Chunder* v *Bhyrub Chunder*, 15 W R 427

The agreement to refer to arbitration and the application to the Court founded upon it must have the concurrence of all the parties concerned and if all the defendants including those who have not appeared and contested the suit, do not join in the reference to arbitration, the award is wholly invalid and not merely against those who joined in it and is liable to be set aside on the application of any of the parties; *Dooly Chand* v. *Mamuji* 25 C L J 339 21 C W N 387 41 I C 295 (9 C W N. 873, 25 C. L. J 339, 11 C. W N 1152, 29 C 167, *refd to*); *Girija Nath* v *Kanai Lal*, 27 C L J 339 43 I C 169; *Fanindra Nath* v *Dwarka Nath*, 25 C W N 832 (29 A 429, 21 C W N 387 27 C L J 339 *refd to*); *Venkataramanuja Charlu* v *Vasudeva Charyulu*, 23 L W 769: 96 I C 273

An award made without all parties consenting to arbitration, was held binding upon those only who agreed to the arbitration.—*Bishoka Dasia* v. *Anunto Lal*, 4 C L R 65 *See also*, *Doorga Churn* v *Kally*

Dass, 10 W. R. 463. In *Joy Prokash Lall* v. *Sheo Golam*, 11 C 37 (approving 5 W. R. 130, 6 W R. 25, 10 W. R. 463, and 4 C. L R. 65), it has been laid down that an award is good not withstanding that some and not all the parties to the suit may not have joined in the reference to arbitration *See also*, *Lal Mohan* v. *Surya Kumar*, 11 C. W. N. 1152, and *Chairman of Purnea Municipality* v. *Siva Sankar*, 33 C. 899 (9 C W N 873 *dissented from*) But see, *Parshidh Narain* v. *Ghanashyam*, 9 C W N. 873, and *Indur Subbarami* v. *Kandadai*, 26 M. 47, where a contrary view has been taken.

A Court has no jurisdiction to make an order of reference under Sch II, Para 1 of the C P Code without the consent of all the parties including the party who does not appear interested. If an order be made without the consent of such non-appearing party it is illegal and an award made on such reference is also illegal.—*Laduram Nathmull* v. *Nandlal*, 47 C 555· 31 C L J. 150 •

An arbitrator's award declared the right of a member of a Hindu family jointly possessed of property, such member being deaf and dumb, and not a party to the arbitration award. He afterwards sued for a separate possession against the others who in their defence denied his title to inherit by Hindu law, on account of his physical infirmity. The award having been produced at the hearing, *held*, that this member of the family, not being a party to the award, was not bound by the award.—*Hira Singh* v. *Ganga Sahai*, 6 A. 322, P. C. (*affirming* 2 A. 809)

Application for Reference shall be in Writing.—The provision of the second clause of this para , *viz* , that an application for reference shall be in writing, is directory only and not imperative, and non-compliance with the provision does not render the reference a nullity, but is only an irregularity which would be cured by s 578, C. P. Code 1882 (s. 99) and that the defect was further cured by the written application subsequently made to extend the time —*Shama Sundaram* v. *Abdul Latif*, 27 C 61: 4 C. W. N. 92 (*Followed* in *Abdul Hamid* v. *Riazuddin*, 30 A 32, *referred to* in *Mahabir* v *Manohar*, 22 A. L. J. 67); *Mirza Mahomed Hasan Beg* v. *Mirza Shakir Beg*, 10 O & A. L R. 55. Where the agreement was in writing but was not signed by one of the parties, it was held that para 1 of this Schedule did not require that the writing should of necessity be signed —*Umed Singh* v. *Sobbaq Mal*, 43 I. A. 1: 43 C. 290: 32 I. C. 161. It has also been held that the record made by the Court on an oral application for reference is sufficient.—*Mahabir* v. *Mandhar*, 46 A. 208. 79 I C 816 A I R. 1924 All. 540. But the award was held to be invalid where a *pardanashin* lady was a party and the application was signed by her pleader, who was not authorized to do so by his *Vakalatnama*, *Fanindra* v *Dwarka*, 25 C. W. N. 832.

Application for Reference should be Made by All the Parties Interested.—This para. requires that all the parties interested should not *only agree to a reference, but that they should all apply to the Court* for an order of reference.—*Miran Baoksh* v. *Sher Muhammed*, Punj. Rec. No. 17, p. 39

Effect of Omission of One Party to Sign Petition of Reference.—The omission of one of the parties to a case referred to arbitration to sign the petition of reference is not conclusive that he was not a party to the

reference and the award will not be invalid merely on that ground.—*Tekait Mal* v *Anandamoyi*, 38 I. C. 226.

"Before judgment."—A suit may be referred to arbitration after a reference is made to the High Court.—*Ramlal* v. *Deoraj*, 44 A. 91: 64 I. C. 601: A. I. R. 1922 All. 173.

Power of Appellate Court to Make Reference.—Under s. 107, an Appellate Court has the power with the consent of the parties, of referring to arbitration matters in dispute in an appeal if all the parties interested agree to a reference.—*Bhugwan Das* v. *Nund Lall*, 12 C. 173. *Followed* in *Suresh Chunder* v. *Ambica Churn*, 18 C. 507. *See* also, *Dutta* v. *Khedu*, 33 A. 645. *In re Sangralingam Pillai*, 3 M. 78; *Russool Bibee* v. *Jan Ali*, 12 B L. R. 267-*note* 17 W R 31; *Chiranji Lal* v *Jamna Das*, 7 N. W. P. 243, and *Hachan Banoo* v. *Abdul Hakim*, 19 W. R. 321. *Contra*;—*Juggessur Dey* v *Kritarthomoyee*, 12 B. L. R. 266, F. B. 21 W R 210, F. B

An Appellate Court, in remanding a case, has no power to order the first Court to call upon the parties to the suit to agree to arbitration, or, on their refusing to do so, to appoint arbitrators —*Punna Bibee* v. *Khoda Buksh*, 22 W R. 396

A Court to which issues have been remitted by the Appellate Court under s 566, C P Code, 1882 (Or. XLI, r 25), has only jurisdiction to try the issues remitted and is *functus officio* in other respects, and cannot make a reference of the case to arbitration, which is only within the jurisdiction of the Appellate Court —*Nand Ram* v *Fakir Chand*, 7 A. 523 (22 W. R 207 *referred to*).

Power of Court to Refer Matters Outside Suit.—Under Sch II, para. 1, C. P. Code, the jurisdiction of the Courts to refer to arbitration is confined to matters in difference in the suit itself and does not extend so as to include other matters in dispute between the parties not included in the suit. An award under an invalid reference being itself invalid, gives no rights as an award or as a compromise —*Peddapalayam Bodachari* v. *Peddapalayam Muniya Chari*, (1921) M W N. 756· 14 L W. 666.

Arbitration under Special Acts.—Under the general law the parties to suits for arrears of rent, may, with the leave of the Court, refer the matters in suits between them to arbitration —*Khemna Gowala* v *Budoloo Khan*, 6 C 251 7 C L R 92, *Goshain Girdharji* v *Durga Debi*, 2 A. 119, *Gouri Shankar* v *Babhan Lal*, 14 A 347. *Contra*,—*Fahimunnissa* v. *Ajudhia Prasad*, 6 A 170

A suit under s 16 of the Religious Endowments Act (XX of 1863) may be referred to arbitration —*Perumal Naik* v. *Sami Natha*, 10 M 468. *See* also, *Protap Chandra* v *Brojo Nath*, 19 C 275, and *Karedla Vijayaraghava* v *Vemavarapu*, 26 M 361

An executor, against whose application for probate a caveat has been entered, cannot submit to arbitration the question whether the will propounded by him was duly executed by the deceased —*Ghellabhai Atmaram* v. *Nandubai*, 21 B 335 (*reversing* in appeal, 20 B 238).

When a complaint has been preferred to a Criminal Court, and the Magistrate has directed that the subject-matter of the complaint be referred to arbitration, if the parties consent and proceed to such reference, the award may be enforced under the provisions of the C. P Code—*Sheo Nund Rai* v *Mahanund Ram*, 1 Agra 45.

Withdrawal of Suit After Reference to Arbitration.—After a case has been referred to arbitration on the application of the parties under this para, the Court has no power to allow one of the parties to withdraw from the suit with liberty to bring a fresh suit. *An order of Court permitting the withdrawal of the suit and liberty to bring a fresh suit is ultra vires and a fresh suit instituted in pursuance of the permission thus given, is barred by s. 21 of the Specific Relief Act (I of 1877), and also by the second clause of s 373, C. P Code, 1882 (Or. XXIII, r 1)*—*Sheorambet* v. *Deodat*, 9 A 168 *See* however, *Gouri Shankar* v. *Maida Koer*, 31 C 516

Where a Party Dies After Application but Before Order of Reference.—*In such a case, the death of the party does not operate as a revocation of the authority of the proposed arbitration If, therefore, the right to sue survives, it is competent to the Court to make an order of reference after substitution of the representative of the deceased party.*—*Dutta* v. *Kheda*, 33 A 645, *Binayakdas* v *Sashi*, 26 C W. N 801: 70 I. C. 459: A I R 1922 Cal 226

Execution Proceedings.—This Schedule does not apply to execution proceedings, and a reference to arbitration by an execution Court is without jurisdiction.—*T Wang* v *Sonawangdi*, 52 C. 530: 87 I C. 633: A I R 1925 Cal. 812

Form.—For form of application for an order of reference, *see*, the Appendix to this Schedule, Form No. 1.

Appointment of arbitrator. **2.** The arbitrator shall be appointed in such manner as may be agreed upon between the parties. [S. 507, para. 1.]

COMMENTARY.

This para. corresponds to para 1 of s 507 of the C. P. Code, 1882 with this modification that the word "*appointed*" has been substituted for the word "nominated," which occurred in the old section. The other changes are not material

The second *para*, of s. 507 has been omitted from this para and inserted in para 5 with some amendments.

Appointment of Arbitrator.—Before a Judge refers a case for arbitration he should ascertain whether the persons nominated are willing to accept the office, and, till he has done so, any nomination of an arbitrator by him, without the application or consent of the parties, is illegal—*Troylucko Nath* v *The Collector of Beerbhoom*, W. R. (1864) 338.

Where a party has selected an arbitrator, he cannot ask the Court to appoint another arbitrator.—*Shiam Sundar* v *Bhairon Singh*, A. W. N. (1906), 51: 3 A. L. J. 185.

The Code gives no power to a Court to force arbitrators on an unwilling suitor. The award of arbitrators so appointed will not be enforced.—*Sheo Nath* alias *Burray Kaka* v. *Ram Nath* alias *Chotay Kaka*, 5 W. R. 21 P. C., 10 M. I. A. 418.

A pleader of one of the parties to the suit should not be appointed as arbitrator.—*Kali Prosanno* v. *Rojani Kant*, 25 C. 141. *Referred to* in *Mahomed Wahiduddin* v. *Hakiman*, 29 C. 178: 6 C. W. N. 235.

Order of reference.

3. (1) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award and shall specify such time in the order.

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this schedule, deal with such matter in the same suit. [S. 503.]

COMMENTARY.

Sub-rule (1) corresponds to s. 508 of the C. P. Code, 1882, with this modification that the words "*for the making*" have been substituted for the words "for the delivery," which occurred in the old section.

Sub-rule (2) corresponds to para. 2 of s. 508, C. P. Code, 1882, with change of language only; there being no change in the meaning.

Discretion of Court to Refuse Application for Reference to Arbitration by Parties.—If the parties agree to refer the matter in dispute to arbitration and apply to the Court for reference accordingly, the Court has no discretion to refuse to do so, even though the application may have been made after a long hearing of the case by the Court.—*Mohendra Lal* v. *Fakir Chandra*, 24 I. C. 610, *Baldeo Sahai* v. *Harbans*, 33 A. 626: 8 A. L. J. 652.

Matters in Difference between the Parties.—Where all matters in difference between the parties in the suit were referred to arbitration under an order of Court *Held*, that the arbitrators had power to award interest after the date of the submission, and to deal with the costs of reference and award.—*Mohan Lal* v. *Mahu Ram*, 1 B. L. R. 144.

The arbitrators to whom the matters in difference in two suits for money were referred to arbitration, made an award for payment to the plaintiff of certain sums by the defendant, and further directed that these sums should be paid by certain instalments. *Held*, that as it was clear that the reference to arbitration gave the arbitrators full powers, not only as to the amount to be paid, but also as to the manner of payment the lower Appellate Court was wrong in reducing the number of instalments which had been fixed by the award.—*Jawahir Singh* v. *Mul Raj*, 8 A. 449.

A decision of arbitrators in a matter not in difference between the parties nor referred to them, is null and void for want of jurisdiction.—*Moshaheb Singh* v. *Konomutty Bewa*, 15 W. R 172.

An award upon a question referred to arbitrators, on whose part no misconduct or mistake appears, precludes the parties who have submitted to the reference from afterwards contesting in a suit the question so referred and disposed of by the award.—*Bhagoti* v. *Chandan*, 11 C. 386. P. C.; 12 I. A. 67.

Power of Arbitrators to Deal with the Question of Costs.—*See notes under para. 13.*

Courts shall Fix Time for Delivery of Award.—Paragraph 3 provides that the Court shall fix such time as it thinks reasonable for the making of the award and shall specify such time in the order of reference. Paragraph 8 enables the Court from time to time to enlarge the period for the making of the award Paragraph 15 provides that an award made after the expiration of the period allowed by the Court may be set aside by the Court. The provision contained in this paragraph, requiring the Court to fix a reasonable time for the making of the award, is not merely directory but imperative. Hence the provisions of this para should be strictly followed It has, however, been held that, if no time is fixed for the delivery of the award in the order of reference, but the Court subsequently makes an order under para 8 for enlarging the time and fixes in that order the time within which the award is to be made, the omission to fix the time in the order of reference is not fatal to the award —*Raja Har Narain* v. *Chaudhrain Bhagwant Kuar*, 13 A. 300: 18 I. A 55 In *Robindra Deb* v *Jogendra Deb*, 27 C. W. N. 420: 80 I. C. 459: A I R 1923 Cal. 410, it was held by Rankin, J., recalling the order of reference, that the provision in para. 3 of Sch II, *viz.*, "the Court shall fix such time as it thinks reasonable for the making of the award," is mandatory; accordingly, a reference which gave the arbitrators leave to extend for such further time as they may allow themselves was bad and of no effect. *See* also, *Gouri Shankar* v. *Babban Lal*, 14 A. 347, *Luchman Das* v. *Abparkash*, 30 A 169

But the Madras High Court in *Muthukutti Nayakan* v. *Acha Nayakan*, 18 M. 22 (*referring* to *Har Narain* v. *Bhogwant Kuar*, 10 A 137), held that an award is not invalid merely because no time has been fixed for the making of the award, s. 508, C. P. Code, 1882, being directory and not mandatory. This view of the Madras High Court is opposed to the Privy Council case reported in 13 A. 300 In *Omersey Premji* v. *Shamji Kanji*, 13 B 119, the Bombay High Court has held that an award made but not filed within the time specified by order of the Court is not invalid. *See* also, *Mohan Lal* v. *Baz Khan*, 46 I. C 324, *Radhakant* v. *Jaladhar*, 37 I C. 844.

In the case of an arbitration made under the order of a Court it is sufficient if the award is made, completed and signed by the arbitrators within the period limited under s. 508, C P. Code (this rule). *It is not* necessary for the validity of such award that it should actually reach the hands of the Court within such period.—*Asadullah* v. *Mohammad Nur*, 27 A. 459. (22 M 22, 13 B 119, and 13 A. 300 *followed*; 8 A 543 *dissented from*). *See* also, *Debendra Nath* v. *Sarbamongola*, 8 C. W. N. 916.

The time fixed by the Court for the delivery of an award was the 16th of April 1900. The award was actually completed and signed and made over to a peon of the Court on that day; but as it was received by the peon after Court hours, it did not in fact reach the hands of the Court until the next day *Held*, that the award is within time.—*Sitaram* v. *Bhawani Din*, 26 A. 105 (8 A. 543 and 518, 13 A. 300, 13 B 119, and 22 M. 22 *referred to*).

Where no time had been fixed in the order directing the arbitrators for sending in the award or where the Court omitted to fix a date for delivery of the award, the award is invalid.—*Ganga Gobinda* v. *Kali Prosanno*, 1 B. L. R. S. N. 13: 10 W. R. 206. *See* also, *Lachman Das* v *Abparkash*, 30 A. 169 (8 A. 548 *followed*)

Where no time was originally fixed within which the award was to be made, it is open to either party to hasten the proceedings by giving notice to the arbitrators that the award must be made, and an umpire appointed, within a reasonable time; but where the time elapsing after the notice has been actively employed by the arbitrators, and the delay has been owing to necessity which they could not control, the parties cannot recede from their submission by reason of the notice.—*Pestonjee* v. *Manockjee & Co.*, 10 W. R 51, P C : 12 M I A 112 *See* also, *Ablokhee Kooer* v. *Oodun Singh*, 15 W R. 331.

Power of Courts to Extend Time for Making Award.—*See notes under rule 8.*

Cl. (2). "The Court shall not deal with such matter in the same suit."—When once a matter is referred to arbitration, it is not competent to the Court, under the second paragraph of this para. to "deal with" the matter in difference between the parties except as provided in this schedule. There is no rule of that schedule which authorizes the Court to revoke the authority conferred on an arbitrator and to appoint a new one except in cases strictly within the purview of s 510, C P Code, 1882 (r 10, Sch II) The enactment of the second paragraph of this section, has the effect of rigidly restricting the Courts to the exact procedure laid down when dealing with cases in which the appointment of a new arbitrator becomes necessary —*Halimbhai Karimbhai* v *Shankar Sai*, 10 B 381

Where a matter is referred to arbitration, the Court has no power to grant permission to the plaintiff to withdraw from the suit with liberty to bring a fresh suit, for there is no paragraph in this Schedule corresponding to Or. XXIII, r 1 —*Sheo Amber* v *Deodat*, 9 A 168, *Debi Churn* v. *Bipra*, 7 C W N 186

It is not open to the Court to hear the suit on the merits unless the arbitration has been superseded under paras 5, 8 or 15 —*Jamna* v *Nazib*, 24 A 312 Similarly, the Court has no power to confirm an order passed by arbitrators making payments of their fees a condition precedent to the hearing of the reference, there being no paragraph in this Schedule empowering the Court to make an order in that behalf —*Sted* v *Roberts*, 6 C. 809

The parties to a suit applied for an adjournment on the ground that they had agreed to refer the matters in difference between them to arbitration The Court accordingly referred the matters in difference to arbitra-

tion and an award was made. *Held*, that under the circumstances, the further hearing of the suit was barred.—*Saliq Ram* v. *Jhunna Kuar*, 4 A. 546.

When a Court has referred a suit to arbitration, it has jurisdiction over the arbitrators to compel them to give up documents filed before them as exhibits during the course of the arbitration, and to return the original record of the suit which may have been handed to them. Such jurisdiction can be exercised by an application made in the suit on notice to the arbitrators.—*Nursing Chunder* v. *Nuffer Chunder*, 17 C. 832.

A suit was referred to three arbitrators who were to make an award within six months. The arbitrators had only one meeting, at which an agreement was come to by parties to settle all matters in dispute among themselves and withdraw the matters from arbitration, which was accordingly done, but nothing appeared to have been afterwards done. No award was made within six months. On an application by the plaintiff to have the suit restored to the file of the Court,—*held*, that the suit was still pending, the arbitrators not having determined it while they had jurisdiction to do so, and it was ordered that it should be brought again before the Court.—*Gopi Nath* v. *Shib Chandra*, 6 B. L. R. App. 74.

After reference to arbitration award was made and delivered, but it was subsequently discovered that one of the plaintiffs had died before the determination of the arbitration proceedings, and the Munsif accordingly set aside the award, and again referred the matter to the arbitrators after the heirs of the deceased plaintiff were brought upon the record. The arbitrators made a fresh award, and the Court passed a decree accordingly. *Held*, that the Court had no power to deal with the matter.—*Pachkouri Ram* v. *Nand Rai*, 30 A. 505.

Revocation of, or Withdrawal from, Arbitration.—It is almost an universal rule that a submission to arbitration is revocable before award is made.—*Surubjeet Narain* v. *Gouree Pershad*, 7 W. R. 269.

When persons have agreed to submit the matter in difference between them to the arbitration of one or more specified persons, no party to the agreement can revoke the submission to arbitration, unless for good cause, and a mere arbitrary revocation of the authority is not permitted.—*Pestanjee Nusserwanjee* v. *Manockjee & Co.*, 10 W. R. 51, P. C.: 12 M. I. A. 112 (*followed* in *Nainsukh Rai* v. *Umadai*, 7 A. 273, and also in *Sultan Mohammad* v. *Sheo Prasad*, 20 A. 145). *See* also, *Ram Coomar* v. *Kala Chand*, 21 W. R. 395; *Ablakee Kooer* v. *Oodun Singh*, 15 W. R. 331 and *Bansidhar* v. *Sital Prasad*, 29 A. 13, where it has been held that if it be proved that the arbitrator is in fraudulent collusion with one of the opposite side, that may be a good ground for revocation. A reference to arbitration made under an order of Court cannot be revoked at the instance of a party.—*Nilmonee* v. *Mohima Chunder*, 17 W. R. 516.

An agreement to refer an existing dispute to arbitration is as binding and capable of enforcement as any other lawful contract; and a submission of such a dispute to arbitration once made is not, without just and sufficient cause, revocable.—*Perumalla* v. *Perumalla*, 27 M. 112. *See* also, *Nagasawmy Naik* v. *Rungasamy*, 8 M. H. C. 46 (3 Mad. H. C. 82 *overruled*; 3 Mad. H. C. 183 and 7 Mad. H. C. 257 *followed*).

An agreement by parties to a suit to have a case decided in accordance with the statement made on oath by a third party, is in the nature of a reference to arbitration under the C. P. Code, and the revocation of such a reference is not prohibited by the law.—*Lekhraj Singh* v. *Dulhma Kuar*, 4 A. 302.

If, after a reference to arbitration, it transpires that the arbitrator has been acting as a muktear of one of the parties without any remuneration, the other party is entitled to withdraw from the reference and the award made by the arbitrator after receipt of notice of revocation cannot be enforced by suit. So, where an arbitrator is indebted to one of the parties. —*Mahomed Wahiduddin* v *Hakiman*, 29 C. 278: 6 C. W. N. 235

A submission to arbitration can only be revoked on good grounds. Long and unreasonable delay in the conduct of the proceedings is a good ground for revocation of the agreement for submission. When an agreement to refer has been duly revoked the Court is incompetent to order it to be filed under s 523, C. P Code, 1882.—*Coley* v. *DaCosta*, 17 C 200.

In the course of arbitration proceedings in Calcutta, the parties telegraphed to the arbitrators to stay further proceedings. *Held*, that the telegrams sent to arbitrators did not amount to a revocation of their authority.—*Kellie* v. *Fraser*, 2 C 445.

Form.—For form of order of reference, *See* Form No. 2, to the Appendix to this Schedule

Where reference is to two or more, order to provide for difference of opinion.

4. (1) Where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—

(*a*) by the appointment of an umpire; or

(*b*) by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail; or

(*c*) by empowering the arbitrators to appoint an umpire; or

(*d*) otherwise as may be agreed between the parties or, if they cannot agree, as the Court may determine.

(2) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is required to act. [S. 509.]

COMMENTARY.

This para corresponds to s 509, C P Code, 1882, with some alterations in the language of clauses (*b*) and (*d*). The changes are of a verbal character; no change seems to have been made in the meaning.

Provision as to Difference of Opinion among Arbitrators.—Where a case has been referred to arbitration, but no provision has been made in

the order of reference for any difference of opinion among them. *Held*, that the Court should have ordered that the arbitrators should appoint an umpire; or should have declared that the decision of majority should prevail; or should have appointed an umpire; or should have made such arrangements as the parties would have consented to; or if they could not agree such arrangement as it thought fit. Where this was not done, the High Court in special appeal remanded the case with instructions to submit the case again to the arbitrators with a distinct order.—*Haradhan Dut* v *Radha Nath*, 2 B L R. S. N. 14, 10 W. R. 398 But see, *Thakoor Dass* v. *Ram Jeebun*, 14 W. R. 150.

The mere absence of a clause in the order of reference providing for a difference of opinion between the arbitrators cannot vitiate the award where there is no such difference of opinion.—*Gour Chunder* v. *Sodoy Chunder*, 17 W R. 30. *Followed* in *Bepin Behary* v. *Krishna Behary*, 8 C. L. J. 475. Where an order of reference to arbitration does not provide for difference of opinion among the arbitrators, and for authorizing a majority to decide the case, the award will, on objection being taken, be set aside.—*Futteh Singh* v. *Gango*, 4 W. R. 4. *Distinguished* in 8 C. L J. 475.

Where the parties agreed to refer a suit to arbitration, but no provision was made that the decision by the majority of arbitrators should be binding, and two of five arbitrators withdrew, *held*, that the decision by the remaining three who constituted the majority was invalid.—*Garupathappa* v. *Narasingappa*, 7 M 174.

In an agreement to refer certain matters to arbitration, no provision was made for difference of opinion between the arbitrators by appointing an umpire or otherwise. The arbitrators being unable to agree, the Court, on the application of one of them, appointed an umpire, and directed that the award should be submitted on a particular date. An award was made by the umpire, and one arbitrator and a decree followed. *Held*, that the award was not legal, inasmuch as the agreement to refer gave the Court no power to appoint an umpire and required that the award should be made by the arbitrators named by the parties.—*Muhammad Abid* v *Muhammad Ashgar*, 8 A. 61.

Effect of Award Made Contrary to Order of Reference.—When a case has been referred to arbitration, the presence of all the arbitrators at all meetings, and, above all, at the last meeting, when the final act of arbitration is done, is essential to the validity of the award.—*Nand Ram* v. *Fakeer Chand*, 7 A. 523. *See*, however, *Nadiar Chand* v. *Gobinda Chunder*, 2 C. L. J 61.

A case was referred to the arbitration of five persons, with a proviso that, in the event of any two of the arbitrators being absent, the arbitration should be continued by the other three. Two of the arbitrators were pleaders on either side, and they, with the consent of the parties, ceased to act as arbitrators, but argued the matter before the other arbitrators. *Held*, that the award made by the other three arbitrators was a valid award.—*Devendro Nath* v. *Aubhoy Churn*, 9 C. 905, 12 C. L R 525

Umpire appointed contrary to the terms of the agreement—Decision by majority of arbitrators *Held*, that, as it was stipulated as an essential

part of the submission that an umpire should be chosen from seven persons named, the power of the Court to appoint an umpire under this section was controlled and limited by that stipulation; and that the umpire not being one of the seven persons named in the submission, there was no valid award.—*Barracho* v. *De Souza*, 7 M. H. C. 72.

Delegation of Duty by Arbitrator.—An arbitrator cannot delegate his duties to a third person.—*Jamna* v *Nasib*, 24 A 312. But he may delegate, to a third person, the performance of acts of a ministerial character; —*Bula* v. *Municipal Committee of Lahore*, 29 C. 854; 29 I. A. 168

Arbitrators Cannot Delegate their Power of Appointment of an Umpire.—Where by a contract the matters in dispute between the parties were referred to the arbitration of two persons, with a provision that, if they disagree, they should appoint an umpire. *Held*, that the arbitrators could not delegate the power of appointment of umpire conferred on them by the contract to a third person.—*Smith* v *Ludha Ghella*, 17 B. 129.

Extension of Period for Submission by Umpire.—As in the case of an arbitrator, so in the case of an umpire, a Court has power to extend the period within which the award is to be submitted. The Court can extend the time allowed to an umpire under this section.—*Kupu Rau* v. *Venkataramayyar*, 4 M. 311.

Power of Court to appoint arbitrator in certain cases.

5. (1) In any of the following cases, namely:—

(*a*) where the parties cannot agree within a reasonable time with respect to the appointment or an arbitrator, or the person appointed refuses to accept the office of arbitrator, or

[S. 507 (2) and s 510.]

(*b*) where an arbitrator or umpire—

(*i*) dies, or

(*ii*) refuses or neglects to act or becomes incapable of acting, or [S. 510.]

(*iii*) leaves British India in circumstances showing that he will probably not return at an early date, or

(*c*) where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so,

any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or umpire. [S. 511.]

(2) If, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator or no umpire is appointed as the case may be, the Court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire or make an order superseding the arbitration, and in such case shall proceed with the suit. [S. 510.]

COMMENTARY.

This para. embodies in a concise and amended form the provisions contained in ss 507 (2), 510 and 511 of the C. P. Code of 1882 The provisions of the old sections have been recast and summarized in this rule by change of language and phraseology, as will appear on a comparison of the provisions of the old sections with this para.

Duty of Court under This Paragraph.—The Court must, on the happening of any of the events mentioned in this para. either appoint a new arbitrator or supersede the arbitration altogether and proceed with the suit. When, therefore, one of the three arbitrators refused to act, and the Court neither appointed a new arbitrator nor made an order superseding the arbitration, it was held that the award made by the other two was invalid.—*Nand Ram* v *Fakir Chand*, 7 A. 523; *Thammiraju* v *Bapiraju*, 12 M 113; *Thakurdas* v *Narain*, 2 Lah. L. J., 637: 56 I C 644

Death, Negligence, Refusal or Incapacity of Arbitrators to Act.—Where a case was referred to the arbitration of three persons, and the parties agreed to be bound by the majority, and one of the arbitrators subsequently refused to act and withdrew: *Held, that the* Court could not pass a decree on the award of the remaining arbitrators, and could only, under this section, appoint a new arbitrator or supersede the arbitration and proceed with the suit —*Nand Ram* v *Fakir Chand*, 7 A. 523; *Thammiraju* v *Bapiraju*, 12 M 113

Where two of five arbitrators nominated by the parties and appointed by the Court had not consented before, and after appointment declined to act, and the Court appointed two arbitrators in their place against the consent of one of the parties, *held*, that the appointment of new arbitrators was not warranted by the provisions of s 510, C P Code, 1882, and that the order of reference to such arbitrators, the award made by them, and the decree passed upon their award, were illegal.—*Pagardin Ravutan* v. *Moidinsa Ravutan*, 6 M. 414. *Approved* in *Bepin Behari* v. *Annoda Prasad*, 18 C. 324 But under this para. the Court has power to appoint an arbitrator or arbitrators either in the place of an arbitrator, or in the place of arbitrators for which the consent of all parties is not necessary —*Rampersad* v *Jaggernaath*, 6 C. L. R. 1.

When a person goes away from the country and remains away, and there is no evidence to show an intention to return, that person becomes incapable of acting as umpire.—*Godadhar Moitry* v *Ganga Prosad*, 4 B L. R. O. C. 89.

The Court has no power to revoke the authority conferred on an arbitrator and to appoint a new one, except in cases falling strictly within the purview of this para. where " the scope and the object of the reference cannot be executed." It is only in those cases, apparently, that the authority conferred on arbitrators can be revoked " for good cause," the cause being such as is contemplated in that section, as where " an arbitrator refuses, or neglects, or becomes incapable to act, or leaves British India under circumstances showing that he will probably not return to India at an early date."—*Halimbhai Karimbhai* v *Shankar Sai*, 10 B 381

Matters in dispute were referred to the arbitration of five persons of whom four made their award. Subsequently the same arbitrators granted an application for re-hearing. Before the matter was re-heard one of the four died, and an order striking off the application was made by two of the surviving arbitrators. *Held*, that the award was not valid and final.—*Boon Jad Mathoor* v. *Nathoo Shahoo*, 3 C 375; 1 C L. R. 455.

Where certain matters were referred to arbitrators who refused to act, and the Court of first instance passed an order directing them to proceed and to make an award, and they, on the passing of such order made an award. *Held*, that all proceedings taken by the arbitrators in obedience to the order of the Court, directing them to arbitrate against their will, were null and void —*Shib Charan* v. *Ratiram*, 7 A. 20

Where one of the arbitrators, before duly signing the award, tendered his resignation in a letter to the Judge, but was induced to withdraw it, and afterwards signed the award, *held*, that the award was valid —*Joy Mungal Singh* v. *Mohun Ram*, 23 W R 429, P. C (*affirming* 15 W. R 38).

Appointment of New Arbitrator or Umpire.—It was held under the corresponding section 507 of the old Code, that the Court had no power, on the happening of either of the events referred to in cl. (*a*) of this paragraph, to appoint a new arbitrator without the consent of all the parties to the reference.—*Pugardin* v. *Moidinsa*, 6 M 414. *Bepin* v. *Annoda*, 18 C. 324 But under this paragraph, the Court has power to appoint a new arbitrator without the consent of all the parties even in the cases mentioned in cl (*a*) In cases covered by cl. (*b*), it is open to the Court to appoint only one new arbitrator in place of several old arbitrators — *Rampersad* v *Juggannath*, 6 C L R 1 But the Court has no power to appoint an arbitrator or umpire under sub-para (2) unless notice as required sub-para (1) is given and the party served with the notice has been given an opportunity of being heard.—*Abdul Gani* v. *Din Doyal*, 41 A. 578 50 I. C 655; *Thakar Das* v *Ram Das*, 7 Lah L J 163: 88 I C 975: A I R 1925 Lah. 374 An irregularity of procedure in the appointment of a new arbitrator is cured by consent of parties —*Mahmud Sheikh* v. *Messrs Kankinarah & Co*, 28 C W N 634 A I R 1924 Cal 665

Appointment of Umpire.—The appointment of an umpire under s. 511, C. P Code, 1882, is required where there are two or more arbitrators to provide for any difference of opinion amongst them; but not where, with the consent of the Court, only one arbitrator has been appointed.—*Mahabir Misser* v. *Juggar Nath Misser*, 25 W R. 11.

Provision should be made in the order of reference for the appointment of an umpire in case of difference of opinion among the arbitrators —*Huradhan* v. *Radha Nath*, 2 B. L. R. S. N. 14; 10 W. R. 398

Award by umpire and one arbitrator without provision for the appointment of an umpire—agreement to refer not providing for disagreement of arbitrators—Appointment of umpire by the Court. *Held*, that there had been no legal award such as the law contemplated, inasmuch as the agreement to refer gave the Court no power to appoint an umpire, and required that the award should be made by the arbitrators named by the parties—*Muhammad Abid* v. *Muhammad Asghar*, 8 A. 64.

Where the terms of a submission to arbitration were that an umpire should be selected by seven persons named, and the umpire first selected declined to act, and the Court of its own motion appointed an umpire who was not one of the seven persons named in the submission. *Held*, that, as it was stipulated as an essential part of the submission that an umpire should be chosen from seven persons named, the power of the Court to appoint an umpire was controlled and limited by that stipulation; and that the umpire not being one of the seven persons named, there was no valid award.—*Barracho* v. *De Souza*, 7 Mad. H. C. 72.

Where Arbitrator Refuses to Act.—It is an essential principle of the law of arbitration that the adjudication of disputes by arbitration should be the result of the free consent of the arbitrators to act; and the finality of the award is based entirely upon the principle that the arbitrators are Judges chosen by the parties themselves, and that such Judges are willing to settle the disputes referred to them. Thus, where an arbitrator refused to act, and the Court, instead of accepting his refusal, directed him to proceed and make an award, it was held that the award was invalid.—*Shib Charan* v. *Ratiram*, 7 A. 20.

Order Superseding Arbitration.—If a Court refers a dispute to arbitration, it cannot proceed with the suit until it supersedes the arbitration. If it does proceed without supersession, it acts without jurisdiction—*Ganesh Prasad* v. *Domodar Das*, 10 A. L. J. 28; *Jamna* v. *Nasib*, 24 A. 312.

Form.—For form of appointment of new arbitrator, *see*, Appendix to this Schedule, Form No. 3.

Powers of arbitrator or umpire appointed under paragraph 4 or 5.

6. Every arbitrator or umpire appointed under paragraph 4 or paragraph 5 shall have the like powers as if his name had been inserted in the order of reference. [S. 512.]

This para. corresponds to s. 512, C. P. Code, 1882, with some verbal changes only

Summoning witnesses and default.

7. (1) The Court shall issue the same processes to the parties and witnesses whom the arbitrator or umpire desires to examine, as the Court may issue in suits tried before it.

(2) Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties and punishments, by order of the Court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court.

[S. 513.]

COMMENTARY.

This para exactly corresponds to s 513, C P. Code, 1882

Arbitrator's ought only to take such evidence as is required by the terms of the agreement referring the question in dispute to arbitration.—*Krishna Kantha* v *Bidya Sundaree*, 2 B L. R. App. 25.

"Refusing to give their evidence."—The words refusing to give their evidence in Sch. II, para. 7 (2) are intended to refer to the case of a person who refuses to give evidence when placed on oath and required to answer questions put to him A person therefore who elects not to produce any evidence cannot be said to refuse to give evidence within the meaning of the enactment —*Janan* v *Narain Das*, 8 A L. J 929; 11 I. C. 259.

Extension of time for making award.

8. Where the arbitrators or the umpire cannot complete the award within the period specified in the order, the Court may, if it thinks fit, either allow further time, and from time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period; or may make an order superseding the arbitration, and in such case shall proceed with the suit.

[S. 514.]

COMMENTARY.

Alterations in the Rule.—This para corresponds to s 514, C. P. Code, 1882, with some alterations and omissions

The words "*where the arbitrators or the umpire cannot complete the award*" have been substituted for the words "if from the want of the necessary evidence or information, or from any other cause the arbitrators," which occurred in the old section. By the above change, the scope of the present rule has been enlarged, as it includes any cause for non-completion of the award within the time fixed; but under the old section certain causes were specifically mentioned.

The words "*either before or after the expiration of the period fixed*," have been added after the words "from time to time." The other changes are merely verbal.

Extension of Time for Making an Award.—Under this para the Court may extend the time for making the award after the time fixed therefor has expired. It is not necessary that the application to extend *the time should be made before the expiry of the period originally fixed* The application may be made even after the expiry of the time originally fixed —*Hari Narain* v *Bhagwant*, 10 A. 137. But the application must be made before the award is made, and the Court has no power to enlarge the time for the making of an award after the time for making it has expired and after the award has been made —*Raja Har Narain* v. *Bhagwan* 13 A. 300 18 I A 55; *Lakshminarasinham* v. *Somasundaram*, 15 M 384 S 148 of this Code does not enable the Court to extend the time when the award has already been made.—*Shibkrishna* v *Satish*, 38 C 522. The application for extension of time need not necessarily be in writing.—*Sakal Chand* v. *Ambaram*, 26 Bom. L. R. 280: 80 I C. 260: A I R 1924 *Bom.* 380.

Application for the extension of the period for the submission of an award and orders thereon should be made in writing and recorded— *Monji Premji* v *Maliyakel Koy Assan*, 3 M. 59.

As in the case of an arbitrator, so in the case of an umpire, a Court has power to extend the period within which the award is to be submitted The Court can extend the time allowed to an umpire under s 509, C. P Code, 1882 —*Kupu Rau* v *Venkataramayyar*, 4 M. 311.

A Court has power, to act under this para. at any time before the award is actually made whether *the time previously limited for making* the award has expired or not —*Ram Manohar* v. *Lal Behari*, 14 A 343 (13 A 300 *referred to*)

An order extending time for the presentation of an award upon application presented within time is not bad in law by reason of its having *been made after the expiry of the term which it purports to extend*— *Suppu* v. *Govinda Charyar*, 11 M 85

Award Made Out of Time.—An award made out of time is invalid unless time for its submission is expressly enlarged by the Court —*Simson* v. *Venkatagopalam*, 9 M. 475 *See* also, *Bhugwan Dass* v. *Nunda Lall*, 12 C. 173; *Behari Das* v *Kallian Das*, 8 A. 543; and *Debendra Nath* v. *Sarbamangola*, 8 C. W. N. 917. In *Har Narain* v. *Chaudhrain Bhagwant Kuor*, 13 A. 300, P. C., it has been held (*approving Chuha Mal* v *Hari Ram*, and *reversing* 10 A. 137) that where an award was not made within the period fixed by the Court's order, but was made after the date given in the last order extending the time for its delivery, the award was invalid. But the *Madras High Court* in *Muthukutti Nayakan* v. *Acha Nayakan*, 18 M. 22 (*following* the ruling in 10 A. 137, which has been *reversed* by the P. C in 13 A 300), has held that an award is not invalid because no time has been fixed for the making of the award. The Judicial Committee, in 13 A. 300, has held that the provisions in s. 508, C. P Code, 1882, requiring the Court to fix a reasonable time for the delivery of the award is not merely directory but is *mandatory* and *imperative*. But the Madras High Court, in 18 M. 22, has held that the provisions are directory and not mandatory. S. 148 of this Code does not alter the law laid down in this respect. An award made after the expiration of the period allowed by the Court may be set aside under rule 15, cl (*c*).

Where a Judge dismissed a suit for failure of the parties to attend on the date fixed for filing of the award even though the award was not filed on that date the order of dismissal is improper and would be set aside. Since the filing of the award is an act of the arbitrator, the parties need not be present in Court.—*Maharaj Bhagat* v. *Harihar Bhagat*, 3 Pat. L T. 346: 65 I. C. 144.

If the arbitrators fail to submit their award within the time prescribed, Sch. II of para. 8 of C. P. Code applies and it is within the discretion of the Court after hearing both the parties to the suit to make an order under that article superseding the arbitration and proceeding with the suit.—*Haishikesh Das* v. *Lal Mohan*, 57 I. C. 890.

The time fixed by the Court for the delivery of an award was the 16th April 1900. The award was actually completed and signed and made over to a peon of the Court on the same day, but, as it was received by the peon after Court hours, it did not in fact reach the hands of the Court, until the next day. *Held*, that the award was within time.—*Sita Ram* v. *Bhawani Din*, 26 A 105 (8 A 543 and 548, 13 A. 300, 13 B. 119, and 22 M. 22 *referred to*).

An award made, that is, completed and signed but not submitted to the Court within the time limited for delivering the same in Court is valid in law.—*Asadullah* v *Muhammad Nur*, 27 A 459 (22 M. 22, 13 B 119, 13 A. 300 *followed*, 8 A. 543 *dissented from*) *See* also, *Debendra Nath* v. *Sarbamangola*, 8 C. W N. 916 Where by an order of reference an arbitrator is given power to extend the time for making the award, he can only extend the time before the time originally fixed for making the award has expired.—*Co-operative Hindusthan Bank* v *Bhola Nath*, 19 C. W. N. 165.

Estoppel by Conduct.—The parties to a reference may be estopped by their conduct from impeaching the validity of an award on the ground that it was made after time —*Patto Kumari* v *Upendranath*, 4 Pat L. J. 265, 270; *Kishen Lal* v. *Jai Lal*, 521, C 352.

Order Superseding the Arbitration.—Before the Court can proceed *to hear the suit it is necessary that it would itself make, either under* this para. or para 5, an order superseding the reference to arbitration —*Jamna Kunwar* v. *Nasib Ali*, 24 A. 315.

Appeal.—Under s. 104 (1) (*a*) an appeal lies from an order superseding arbitration, where the award has not been completed within the period fixed by the Court

Where umpire may arbitrate in lieu of arbitrators.

9. Where an umpire has been appointed, he may enter on the reference in the place of the arbitrators—

(*a*) if they have allowed the appointed time to expire without making an award, or

(*b*) if they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree. [S. 515.]

Extension of Time for Making an Award.—Under this para. the Court may extend the time for making the award after the time fixed therefor has expired. It is not necessary that the application to extend the time should be made before the expiry of the period originally fixed. *The application may be made even after the expiry of the time originally fixed.*—*Hari Narain* v. *Bhagwant*, 10 A. 137. But the application must be made before the award is made, and the Court has no power to enlarge the time for the making of an award after the time for making it has expired and after the award has been made.—*Raja Har Narain* v. *Bhagwan*, 13 A. 300 18 I. A 55; *Lakshminarasinham* v. *Somasundaram*, 15 M 384 S 148 of this Code does not enable the Court to extend the time when the award has already been made.—*Shibkrishna* v. *Satish*, 38 C 522 The application for extension of time need not necessarily be in writing.—*Sakal Chand* v *Ambaram*, 26 Bom. L. R 280; 80 I C 260 A I. R. 1924 Bom. 380.

Application for the extension of the period for the submission of an award and orders thereon should be made in writing and recorded.—*Monji Prempu* v *Maliyakel Koy Assan*, 3 M. 59.

As in the case of an arbitrator, so in the case of an umpire, a Court has power to extend the period within which the award is to be submitted The Court can extend the time allowed to an umpire under s 509, C P Code, 1882.—*Kupu Rau* v *Venkataramayyar*, 4 M. 311.

A Court has power, to act under this para. at any time before the award is actually made whether the time previously limited for making the award has expired or not.—*Ram Manohar* v. *Lal Behari*, 14 A. 343 (13 A 300 *referred to*).

An order extending time for the presentation of an award upon application presented within time is not bad in law by reason of its having been made after the expiry of the term which it purports to extend.—*Suppu* v. *Govinda Charyar*, 11 M. 85

Award Made Out of Time.—An award made out of time is invalid unless time for its submission is expressly enlarged by the Court.—*Simson* v. *Venkatagopalam*, 9 M 475. *See also*, *Bhugwan Dass* v. *Nunda Lall*, 12 C. 173; *Behari Das* v. *Kallian Das*, 8 A 543; and *Debendra Nath* v *Sarbamangola*, 8 C. W. N. 917. In *Har Narain* v. *Chaudhrain Bhagwant Kuor*, 13 A. 300, P C., it has been held (*approving Chuha Mal* v *Hari Ram*, and *reversing* 10 A. 137) that where an award was not made within the period fixed by the Court's order, but was made after the date given in the last order extending the time for its delivery, the award was invalid. But the Madras High Court in *Muthukutti Nayakan* v. *Acha Nayakan*, 18 M 22 (*following* the ruling in 10 A. 137, which has been *reversed* by the P. C in 13 A. 300), has held that an award is not invalid because no time has been fixed for the making of the award. The Judicial Committee, in 13 A 300, *has held that the provisions* in s 508, C. P. Code, 1882, requiring the Court to fix a reasonable time for the delivery of the award is not merely directory but is mandatory and imperative But the Madras High Court, in 18 M. 22, has held that the provisions are directory and not mandatory. S 148 of this Code does not alter the law laid down in this respect. An award made after the expiration of the period allowed by the Court may be set aside under rule 15, cl (c).

Draft of award was signed by all the five arbitrators, but the fair copy was signed by only four of the arbitrators. *Held*, that the award was complete at the date of rough draft, and that its validity was not affected by the subsequent occurrences—*Kula Nagabushanam* v. *Kula Seshachalam*, 1 Mad. H. C. 178.

Arbitrator's Presence at Meetings Essential to the Validity of the Award.—The presence of all the arbitrators at all meetings, and, above all, at the last meeting when the final act of arbitration is done, is essential to the validity of the award.—*Nandram* v. *Fakir Chand*, 7 A. 523. The absence of one of the arbitrators from a part of the hearing vitiates the judicial character of the proceeding.—*Benode* v *Pran Chandra*, 14 C. L. J. 143: 11 I. C. 898.

"Together with any depositions and documents."—Although the arbitrator may deliver his award to one of the parties, he ought not to hand over with it the proceedings, depositions and exhibits.—*Jagot Sunderi* v. *Sonatan Bysak*, 5 B L R 357

When a Court has referred a suit to arbitration, it has jurisdiction over the arbitrators to compel them to give up documents filed before them as exhibits during the course of the arbitration and to return the original records of the suit which may have been handed to them Such jurisdiction can be exercised by an application made in the suit on notice to the arbitrators.—*Nursing Chunder* v. *Nuffur Chunder*, 17 C. 832

Notice of Filing to be given to Parties.—When a Court passed a decree in the terms of an award without giving notice of the filing of the award under this rule, it was held that the Court had acted with material irregularity and the judgment was liable to be set aside in revision.—*Ranjit* v. *Bissan Ram*, 94 I. C 115 A. I R 1926 Cal 1018; *Rangasami* v *Muthusami*, 11 M. 144. Followed in *Chaturbhuj* v. *Ganesh*, 20 A 474 Where pleaders of both parties were shown the order of the Court recording the filing of the award and initialled the order sheet as an acknowledgment, it was held that this was good notice —*Bholanath* v *Bata Krishta*, 7 Pat L T. 739, *Saroj Bala* v *Jatindra*, A I R 1927 Cal 619

When the arbitrator himself brings in the award, the Court is bound to give notice to the parties that the award has been filed, and the Court cannot pass a decree unless such notice has been given If the parties or their pleaders bring in the award and ask that it should be filed, and the Court informs them that they should file objections within the time then no notice is necessary —*Valchand* v *Gulba*, 28 Bom L. R 511 98 I. C 547 A I R 1926 Bom 312.

Delivery of an Award.—The act of an arbitrator in handing an award to the proper officer of the Court for the purpose of being filed in Court, is not an "application" within the meaning of the Limitation Act. Hence there is no period of limitation within which an award should be delivered by an arbitrator in Court —*Roberts* v *Harrison*, 7 C. 333 · 9 C. L. R. 207.

Form.—For form of award *see* Form No 5 in the Appendix to this schedule.

Statement of special case by arbitrators or umpire.

11. Upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and shall order such opinion to be added to and to form part of the award. [S. 517.]

COMMENTARY.

This para. corresponds to s 517 of the C. P. Code, with some alterations. The words "*with the leave*" have been substituted for the words "with the consent"; and the words "*shall order such opinion to be added to*" have been substituted for the words "such opinion shall be added to," which occurred in the old section.

Special Case.—The scope of the special case contemplated by this para. is limited to questions of law.—*Laxman* v. *Ram Chandra*, 48 B. 663; 26 Bom. L. R. 836: 84 I. C 378: A. I. R. 1925 Bom. 22

Appeal.—Under s 101 (1) (*b*) an appeal lies from an order on an award stated in the form of a special case. Where, however, the arbitrators differ on a question of law arising in the arbitration and refer it for opinion to the Court without making an award stated in the form of a special case, no appeal lies from an order made upon such reference—*Purshottam Das* v *Ram Gopal*, 35 B. 130: 12 Bom. L R. 852: 8 I C. 171.

Form.—For form of special case, *see*, Form No 4, given in the appendix to this schedule

Power to modify or correct award.

12. The Court may, by order, modify or correct an award—

(*a*) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or

(*b*) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or

(*c*) where the award contains a clerical mistake or an error arising from an accidental slip or omission. [S. 518.]

COMMENTARY.

This rule corresponds to s. 518 of the C. P Code, 1882, with some alterations and additions. The word "*and*" has been substituted for the

ord " provided," which occurred in cl. (*a*) of the old section; and cl. (*c*) as been newly added.

" The Court may, by order, modify or correct an award."—The Court as no power to modify or correct an award except in the three cases mentioned in this rule. Where a Court modifies an award because it takes a iew *different from that held by the arbitrator, it acts without jurisdiction.* —*Parma Dut* v. *Bipju*, (1916) Punj. Rec. No. 78, p. 213: 35 I. C. 887; *opal Dinkar* v. *Ganesh Narayan*, 45 B. 512. 59 I. C. 785; *Aftab Begam* . *Haji Abdul*, 22 A. L. J. 816: 81 I C. 525 A I. R. 1924 All 800.

When, under *para* 12 *of the second schedule, the Court proceeds to* orrect an award in a case where a severable matter not referred has been ealt with, it does so by cancelling that part of the award and the part cancelled is set aside for all purposes. Neither para 12 nor para. 14 directed to such a confusion of jurisdiction as the present case disoses.—*Rampratap Chamria* v *Durga Prasad Chamria*, 28 C. W N.424.

" When a part of the award is upon a matter not referred to arbitraon."—The addition, in a judgment according to an award, of a trifling rection upon a matter not referred to the arbitrators, which was quite parable from the other parts of the award, and did not affect the decision the matter referred, was held not to affect the finality of the judgment.— *uro Soonduree* v *Sreedhur*, 17 W. R 352

The arbitrators to whom the matters in difference in two suits were ferred for arbitration, made an award for payment of certain sums of oney to plaintiff by certain instalments The plaintiff preferred objecons to the award in so far as it directed payment by instalments and the st Court modified it to that extent. The Appellate Court while allowg the power of the arbitrators to direct payment by instalments reduced e number of instalments *Held*, that the reference gave the arbitrators ll powers to direct payment by instalments and that the lower Appellate ourt was wrong in reducing the number of instalments.—*Jawahir Singh* *Mul Raj*, 8 A. 449

The decision of arbitrators in a matter not in difference between the rties, nor referred to them, is null and void for want of jurisdiction — *oshahel Singh* v. *Kononuutty*, 15 W R 172 *See* also, *Mumtaz Ali* v. *hakhawat Ali*, 23 A. 394, *Buta* v. *Municipal Committee of Lahore*, 20 . 854, 87 P. R. 1902 P. C.

" And such part can be separated from the others."—*See notes under ara.* 14.

" Where the award contains a clerical mistake," etc.—Under para. 2 (*b*) and (*c*) of Sch. II to the C. P Code, the only power the Court has either to amend without affecting the decision or to rectify a clerical istake or an error arising from an accidental slip or omission It has o power to correct an error of calculation or arithmetic and award a sum fferent from that awarded by the arbitrator —*Gopal Dinkar* v. *Ganesh arayan*, 45 B 512 22 Bom L. R 1416 59 I. C 785, *Shamlal* v *ashottam Das*, 42 A. 277· 58 I. C 585

An award was made upon the basis of certain figures contained in rtain documents relied on by both the parties and a decree was passed

according to the award without any objection from any of the parties It was subsequently found that there was a mistake in the figures, on which the award was based and the party who was affected by the mistake *applied for correction of the error: Held, that the application was not to* correct an error patent and apparent on the face of the record but to go much deeper into the matter and to reopen the accounts and the figures at which the arbitrators had arrived and the remedy lay either by review or by appeal; *Makam Lakshmi* v. *Makam Batchayya*, 53 M. L. J. 88 A. I. R. 1927 Mad. 720; *see* also *Ramanathan* v. *Muthiah Chetty*, 43 M. 429

" Or contains any obvious error."—In a suit for dissolution of partnership and for accounts plaintiff claimed interest which the defendant denied The matter in dispute was referred to arbitration, one of the points referred being whether the defendant was liable for any money and, if so, the amount due. *Held*, that it was not an error on the part of the arbitrator to include in his award the sum payable by the defendant as *interest both on sums advanced to the firm and on* those advanced to defendant for the personal use and also for the period before and after the suit and up to the date of the award.—*Jaharmal* v. *Birinchi*, 56 I. C. 941.

Appeal.—Under s 104 (1) (*c*), an appeal lies from an order modifying or correcting an award.

Order as to costs of arbitration.

13. The Court may also make such orders as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them [S. 519.]

COMMENTARY.

This para corresponds to s. 519, C. P. Code, 1882, with this modification that the word " *where* " has been substituted for the word " if " after the word " arbitration."

Power of Arbitrators to deal with costs.—The parties to a suit having referred the matter in dispute to arbitration, the arbitrators, without being specially authorized to decide the question of costs, included in the award a direction that the defendant should pay the costs of the plaintiff. *Held*, that the arbitrators had no implied authority to deal with the question of costs and directed the award to stand good, except so far as it awarded costs.—*Dagdusa Tilak Chand* v. *Bhukan Govind*, 9 B. 82, *Amolak* v *Charan Das*, 52, P. R. 1913: 16 P. W. R. 1913: 17 I. C. 684

Where award or matter referred to arbitration may be remitted.

14. The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrator or umpire, upon such terms as it thinks fit—

(*a*) where the award has left undetermined any of the matters referred to arbitration, or where it determines

any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred;

(b) where the award is so indefinite as to be incapable of execution;

(c) where an objection to the legality of the award is apparent upon the face of it. [S. 520.]

COMMENTARY.

This para. corresponds to s. 520, C. P Code, 1882, with some additions. The words "*unless such matters can be separated without affecting the determination of the matters referred,*" have been added to clause (a). The above additions seem to have been made adopting the law as laid down in the Privy Council case (29 C. 854, P. C.: 7 C. W. N. 82, P. C.) noted below.

Award Going Beyond Matters in Dispute in Suit and Adjudging rights of a Stranger to Suit, If Valid.—Where the arbitrators made an award which dealt with matters not included within the scope of the suit and was in excess of their authority in respect of matters included within its scope, *held*, that the award was invalid and could not be enforced either under the C. P. Code, Sch II, or the Indian Arbitration Act, and at any rate, it was not a case in which the Court should exercise its discretionary powers under para. 12 or para. 14 of Sch II of the C P Code.—*Ram Pratap Chamria* v. *Durga Prasad Chamria*, 28 C W N 424

Cl. (a)—" Where the award has left undetermined any of the matters referred to or determines any matter not referred to arbitration."—The ground for holding an award to be invalid on account of its not disposing of all the matters referred, appears to be that there is an implied condition in the submission of the parties to the arbitration that the award shall dispose of all. This condition may be waived by the consent of the parties before the arbitrators —*Mahund Ram* v *Salig Ram*, 21 C 590, P. C.: *Bhagwan Das* v *Shiv Dial*, (1913) P R 92, p. 332 17 I C. 584 —Where there was no distinct and separate finding on each of the issues, but there was a decision on the whole matter in controversy, the award cannot be said to have left undetermined any of the matters referred to in arbitration, and it should not therefore be remitted for re-consideration —*George* v *Vastian Soury*, 22 M 202 A separate finding on each issue is not necessary, when the whole matter in issue between the parties is decided by the arbitrators —*Ghulam Khan* v *Muhammad Hassan*, 29 C 167, 186: 29 I. A. 51

In a suit for partition and for settlement of accounts, the arbitrator to whom the case was referred for determination made an award only with reference to partition, but omitted to settle accounts *Held*, that the Court had acted erroneously in confirming the award before the accounts had been settled, inasmuch as the award had left undetermined a very important matter, *viz.*, the settlement of accounts, and that the Court should, under this rule have remitted the award for the reconsideration

of the arbitrator.—*Sadik Ali* v. *Imdad Ali*, 5 A. 286. Where several issues in a suit are referred to arbitration, but the arbitrator makes his award deciding only some of the issues, the award must be remitted for the determination of the other matters raised in the case.—*Jonardan* v. *Sambhunath*, 16 C 806

In a suit for division of certain lands to which the parties were equally entitled, the arbitrators decided the other matters, but as regards the field, said that it was inconvenient to divide them in consequence of the rains, and ordered the parties to receive the profits half and half. *Held*, that the award left undetermined one of the principal subjects of dispute; and as the Court had no power to remit the award to the arbitrators, the applicant was entitled to a judgment setting aside the order for filing the award.—*Dandekar* v. *Dandekars*, 6 B. 663. *Followed* in *Mustafa Khan* v. *Phulji Bibi*, 27 A 526, where it has been further held that a Court has no power to amend the private award or remit it for reconsideration of the arbitrators

In cases where a reference to arbitration is made by the order of the Court, the Court may remit the award for the determination of the matter left undetermined under para 14 of Sch II; but in the case of an arbitration without the intervention of the Court, para. 21 of the schedule confers no such power on the Court.—*Babu Kunj Lal* v. *Babu Banwari Lal*, 4 Pat L. J 394 48 I C 711.

Where Reference to Arbitration Proves Abortive.—When the arbitration agreed to by the parties proves abortive, the Court has no jurisdiction to send the case to another arbitrator of its own motion without the consent of all the parties. The Court can supersede the award or remit it to the original arbitrator but it cannot make a fresh reference to arbitration.—*Satish Chandra* v. *Baliram*, (1921) Pat. 170: 2 Pat. L. T. 277.

" Unless such matter can be separated."—Where one portion of the award related to the matters referred, and another portion went beyond the strict terms of the reference, but the two portions were clearly separable so that any direction given by the arbitrators in excess of their authority could be treated as null and void without affecting the rest of the award *Held*, that the whole award was not invalid as being in excess of the jurisdiction of the arbitrators.—*Buta* v. *Municipal Committee of Lahore*, 29 C 854, P. C : 7 C. W. N. 82, P. C.

An award that goes beyond the terms of reference to the arbitrators is to that extent *ultra vires*.—*Raja Mohammed Mamtaz Ali* v. *Sakhawat Ali*, 23 A. 394 P C : 5 C. W. N. 881 P. C.

Cl. (b). " Where the award is so indefinite as to be incapable of execution."—Under cl. (*b*) of this para. the award is to be remitted when it is so indefinite as to be incapable of execution. But the fact that a particular expression used in an award is capable of more than one interpretation, does not show that it is indefinite; much less that it is so indefinite as to be incapable of execution. The expression in such a case has to be interpreted in execution proceedings consequent on the decree following the award.—*Raghuraj Bahadur* v. *Rajeswar*, 35 I. C. 761: 3 O. L. J. 258.

Cl. (c). "Where an objection to the legality of the award is apparent on the face of it."—An award, defective and illegal on the face of it, should be at once remitted to the arbitrators —*Luchmee Narain* v. *Pyle*, 2 N. W. P. 150; *Ram Kuru* v. *Zahira*, 101, P R. 1868; *Narain* v. *Kanhe*, 3 P. R 1872. But where there is no illegality apparent on the face of an award, a Court cannot remit it for re-consideration.—*Manak Chand* v. *Ram Narayan*, 2 A. 181 F. B.

An error in law on the face of an award, such as will justify the Court in setting it aside, must be an error in some legal proposition, to which the arbitrators have tied themselves, the same being found in the award or a document actually incorporated therein, and forming the basis of the award.—*Champsey Bhara & Co* v. *The Jivraj Ballov Spinning Co.*, A. I. R. 1923 P. C. 66; *Ram Devi* v *Gamshi Lal*, 48 A. 475 95 I. C. which cannot be amended by the Court under s. 518 (para 12). Such 416: A. I. R. 1926 All 501.

This section authorizes a Court to remand a case, to arbitrators for reconsideration when their award contains mistakes, omissions, or defects, award on the refusal of the arbitrators to reconsider it, becomes null and void, without proof of corruption or misconduct.—*Mohun Kishen* v. *Bhoobun Shyam*, 7 W. R 406

A case involving questions of Hindu law having been referred to arbitration, the arbitrator decided the case against the plaintiff The plaintiff obtaining the opinions of certain pundits in his favour, applied to the Court to remit the award The Court accordingly remitted the award with the opinions of the pundits, requesting the arbitrator to reconsider them The arbitrator having refused to act further, the Court proceeded to determine the suit and gave the plaintiff a decree *Held*, that there being no illegality apparent on the face of the award, the Court was not justified in remitting the award, or setting the award aside, and proceeding to determine the suit itself —*Nanak Chand* v *Ram Narain*, 2 A 181 Referred to in *George* v *Vastian Soury*, 22 M 202.

Where six arbitrators were appointed but they did not all take part in *the proceedings, it was held that the award so passed by the arbitrators* was invalid on the face of it under para 14 (c) of Sch II of the C P Code —*Kali Charan* v *Guptnath*, 16 A. L J. 307. 45 I C 34

A reference to arbitration provided that the arbitrator should determine the case after hearing the evidence and that if one of the parties failed to appear before him, he should have power to proceed to hear the evidence *ex parte* *Held*, that, on the plaintiff's failure to appear before the arbitrator on the day fixed for trial, the arbitrator could not make an award without taking evidence but should have proceeded to hear the evidence of the other side. *Held*, also that the award so made without taking any evidence could not be set aside by the Court on the plaintiffs' application under Or. IX, r. 9, C. P. Code, but should be remitted under para 14 of Sch II of the C P. Code to the arbitrator for reconsideration if a proper case was made out by the plaintiff to execuse his absence before the arbitrator.—*Gopal Chandra* v. *Kshetra Mohan*, 22 C W. N 933 46 I. C 195.

Where a suit was referred to arbitration for the determination of the only question whether a Hindu was born blind and therefore not entitled to inherit and the arbitrator made an award whereby the blind man was declared to be entitled to a life interest in a certain portion of the property, it was held on an objection to the award under cl. (c) of this para that the award was not so patently illegal that it could be remitted to the reconsideration of the arbitrator.—*Madepalli* v. *Madepalli*, 41 M 1022: 34 M. L. J. 323: 45 I. C. 644.

Part of the Award Cannot be Remitted.—There is no provision in the Civil Procedure Code by which a portion of an award may be remitted.—*Tursi Ram* v *Basdeo*, 24 A. L. J. 705: 96 I. C. 531: A. I. R. 1926 All 567.

Pleader—Whether can be Arbitrator.—A gentleman of the legal profession does not become incompetent to act as an arbitrator merely because on some occasions he was engaged by one of the parties as their pleader; *Rajendra Nath* v *Abdul Hakim Khan*, 39 I. C. 767.

Appeal.—No appeal lies from an order under this para. remitting an award to the reconsideration of the arbitrators. Where an award is remitted to the reconsideration of the arbitrator, and a decree is passed in accordance with the revised award, no appeal lies from the decree on the ground that the order of remittal was wrong.—*Subbiah* v *Subramania*, 31 M. 479, *Baland Bakhsh* v. *Ram Chandra*, 6 Lah L. J 500. 84 I. C. 693.

15. (1) An award remitted under paragraph 14 becomes void on failure of the arbitrator or umpire to reconsider it. But no award shall be set aside except on one of the following grounds, namely :—

Grounds for setting aside award.

(*a*) corruption or misconduct of the arbitrator or umpire;

(*b*) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire;

(*c*) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid.

(2) Where an award becomes void or is set aside under clause (1), the Court shall make an order superseding the arbitration and in such case shall proceed with the suit. [S. 521.]

COMMENTARY.

Alterations in the Para.—This para. corresponds to s. 521, C. P. Code, 1882, with several alterations and additions.

The words "*on failure*" have been substituted for the words "on the refusal," after the words "becomes void."

The words "*and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid*" have been added to clause (c); and the last para of s. 521, which ran as follows: "and no award shall be valid unless made within the period allowed by the Court" has been omitted The object of the addition of the words "or being otherwise invalid" will appear from the following report of the Special Committee.

To meet the difficulty expressed in the case reported in 25 C. 141, (which followed many other cases in the Calcutta High Court), we have inserted the words "*or being otherwise invalid*" in sub-section (c) of s. 521 of the present Code. If, therefore, either party considers the award invalid on any ground he can apply to have it set aside.—*See the Report of the Special Committee.*

Sub-section (2) is new

"But no award shall be set aside."—There is a clear distinction between setting aside an award and remitting it, the latter implying that the award is alive and in existence and once an award is set aside under para. 15, it cannot be remitted under para. 14, and the Court must pass an order superseding the award and in case of an application under para. 17, there being no pending suit, the Court's power comes to an end with the order superseding the award.—*Satish Chandra* v *Baliram*, (1921) Pat. 170: 2 Pat. L T 277

"Corruption or misconduct."—The word "misconduct" does not necessarily imply moral turpitude, but it includes neglect of the duties and responsibilities of the arbitrators, and what Courts of Justice expect from them before allowing finality to their awards —*Ganga Sahai* v. *Lekhraj*, 9 A. 253, *Amir Begam* v. *Badruddin*, 36 A 336 23 I. C. 625 P C.; *Tyebbhai* v. *Abdul Husein*, 25 Bom. L R. 392 85 I. C 424 A. I. R. 1924 Bom. 149 *Yusuf Khan* v. *Riyasat Ali*, 3 O. W N. 279 93 I. C. 446: A. I. R 1926 Oudh 307

The term "misconduct" in s 521, C P Code, 1882 (r 15), does not necessarily imply "corruption."—*Kali Charan* v *Sarat Chandra*, 30 C. 397 7 C. W. N 545.

Perversity is misconduct within the meaning of s 15 of the Second Schedule of the C P. Code, and a Court would be justified in setting aside an award on that ground.—*Nga Tok* v. *Nga Kasmi*, 5 Bur L T. 55. 14 I C. 978

"Acts amounting to misconduct."—*The following acts have been held to amount to "misconduct" within the meaning of this para. affording grounds for setting aside an award:*—

Proceeding with the arbitration in the absence of one of the arbitrators.—*Thammiraju* v. *Bapiraju*, 12 M. 113; *Nandram* v. *Fakirchand*, 7 A 523; *Benode* v. *Pran Chandra*, 14 C. L. J. 143.

Where three out of five arbitrators were not present at the time the award was made and did not sign the award, although it purported to be signed by all of them, it was held that it amounted to misconduct, justifying the setting aside of award.—*Ram Narain* v. *Baijnath*, 29 C. 36

Irregularities in procedure which amount to no proper hearing of the matters in dispute amount to misconduct on the part of the arbitrator—*Amir Begam* v. *Badruddin*, 36 A. 336; 23 I. C 625 P. C.

Hearing and receiving evidence from one side in the absence of the other side, without giving the other side the opportunity of meeting and answering it, is also "misconduct" within the meaning of this para *Cursetji* v. *Crowder*, 18 B. 299; *Mohammed Afzal* v. *Abdul Hamid*, 7 Lah L. J. 463 · 88 I. C. 161 · A. I R 1925 Lah. 570.

Refusal of arbitrator to hear witnesses produced by the parties amounts to judicial misconduct within the meaning of this para —*Rughoobar* v *Maina Koer*, 12 C L. R. 564. Receiving documents from one party and basing the award upon those documents, without giving the other party an opportunity of seeing those documents and of meeting the inferences deducible therefrom, is misconduct within the meaning of this para—*Delhi Cloth & General Mills Co* v. *Kidari Pershad*, 64 I. C. 363

Making private inquiries and basing their award on information privately obtained.—*Daya Kishan* v. *Dhram Das*, 4 A. L. J. 169, *Kanhaiya Lal* v. *Khairati Lal*, 49 I. C. 303. 9 P. W. R. 1919; *Ganga Sahai* v *Baldeo*, 20 A L. J. 117 65 I. C. 279, or failing to disclose their interest in any one of the parties or the subject-matter of the reference —*Kaliprasanna* v *Rajani*, 25 C. 141; *Mahommad* v. *Hakiman*, 29 C 278, or improperly adding another to their number amounts to misconduct within this para.—*Phiran* v. *Baroran*, 7 N. W. P. 367.

Making enquiries behind the back of any party also amounts to misconduct within the meaning of this para.—*Abdul Hamid* v. *Md Afzal*, A. I. R 1927 Lah. 425.

Acquiecence in Acts Amounting to Misconduct.—It is well-settled that arbitrators must be present during the whole of the proceedings and deliberations, but it is open to the parties to waive the absence of one of the several arbitrators. Therefore an award signed by an arbitrator, who was present one day only or for a short time and did not hear the evidence or take part in the deliberations of the remaining arbitrators is not invalid, if the irregularity is waived.—*Kunj Lal* v. *Banwari Lal*, 4 Pat L. J. 394: 48 I. C. 711; *Cursetji* v. *Crowder*, 18 B. 299; *Ramanath* v. *Ram Narain*, 67 I. C. 866.

Acts not Amounting to Misconduct.—It is not a valid objection to to an award that the arbitrators have not acted in strict conformity to the rules of evidence.—*Suppu* v. *Govindacharyar*, 11 M. 55; *Maung Shere* v. *Min Nyun*, 3 Rang. 387; 91 I. C. 659: A. I. R. 1925 Rang. 383. It is not misconduct on the part of an arbitrator to delegate, to a third person,

the performance of acts of a ministerial character, so long as he exercises his own judgment on the matters referred.—*Buta* v. *Municipal Committee of Lahore*, 29 C. 854: 29 I. A. 168. Misconduct cannot be presumed from the fact that the arbitrator is the relative of one of the parties —*Nainsukh* v. *Umadai*, 7 A. 273. From the mere fact that the arbitrators failed to satisfy the Court that their delay was due to the negligence of the parties or other proper causes, it cannot be presumed that they acted fraudulently. —*Savlappa* v. *Dev Chand*, 26 B. 182. An award cannot be set aside on the mere surmise that the arbitrator has been partial.—*Nainsookh* v. *Umadai*, 7 A. 273. An award is not vitiated by material irregularity by reason of the facts that one of the arbitrators used knowledge obtained by him privately, provided he communicated that knowledge to the other arbitrators in the presence of the parties.—*Sheik Mohidin* v *Ramaswami*, 41 M. L. J. 276.

The mere fact that the arbitrators questioned the parties as to their respective cases, would not amount to misconduct so as to vitiate an award, unless the parties were denied the opportunity of meeting the representations made by the other side —*Ramaswami* v. *Subbier*, 24 L. W. 482: 97 I. C. 472, A. I R. 1926 Mad. 1158

An award is not illegal by reason of the acceptance, by the arbitrators, of the offer of a fee for their services, such acceptance not involving any misconduct on their part —*Subraya* v. *Manjunath*, 29 M. 44

Where a particular arbitrator has been selected only because of his personal knowledge of the matter in dispute, it would not be a misconduct on his part to use his personal knowledge in coming to a certain decision, although in such cases it is desirable that he should tell the parties what his personal knowledge is and give an opportunity to adduce evidence sufficient to vary his views —*Daulat Sing* v *Ratna Anand Sing*, 28 Bom. L. R. 926: 97 I C 673· A I R. 1926 Bom 527.

Where the arbitrator is directly interested in the subject-matter of the litigation in that he would get a share out of the money which may be decreed to the plaintiff on the strength of the award, and the plaintiff does not disclose this matter in Court when the case is going to be referred to his arbitration, he, the plaintiff, can be considered to be guilty of fraudulent misconduct, and the case comes within cl (*b*) of this para — *Yusuf Khan* v *Riyasat Ali*, 3 O. L J 224 93 I. C. 446. A. I R 1926 Oudh 307.

A Court is justified in holding that an award is not valid and binding upon the defendant when the arbitrator was the retained pleader of the plaintiff, and no disclosure of this fact was made, before the arbitrator was appointed, to the defendant who was consequently unaware of it — *Kali Prosonno* v. *Rajani Kant*, 25 C 141, *Mahomed Wahiduddin* v. *Hakiman*, 29 C 278 6 C 235

Where the agreement to refer to arbitration was vague and indefinite and did not clearly lay down the power of the arbitrators in dealing with the subject-matter in dispute, and it was not possible to make out what powers were intended to be conferred upon the arbitrators *Held*, that the objection to the validity of the award was well founded —*Bindessuri Pershad* v *Jankee Pershad*, 16 C 412.

Award Made After the Expiration of the Period Allowed by the Court.—The words "or after the expiration of the period allowed by the Court" have been added to sub-cl. (*c*), and the words "and no award shall be valid unless made within the period allowed by the Court," which occurred in s. 521, have been omitted. The effect of this alteration is that the only remedy now open to the party impeaching an award, on the ground that it was made after the expiration of the period allowed by the Court, is to apply, under this para. to set aside the award. If no application is made to set aside the award under this paragraph, or if the application is made but refused, the award becomes final, and no appeal will lie from a decree based upon the award.—*Shib Kristo Daw & Co.* v. *Satish Chandra*, 39 C. 882. *Followed* in *Bhai Khan Singh* v. *Rai Bahadur*. *See* also, *Lala Mohan Lal*, 56 P. L. R. 1917.

Paragraph 15 of Sch. II of the C. P. Code does not render an award made out of time *per se* a nullity. The award is merely *voidable* and if not sought to be set aside within 10 days from the time when it was filed, it is binding upon the parties.—*Bibi Patto Kumari* v. *Upendra Nath*, 4 Pat L. J. 265; 50 I. C. 52

Under s. 521 of the old Code (this para.), an award made out of time was a nullity.—*Behari Das* v. *Kallian Das*, 8 A. 543; *Bhugwan Das* v. *Nund Lal*, 12 C. 173; *Simson* v. *Venkatagopalam*, 9 M. 475. *See* also, *Har Narain* v. *Bhugwan Kuor*, 13 A. 300, P. C., in which, approving *Chuha Mal* v. *Hari Ram*, 8 A. 548, and *reversing* 10 A. 137, it was held that where an award was not made within the period fixed by the Court's order, but was made after the date given in the last order extending the time for its delivery, the award was invalid. The above Privy Council case was *followed* in *Ram Monohur* v. *Lal Behari*, 14 C. 343. But under the present para. it is merely voidable, and if not set aside within the period provided by s. 158, Limitation Act, is binding upon the parties.

Objection to Invalidity of Award, When to be Taken.—An objection to an award on the ground that it is not an award or on the ground that it is invalid must be made at the time when it is filed. If no objection is then taken, or if it is made and disallowed, the party objecting cannot reagitate the matter by way of appeal from the decree.—*Mahomed Valli Asmal* v. *Valli Asmal*, 26 Bom. L. R. 171 26 M. 47: 31 A. 450 *distd.*; 36 B. 105 *reld. on*).

"Or being otherwise Invalid."—These words at the end of sub-cl. (*c*) are new. The object of adding them will appear from the following report of the Special Committee: "To meet the difficulty expressed in the case reported in 25 C. 141 (*Kali Prosonno Ghose* v. *Rajani Kant*), which followed many other cases in the Calcutta High Court, we have inserted the words "or being otherwise invalid" in sub-section (*c*) of s. 521 of the present Code. If therefore, either party considers the award invalid on any ground he can apply to have it set aside." The addition of these words is also meant to give effect to the principle of finality in cases of arbitration enunciated by the Judicial Committee in *Ghulam Khan* v. *Muhammad Hassan*, 29 C. 167 (183): 29 I. A. 51, and followed in *Chairman of the Purnea Municipality* v. *Siva Sankar*, 33 C. 899 (902).

The words "*or being otherwise invalid*" in clause (*c*) should not be read as *ejusdem generis* with the other cases mentioned in that clause

and are not restricted to cases where an award is bad on grounds like want of jurisdiction. On the other hand, they are meant to include all cases of invalidity, on grounds other than those mentioned. It is open to a minor by a suit instituted either through a guardian or when he attains majority, to impeach an award if he can prove that his guardian was grossly negligent or acted fraudulently in conducting the proceedings before the arbitrator.—*Lakshminarayana* v. *Ram Chandra*, 34 M. L. J. 71: 23 M. L. T. 89.

The meaning of the words " or being otherwise invalid " in Sch. II, para. 15, C. P. Code, and the doctrine of finality of decision either upholding or rejecting objections to an award explained with reference to the ruling in the Full Bench case of *Lutawan* v. *Lachiya*, 12 A. L. J. 57. —*Kanhaiya Lal* v. *Jagannath Pershad*, 43 A 305· 19 A L J. 33.

The words " being otherwise invalid " in Sch. II, para. 15 (1) (c) are intended to give effect to the principle of finality to awards.—15 S. L. R. 165: 65 I. C. 50.

Where an arbitrator, in a reference pending a suit, treats a person, who is not a party to the suit, as a party to the arbitration and decides disputes between parties to the suit or any of them and such person, however just and equitable the award may be, " it is otherwise invalid " within the meaning of para. 15, sub-cl (c).—*Lilaram* v. *Balchand*, A. I. R. 1927 Sind 193

An award is invalid if the arbitrators go beyond the scope of the suit and decide matters which are not in suit and which concern persons who are not parties to the suit.—*Rampratap* v *Durgapratap*, 28 C. W. N. 424. 83 I. C. 300: A. I. R 1924 Cal 567 The Privy Council held that such an award was not in accordance with the order of reference and therefore " otherwise invalid " under para. 15 —*Chamria* v *Chamria*, 53 I. A. 1, 53 C 258. 92 I C. 633· A. I. R 1925 P. C. 293.

Appeal.—Except in the case provided by s. 104, cl. (*a*), no appeal lies from an order under the paragraph setting aside or refusing to set aside an award —*Zahur Ahmed* v *Tashmunnissa*, 23 A L J. 891: 89 I C. 404: A. I R. 1926 All. 55 If the objecting party does not appear in support of the objection, the Court has no option but to pronounce judgment in accordance with award —*Raghunath* v *Bridhichan*, 3 Pat. 839 83 I. C. 26. A I R 1924 Pat. 603; and the decree made thereon cannot be set aside under Or. IX, r. 13, because it is not an *ex parte* decree.—*Raghunath* v. *Bridhichan*, 3 Pat. 839· 83 I C. 26 A I. R 1924 Pat 603 It has been held by the High Courts of Calcutta, Madras, Bombay and the Chief Court of the Punjab that though no appeal lies from an order setting aside an award, the legality of the order may be challenged on appeal from the decree that may ultimately be passed in the suit.—*Achuthayya* v. *Thimmayya*, 31 M 345; *Damodar* v. *Raghunath*, 26 B. 551; *Juma* v *Mubarak*, 97 P R 1912 133 P L R 1912· 106 P. W. R. 1912: 15 I. C 62, *Ambica* v *Nadyar*, 11 C 172. The Allahabad High Court took a contrary view in *Ganga Prasad* v *Kura*, 28 A. 408

Revision.—An order setting aside or refusing to set aside an award is not open to revision.—*Kalicharan* v. *Sarat Chunder*, 30 C. 397; *Damodar* v *Raghu Nath*, 26 B. 537; *Chimanbhai* v. *Keshavlal*, 47 B 721· 73 I. C.

464. A. I. R. 1923 Bom. 402; *Shah Muhammad* v. *Rahmiullah*, 47 A. 121 · 85 I. C 502: A. I. R. 25 All. 458. But an order superseding arbitration may be attacked under s. 105 in appeal from the decree in the suit. —*Rudra Prasad* v *Mathura Prasad*, 47 A. 916: 89 I. C. 175. A. I R 1925 All. 566. An order under this para. setting aside an award on the ground of the arbitrator's misconduct, is not subject to revision by the High Court in the exercise of the power conferred on it under s 115—*Chatter Singh* v *Lekhraj*, 5 A. 293; *Damodar Trimbak* v. *Raghunath Hari*, 26 B 551

Judgment to be according to award.

16. (1) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.

[S. 522.]

COMMENTARY.

Alterations in the Para.—Sub-rule (1) corresponds to paras. 1 and 2 of s. 522, C. P. Code, with this modification that the word "*pronounce*" has been substituted for the word "give."

The third para of s 522, which ran as follows, "*or if the award has been submitted to it in the form of a special case, according to its own opinion on such case,*" has been omitted.

Sub-para. (2). "No appeal shall lie from such a decree except in so far as the decree is in excess of, or not in accordance with, the award." —Sub-para. (2) corresponds to the last para. of the old section, with some alterations and omissions; the old para. is reproduced here for the purpose of comparison: "*Upon the judgment so given, a decree shall follow, and shall be enforced in manner provided in this Code for the execution of decrees. No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.*"

This paragraph gives effect to the "principle of finality" of awards, by declaring that no appeal shall lie from a decree based on an award, except in so far as the decree is in excess of, or not in accordance with, the award.—*Ghulam Khan* v. *Muhammad Hassan*, 29 C. 167: 29 I A. 51; *Hansraj* v. *Sundar Lal*, 35 C. 648: 35 I. A. 88.

"After the time for making an application to set aside an award has expired."—The period of limitation for an application to set aside an award is ten days from its submission to the Court under Art 158 of the Limitation Act (IX of 1908). The date of submission of the award to the Court is the date on which the award is received by the Registrar of the

Court —*Nobin Kally* v. *Ambica*, 5 C. W. N. 813. In *Sova Chand* v. *Hurry Bux*, 40 C. 721: 53 I. C. 40, it was held that it means the date of filing the award

" An appeal lies from a decree based upon a judgment pronounced in contravention of the provisions of this paragraph, though the decree may be in accordance with the award."—Where a decree is passed on an award before the time for making the application to set aside the award has expired an appeal will lie from the decree, though the decree may be in accordance with the award.—*Najimuddin* v. *Albert Puech*, 29 A 584; *Baijnath* v *Narain Prasad*, A I. R 1927 All. 614. The Bombay, Lahore and Madras High Courts have held that in such cases the High Court can interfere in revision under s. 115 —*Raojibhai* v. *Dabyabhai*, 45 B. 832: 59 I C 811; *Bhikka Lal* v. *Acharat Lal*, 49 B. 535 87 I. C 910: A. I. R. 1925 Bom 341; *Ruddaraju* v *Narayanraju*, (1912) M W N. 1232: 12 M. L. T. 608, *Bhagat Darbari* v *Bhika*, 3 Lah L J 487.

" The Court shall proceed to give judgment according to the award."—The Court can only give judgment in accordance with the award, and cannot add an order for interest to it, if interest has not been given —*Mohun Lall* v *Joy Narain*, 23 W R. 105

Held, *per* Mahmood, J —The word " award " used in the last sentence of s 522, C P Code, 1882 (r. 16), must be understood to mean an award as given by the arbitrators and as amended by the Court under s 518, C. P. Code, 1882 (r 12) The words " in excess of, or not in accordance with, the award " used in s 522, C P .Code, 1882 (r. 16), were intended to enable the Court of appeal to check the improper use of the power conferred by s. 518, C P Code, 1882 —*Jawahar Singh* v. *Mulraj*, 8 A 449.

Where the partners of a firm in their partnership deed agreed to refer the dispute to arbitration, and the reference gave the arbitrators a power to make partition, but omitted a power to sell *Held*, on the award being made a rule of Court, that the Court had no power to order the sale of certain property of which the arbitrators were unable to make partition, and the sale of which they recommended on that ground —*Chunimoney* v. *Nistarini*, 3 C. L R 357.

Finality of Decree in Accordance with Award.—*See the Report of the Special Committee quoted under the heading* " NO APPEAL SHALL LIE FROM SUCH A DECREE, ETC "

No appeal lies from a decree based on an award except in so far as the decree is in excess of or not in accordance with the award.—*Ghulam Khan* v *Muhammad Hassan*, 29 C 167, P C 6 C W N. 226, P. C.; *Chairman of the Purnea Municipality* v *Siva Shankar*, 33 C 899, *Behary Lal* v *Chuni Lal*, 29 A 457, *Hansraj* v *Sundar Lal*, 35 C 648, P C. 7 C. L J 520, *Abdul Ali*, v *Anwar Ali*, 11 C W N. 220, *Debendra Nath* v. *Sarbamangola Debi*, 8 C W. N 916, *Haranund Naskar* v *Doyalchand*, 2 C.L J. 142, *Walji Mathuradas* v *Ebji Umersey*, 29 B. 285, *Shiva Prasad* v. *Lachman Prasad*, 46 I C 785, *Batcha Sahib* v *Abdul Gunny*, 38 M. 256: 25 M L. J. 507, *Hari Shanker* v. *Ram Pyari*, 45 A 441: 21 A L. J 326 The only cases in which the Code allows an appeal from a decree

based on an award are: (1) where the decree is in excess of the award, or (2) where the decree is not in accordance with the award.

No appeal lies from a decree passed in terms of the award, even though the award itself was one liable to be set aside as one made beyond the date allowed —*Shib Kristo* v. *Satis Chandra*, 39 C. 822

An Appeal Lies where the Award is Not in Accordance with the Provisions of Para. 16, cl. (1).—An award must be in conformity with cl. (1) of para 16 in order that a decree passed on it may be unappealable—*Tursi* v *Basdeo*, A I R 1926 All. 567. This is perfectly clear from the language used in cl. (2) of para 16. The words are " upon the judgment so pronounced " The words " so pronounced " imply that the award should be one contemplated by cl. (1) of para 16 —*Sahdeo* v. *Melha Singh*, 24 A. L J. 1036, A I R. 1926 All 120

Finality of Decree on Fresh Award.—Where the Court remits an award under rule 14 and the arbitrators submit a fresh award and the Court passes a decree in accordance with such revised award under this para no appeal lies against such decree on the ground that the order of the remittal was wrong and that the original award ought to have been accepted and acted upon —*Subbiahiyer* v *Subramonia*, 31 M. 479: 18 M L J 485.

Invalid Award.—It was held under the old Code in a number of cases that though a decree might be in accordance with the award, it could be challenged by way of appeal on the ground that there was no valid and legal award · the reason being that s. 521 of the old Code presupposed a valid and legal award and not an award upon which no decree could be passed —*Kali Prasanna* v. *Rajani Kant*, 25 C 141; *Nandram* v *Hem Chand*, 17 B 357; *Lachman* v *Brijpal*, 6 A. 174; *Shiblal* v *Chatrabhuj*, 31 A 450, *Romes* v. *Karunamayi*, 33 C. 498. But a contrary view was taken by the Privy Council in *Ghulam Khan* v. *Muhammad Hussain*, 29 C. 167 · 29 I A 51 The words " except in so far as the decree is in excess of, or not in accordance with, the award," in cl. (2) of para 16, now make it clear that no appeal lies from a decree passed in accordance with the award on the ground that the award was invalid —*Chairman of the Purnea Municipality* v. *Siva Sankar*, 33 C. 899; *Kanakku* v. *Nagalinga* 32 M 510 In such a case the party aggrieved may apply under para 15 (1) (c) to have the award set aside.—*Guran Ditta* v. *Pokhar Ram*, A. I. R 1927 Lah 362, *Hari Shankar* v *Ram Piari*, 45 A. 441: A. I. R. 1923 All 502 If he does not avail himself of that remedy, the award becomes final and no appeal lies from the decree based upon the award —*Mahomed* v *Valli*, 26 Bom. L R. 171: A. I. R. 1924 Bom. 324.

Second Appeal.—Where the Court of first instance sets aside the award and passes a decree on the merits, and the first Appellate Court reversing that decree passes judgment in accordance with the award *Held*, that the decision of the Appellate Court is not final under s 522, C. P. Code, 1882 (r. 16), and a second appeal lay. The mere fact that the decree of the first Appellate Court is in accordance with the award is no ground for refusing the appeal —*Shyama Charan* v. *Prolhad*, 8 C W N. 390; *Ganga Prasad* v. *Kurra*, 28 A. 408.

A second appeal will also lie to the High Court where the decree of the Court of first instance is in accordance with the award, and such decree is set aside by the first Appellate Court.—*Krishnan* v. *Muthu*, 22 M 172

Power of Arbitrators to Review their Decision.—After an award has been made and handed to the parties, the functions of the arbitrators cease. They have no power afterwards to deal with an application for review of their decision.—*Dutto Singh* v. *Dosad Bahadur*, 9 C. 575.

High Court's Power of Revision.—An order under s 521, C P. Code 1882 (r. 15), setting aside an award, made on a reference to arbitration in the course of a suit, on the ground of the arbitrator's misconduct, is not subject to revision by the High Court under s 622, C P. Code, 1882 (s 115)—*Chatter Singh* v. *Lekraj Singh*, 5 A 293

Where an order is made refusing to file an award no appeal lies from it, but the High Court can interfere under s 622, C P Code, 1882 (s 115)—*Mana Vikroma* v *Mallicherry*, 3 M 68

Where a decree was passed in the terms of an arbitration award without giving notice of its filing to the parties as required by s. 516, C. P. Code, 1882 (r. 18). *Held*, that it was a good ground for a revision of the decree based upon the award under s 622, C. P .Code, 1882 (s 115)—*Chatarbuj Das* v *Ganesh Ram*, 20 A 474 *See* also, *Rangasami* v. *Muthusami*, 11 M 144

Where a Court passes a decree in terms of an award without giving the parties time to file objection, no appeal lies, against the decree, but the High Court has power to set aside the decree in the exercise of its discretion under s. 115, C P Code.—*Ranjibhai* v *Dahyabhai*, 45 B 832, 22 Bom L. R 1454.

Where a Court passes a decree on an award over ruling the objections of a party without giving him an opportunity to substantiate them by evidence, there is a revision, but not an appeal against the decree.—*Bhagat Darbari Ram* v *Bhikha Ram*, 3 Lah L J. 487; 20 P L R 1922

In any case where there is a disregard of the law amounting to an excess jurisdiction, or a perversion of the purposes of the Legislature, the High Court will interfere under its extraordinary jurisdiction where no other remedy is available.—*Dagdusa Tilak Chand* v *Bhukan Govind*, 9 B 82. *See* also *Merali* v *Sheriff* 36 B 105.

Binding Effect of an Arbitration Award.—An award upon a question referred to arbitrators, on whose part no misconduct or mistake appears, precludes the parties who have submitted to the reference from afterwards contesting in a suit the question so referred and disposed of by the award—*Bhagoti* v *Chandan*, 11 C 386, P C *See* also, *Ghellabhai* v *Nandubai*, 20 B. 238

A judgment and decree passed in terms of an award under s 522, C. P. Code, 1882 (r. 16), constitute *res judicata*.—*Vyankatesh* v *Sakharam*, 21 Bom 465 *See* also, *Wazeer Mahton* v *Chuni Singh*, 7 C. 727.

An award on a private reference made by some of the plaintiffs and the defendants is binding on the rights of the parties to it. The award

is not invalid on the ground that all the plaintiffs were not parties to it—*Jadu Nath* v. *Kailas*, 10 C. L. J. 41. *See*, *Lal Mohun* v. *Surju Kumar*, 11 C. W. N. 1152.

A person who is stranger to the submission to arbitration and who is not a party to the award, is not under an obligation to abide by the award.—*Hira Singh* v. *Ganga Sahai*, 6 A. 322, P. C. (*affirming* 2 A. 809)

A decree on an arbitration award, one of the parties to the submission having been a Hindu widow or daughter, is not binding on the reversioners.—*Gobind Krishna* v. *Khunni Lal*, 29 A. 487

"Suit upon award."—Where a decree is passed in terms of an award, the only mode of enforcing the award is by way of executing the decree, and no separate suit will lie to enforce the award.—*Sasi Sekhareswar* v *Lalit Mohan*, 52 C 314 52 I A 79.

Distinction between Valuer and Arbitrator.—In a partition suit it was arranged between the parties that the defendant, who was the owner of two-thirds share, should buy the plaintiff's one-third share at a price to be settled by certain persons named in the petition of compromise. The referees accordingly made their award and the Court gave judgment upon the award *Held*, on appeal, that the persons to whom it was referred to settle the price were rather valuers than arbitrators, and the order of reference cannot accordingly be regarded as one under s 506 C P. Code, 1882 (r 1) and no decree on the award of the valuers can be made under s. 522, C. P. Code, 1882 (r. 16).—*Chooncy Money* v *Ram Kinkar*, 28 C. 155: 5 C. W. N. 242. *Followed* in *Macnaghten* v. *Rameshwar*, 30 C 831.

When the Court Acts as Arbitrator.—In the course of a suit, both the plaintiff and the defendant jointly presented a petition requesting the Court to inspect the site and peruse the documents filed in the suit and agreeing to abide by the decision which the Court might be pleased to pass as the final decision *Held*, that the Court acted as an arbitrator by consent of the parties and no appeal lay from its decision —*Nidamarthi* v *Thammana* 26 M. 76; *Sayad Zain* v. *Kalabhai*, 23 B. 752. A decree passed in accordance with such a decision must be regarded as a consent decree, and it comes within the purview of Or. XXIII, r. 3 —*Chinna* v. *Venkatasami*, 42 M 625, 628. *See* also, *Baikanta* v. *Sita Nath*, 38 C. 421.

ORDER OF REFERENCE ON AGREEMENTS TO REFER.

Application to file in Court agrement to refer to arbitration.

17. (1) Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement, or any of them, may apply to any Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator. [S. 523.]

COMMENTARY.

This para corresponds to s 523, C P. Code, 1882, with several alterations and additions

Sub-rule (1) with some additions and alterations, corresponds to para. 1 of the old section, which ran as follows "*When any persons agree in writing that any difference between them shall be referred to the arbitration of any person named in the agreement, or to be appointed by any Court having jurisdiction in the matter to which the agreement relates, the parties thereto, or any of them, may apply that the agreement be filed in Court*"

Sub-rule (2) exactly corresponds to para. 2, and sub-rule (3) exactly corresponds to para 3 of the old section

Sub-rule (4) has been substituted for para 4 of the old section, which ran as follows· "*If no sufficient cause be shown, the Court may cause the agreement to be filed, and shall make an order of reference thereon, and may also nominate the arbitrator, when he is not named therein and the parties cannot agree as to the nomination.*"

The changes introduced by the present rule will clearly appear on a comparison of the provisions of the new rule with that of the old section.

Application of the Para. to Cases Governed by the Indian Arbitration Act.—The procedure prescribed by this paragraph does not apply to cases to which the Arbitration Act applies —*See* s 3 of the Indian Arbitration Act (IX of 1899)

Meaning and Scope of this Para.—Para 17 and the subsequent para. refer to cases in which persons themselves agree, independently of the Court, to refer the matters in difference between them to arbitration.

In such a case any party to the agreement may apply to the Court to have the agreement filed and to have an order of reference made thereon. Where such an order is made, the provisions of paras 2 to 16 apply to the proceedings in so far as they are consistent which the agreement so filed.—*Sheo Dat* v. *Sheo Shankar*, 27 A. 53; *Ghulam Khan* v. *Mahammad Hussain*, 29 C. 167: 29 I. A. 51.

Agreement to Refer Future difference to Arbitration.—A general agreement to refer future differences to arbitration comes within this para and may be filed. The para. is not confined to cases in which a dispute actually existing at date of agreement is agreed to refer to arbitration. But the agreement must name the arbitrator or arbitrators and an agreement which provides for the future appointment or election of arbitrators does not fall within the section. The effect of the last clause of s. 523, C. P. Code, 1882 (r. 17) is to give the parties to such an agreement power to nominate the arbitrator, even when they have agreed that he shall be appointed by the Court. In such cases the Court must appoint their nominee.—*Fazulbhoy* v. *Bombay and Persia Steam Navigation Company*, 20 B. 232.

Agreement to refer to Arbitration Matters in Dispute in a Pending Suit.—An agreement between the parties to refer matters in difference in a pending suit to arbitration, without the leave of the Court under paras 1 to 3, is illegal as an invasion of the jurisdiction of the Court, and that an award made on such an agreement is a nullity and cannot be treated as an adjustment, because Or. XXIII, r. 3 is subject to s. 89.—*Amarchand* v. *Banwari*, 49 C. 608: 69 I. C. 808: A. I. R. 1922 Cal. 404; *Ram Pratap* v. *Durga Prasad*, 28 C. W. N. 424: 83 I. C. 300: A. I. R. 1924 Cal. 567. Under the old Code it was held by the Calcutta and Punjab Courts that the corresponding section 523 did not apply to an agreement to refer to arbitration matters in difference in a pending suit.—*Tin Cowry* v. *Fakir Chand*, 30 C. 218: 7 C. W. N. 180, *Dhan Singh* v. *Kahu Singh*, 115 P. R. 1912. But a contrary view was taken by the Bombay and Allahabad High Courts in *Harivalab Das* v. *Utam Chand*, 4 B. 1, *Sheo Dat* v. *Sheo Shankar*, 27 A. 53. Where a pending suit was, by an agreement between the parties, withdrawn, and after such withdrawal, the matter in dispute was referred to arbitration under this para., and an award was made and filed under paras 20 and 21, it was held that the Court having surrendered its jurisdiction by allowing the suit to be withdrawn, the procedure was quite correct.—*Kolil Singh* v. *Ramaswami*, 3 Pat 443. A. I. R. 1924 Pat. 488.

Revocation of Agreement to Refer to Arbitration.—*See notes under para. 3.*

Where a party has been induced by misrepresentation to refer to arbitration he is at liberty to revoke the reference and the agreement to refer cannot be filed in Court.—*Ganesh Das* v. *Kesho Das*, 50 I. C. 637.

Power of Court to Remit or Set Aside Award Made under this Para.—In a suit for partition and to take account, where the arbitrators to whom the case was referred to under this section, omitted to carry out the terms of reference and left undetermined a very important matter *viz.*, the settlement of the accounts. *Held, that the Court,* instead of confirming

the award, should have remitted it under s 523, C. P. Code, 1882 (r 17), for the consideration of the arbitrators.—*Sadik Ali* v *Imdad Ali*, 3 A. 286.

In an agreement to submit to arbitration, which was filed in Court under the provisions of s 523, C. P. Code, 1882 (r. 17), it was stipulated that the decision of the arbitrator should be accepted as final, and that no appeal therefrom should be made by either party. *Held*, that this stipulation did not prevent the Court from setting aside the award, on the ground of misconduct on the part of the arbitrator.—*Ranga* v *Sithoya*, 6 M. 368.

" The agreement shall be in writing."—The paragraph does not apply unless the agreement to refer is in writing —*Tin Cowry* v. *Fakir Chand*, 30 C. 218.

" Shall be numbered and registered as a suit."—When an application is presented under sub-para (1), it has to be numbered and registered as a suit, but that does not mean that proceeding under this para is a suit, because a suit is commenced by filing a plaint —*Satish* v *Paliram*, 6 Pat. L. J. 287 : 61 I. C 390; *Rajmal* v. *Maruti*, 22 Bom. L R 1377: 59 I. C. 755 It has been held by the Calcutta High Court that a proceeding under para. 21 is a suit —*Guru Charan* v *Uma Charan*, 26 C. W N. 240: 70 I C 985

Umpire.—In an agreement to refer certain matter to arbitration which was filed in Court under s 523, C P Code, 1882 (r. 17), and on which an order of reference was made, there was no provision for difference of opinion by appointment of an umpire The arbitrators being unable to agree, the Court appointed an umpire An award was made by the umpire and one arbitrator, without the concurrence of the other arbitrator, and submitted to the Court, which passed a decree in accordance with its terms *Held*, that there had been no legal award, inasmuch as the agreement to refer gave the Court no power to appoint an umpire —*Muhammad Abid* v. *Muhammad Ashgar*, 8 A 64

" Sufficient cause " Against the filing of the Agreement.—Where the parties had executed a deed agreeing to refer all matters in dispute to the arbitration of three persons, and one of the arbitrators refused to continue to act, and the others had consequently refused to proceed with the reference, the Court refused to order the agreement to be filed in the Court —*Brooke* v *Surdial*, 12 B L R App 13

Under ss 523 and 525, C P Code, 1882 (rr 17, 20) parties to a suit as well as persons not engaged in litigation may agree to refer matters in dispute between them to private arbitration without the intervention of the Court, and may apply to have the agreement filed; and the mere fact that a suit is pending with respect to the matters in dispute, is not of itself a sufficient reason to induce the Court to refuse to file the agreement —*Harivalab Das* v *Utamchand*, 4 B 1, *Rahatullah* v *Ibadullah*, 4 O L. J 131 40 I C 38.

The Court should not make an order of reference under this para. where the agreement is to refer to several persons specifically named as arbitrators and one of them dies before the application under this para.

is made.—*Mohanlal* v *Damodar Das*, (1918) Punj. Rec. No. 71, p 238, *Ma Ba U* v *Maung Pe Lan*, 11 Bur. L T. 160: 42 I. C. 911. But the Court is competent to make an order of reference if the agreement expressly provides that in case of death of any arbitrator, another arbitrator may be appointed in his place.—*Sri Ram* v. *Sorabji*, (1919) Punj Rec No. 155, p. 114.

On a reference to arbitration without the intervention of the Court, one of the parties declined to act after the proceedings were begun *Held*, that it was competent to the Court to make an order of reference under para. 17, Sch II, C. P Code on the application of one of the parties and to appoint a new arbitrator under para. 5 even in the absence of a provision to that effect in the deed of aggreement —*Fazal Illahi* v *Prag Narain*, 44 A. 523 20 A. L. J. 327.

During the pendency of the arbitration proceedings on a private reference one of the parties died and the arbitrator thinking that he had no power to bring the representatives of the deceased on the record refused to go on with the arbitration On an application for filing the agreement referring the matters to arbitration, *held*, that the Court could not order the arbitrator to carry on the arbitration proceedings.—*Ahmad Noor Khan* v. *Abdul Rahman Khan*, 42 A 191: 18 A L J. 76: 54 I. C 366

Under the Mahomedan Law, a mother who has not been appointed guardian of the properties of her minor children by the District Judge under the Guardians and Wards Act is not competent to bind the minors by an agreement to refer to arbitration disputes between the minors and other persons regarding their moveable and immoveable properties Such an agreement is not for the manifest advantage of the minors and does not amount to an acceptance on their behalf of an unburdened bounty and can not be filed in Court under Sch II para 17 of the C P. Code—*Mohesenuddin Ahmed* v *Khabiruddin Ahmed*, 47 C 713: 57 I C 915

An agreement to refer to arbitration does not become void by reason of the resignation of one of the arbitrators and this is not a sufficient reason for refusing to file the agreement in Court, in as much as there was a distinct provision in the agreement that in case of disability, resignation or death of any arbitrator, the party which had elected such arbitrator would be competent to appoint another in such arbitrator's place —*Sriram* v *Sorabji*, 3 Lah L J 276.

"Arbitrator appointed in accordance with the provisions of the agreement."—The provision is mandatory Thus where an agreement provides for a reference to a European merchant, the Court has no power to appoint an Indian merchant, *Dreyfus & Co.* v. *Gurditta*, 35 P. R 1911: 9 I. C. 655.

Appeal from Orders Filing or Refusing to File an Agreement to Refer to [illegible] (1) (*d*), an appeal lies from an order under this [illegible] file an agreement to refer to arbitration It [illegible] under the old Code —*Ghulam Khan* v. *Mu* [illegible]

18. Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible oppportunity and in all cases where issues are settled at or before such settlement, apply to the Court to stay the suit; and the Court if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit. [New.]

Stay of suit where there is an agreement to refer to arbitration.

COMMENTARY.

Scope and Object of the Para.—This para. is new and it corresponds to section 19 of the Indian Arbitration Act (IX of 1899). It gives a party who is willing to abide by the agreement, the right to apply for a stay of the suit filed by the other party and has been inserted to meet the cases noted below Under this para the suit will not be barred, but its proceedings may be stayed by an application at the earliest opportunity

Applicability of the para.—A suit was referred to arbitration but subsequently although the arbitrator did not resign or decline to act, practical difficulties arose so as to prevent arbitration proceedings being taken in by the arbitrator and the Court cancelled the arbitration and ordered the suit to be proceeded therewith. *Held*, that para 18, C. P Code, was not applicable to the circumstances of the present case —*Rani Sashi Mukhi v. Parbati Roy Chowdhury*, 23 C W N 293 50 I C. 879

"No sufficient reason."—It is for the plaintiff to show that some sufficient reason exists why the matter should not be referred to arbitration and not for the defendant to show that no such reason exists —*Dinabandhu v Durgaprasad*, 46 C. 1041, *Gonesh Das Ishar Das v Durga*, 3 Lah L J 61 60 I C 776

"Institutes any suit."—This para applies only to suits inst[illegible] after the agreement to refer to arbitration has been made The C[illegible] no power to stay the suit under this para where a suit is fi[illegible] then the parties agree to refer the matters to arbitration.—[illegible] *House*, 35 C 199; *Peruri v Gullapadi*, 34 B 372.

The institution of a suit has not *ipso facto* the effe[illegible] a previous reference to arbitration dealing with the sam[illegible] but if after the institution of the suit, neither party [illegible] of the hearing of the suit under Sch II, para 18, C[illegible] the time of the settlement of issues or before, th[illegible] is to supersede the arbitration for good and any d[illegible] arrived at in that suit would be binding on th[illegible]

reference to arbitration had been made prior to the suit.—*Bainab v Budhna*, 25 O. C. 63: 68 I. C. 235; *Sarat Chandra v Rajkumar*, 60 I C. 863.

Agreement to Refer to Arbitration, Whether Bars a Suit.—Where parties to a suit have agreed to refer the matters in dispute between them in such suit to arbitration, such an agreement ousts the jurisdiction of the Court to proceed with the suit, whether it is filed in Court under the provisions of s. 523, C P. Code, 1882 (r. 17) or not.—*Sheo Dat v Sheo Shanker*, 27 A. 53 (4 A. 546 and 9 A. 168 *followed*). But the Court should proceed with the suit after removing the stay where the arbitrators having been found unwilling to act, the plaintiff applied for removal of the stay —*Laxman Upendra v Manju Nath*, 45 B. 1181: 23 Bom L R 511

When a Court is apprised that a suit has been instituted in contravention of an arbitration agreement, the Court has a discretion to stay the suit and the burden lies on the plaintiff to show that some sufficient reason exists why the matter should not be so referred and not on the defendant to show that such reason exists.—*Gonesh Das v. Durga Dat*, 3 Lah L J 61 · 60 I C 776; *Volkart Bros v. Fateh Muhammad Karim Baksh*, 61 I C 322

To bar a suit under s 21 of the Specific Relief Act (I of 1877), it must be shown that the plaintiff had refused to perform the agreement to refer to arbitration before the action is brought; the filing of the plaint is not such a refusal.—*Koomud Chunder v. Chunder Kant*, 5 C 498, 5 C. L R. 264; *Crisp v Adlard*, 23 C 956; and *Tahal v. Bisheshar*, 8 A 57 On this point, *see* also, *Saliq Ram v. Jhunna Koer*, 4 A. 546; *Sheoamber v Deodat*, 9 A. 168, and *Adhibai v. Cursandas Nathu*, 11 B. 199.

A suit will not lie to enforce an agreement to refer to arbitration even in the case referred to in the first exception to s. 28 of the Contract Act, IX of 1872 But that section does not forbid an action for damages for the breach of such an agreement —*Koegler v. The Coringa Oil Company*, 1 C 42 (on appeal 1 C 466)

See also the cases noted under para. 22.

Power of Court When Agreement to Refer Dispute to Arbitration is Set Up by One Party and Denied by the Other.—A Court can only take action under para 18, Sch. II, C P. Code, when there is a subsisting agreement to refer a dispute to arbitration. It is not necessary that both parties should admit that there is an agreement to refer. It is for the Court to decide whether or not such an agreement had as a matter of fact been made —*Firm of Sheo Parshad Radha Kishen v. Indore Malwa United Mills*, 62 P. R. 1917 · 65 P. W. R. 1917: 39 I. C. 508

" Apply to the Court to stay the suit."—Where after a reference to arbitration one of the parties brings a suit against the other and the latter deliberately refrains from applying for stay of the suit, he must be deemed to have waived his right to arbitration.—*Chimman Lal Posti Mal v Firm Fool Chand Fateh Chand*, 44 A. 292: 20 A. L J. 128. 65 I C. 795; *Ram Nath v Ramrangam*, (1922) C. 181.

Appeal.—Under s 104 (1) (c), an appeal lies from an order staying or refusing to stay a suit when there is an agreement to refer to arbitration.

19. The foregoing provisions, so far as they are consistent with any agreement filed under paragraph 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to the decree following thereon.
[S. 524.]

Provisions applicable to proceedings under paragraph 17.

COMMENTARY.

This para. corresponds to s 524, C. P Code, 1882, with some alterations of a verbal character.

"So far as they are consistent with any agreement filed under para. 17—The words "so far as they are consistent with any agreement so filed" in this para. do not mean that the agreement must contain in every case an express provision as to what ought to be done if any arbitrator is unwilling to act in order that a Judge may act in conformity to it, and that r 5 has otherwise no application The reasonable construction is that the action of the Judge under r. 5 should not be inconsistent with the agreement, if it contains any special provision on the subject.—*Bala* v. *Seetharama*, 17 M. 498

In an agreement to submit to arbitration, which was filed in Court under s 523, C P Code, 1882 (r 17), it was stipulated that the decision of the arbitrator should be accepted as final, and that no appeal therefrom should be made by either party *Held*, that this stipulation did not prevent the Court from setting aside the award on the ground of misconduct on the part of the arbitrator —*Bala* v *Kalapali*, 6 M 368

ARBITRATION WITHOUT THE INTERVENTION OF A COURT.

20. (1) Where any matter has been referred to arbitration without the intervention of a Court, and an award has been made thereon, any person interested in the award may apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court

Filing award in matter referred to arbitration without intervention of Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants

(3) The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.
[S. 525.]

COMMENTARY.

This para corresponds to s 525, C. P. Code, 1882 No other alteration has been made except that the words "any Court having jurisdiction over the subject-matter of the award" have been substituted for the words "Court of the lowest grade having jurisdiction over the matter to which it relates."

The provisions of the Code, *relating to arbitration are not compulsory*, but enabling and they provide certain courses of procedure to be followed if the parties desire to adopt those provisions, but it does not enact that no other course shall be pursued So, where an award is made otherwise than in a suit, the parties need not apply under this rule but may *file a suit to enforce it See the cases noted under rule 21 under the heading "Suit to enforce a private award"*

Scope of the Paragraph.—This para and para. 21 refer *to cases where the agreement of reference is made and the arbitration* itself takes place without the intervention of the Court, and the assistance of the Court is only sought in order to give effect to the award —*Ghulam Khan* v *Muhammad Hassan*, 29 C 167 29 I A 21

This Para. does Not Apply to Arbitration in a Pending Suit.—The provisions of paras 20 and 21 of Sch. II of the C. P. Code have no application to cases where the matters referred to arbitration are *already the subject matter of a suit between the parties to the reference* —*Mani Lal Moti Lal* v. *Gokal Das*, 45 B 245 22 Bom. L R 1048; *Chaubasappa* v. *Baslingayya*, 29 Bom. L R 1254 F B : A I. R. 1927 Bom 567

This Paragraph is No Bar to a Regular Suit to Enforce an Award.—Under the corresponding section 525 of the old Code, it was held that a party interested in an award may, at his option, either avail himself of the summary remedy to enforce the award as provided by that section or he may bring a regular suit to enforce the award —*Subbaraya* v. *Sadasiva*, 20 M. 490, *Bhajahari* v. *Bihari Lal*, 33 C. 381. A suit can be brought upon an award independently of the summary procedure authorized by this paragraph at any period which the law of limitation of suits permits —*Wazir Ali* v *Mulkyar*, 34 P R. 1910 11 P W. R. 1910: 5 I. C. 597.

A Valid Award Bars a Suit on Original Demand.—A valid award operates to merge and extinguish all claims embraced in the submission, and after it has been made, the submission and the award *furnish the only basis by which the rights of the parties can be determined* and constitutes *a bar to any action on the original demand*.—*Krishna* v. *Balaram*, 19 M 220, *Bhajahari* v *Bihari Lal*, 33 C 881.

"Any person interested in the award."—A person who is a stranger to the submission to reference and under no obligation to abide by the award could not be said to be a person interested in the award within the meaning of Sch II, para 20 of the C P. Code.—*Pandit Sankara Prasad* v. *Jagannath*, 9 O L J 410 (1922) Oudh 276

"Where any matter has been referred to arbitration."—A Civil Court has jurisdiction to file an award and pass a decree *thereon* under this para. and para 21 though the matter referred to arbitration is one to which a Civil Court has no jurisdiction to entertain a suit under s. 9 of the C.

P. Code.—*Raghavendra* v. *Gururao*, 15 Bom. L. R. 362; *see* also, *Muhammad Ibrahim* v. *Ahmad*, 32 A. 503, in which it was held that the right to succeed to the trusteeship of a public charitable trust is not a right which can be settled by arbitration without the intervention of a Court. A Court therefore has no jurisdiction to entertain an application to file an award in such a matter under this paragraph

Court to which Application should be Made under this Paragraph.—The words " subject-matter of the award " have been substituted in the paragraph for the words " matter to which the award relates," to make it clear that an application under this paragraph may be made to any Court having jurisdiction over the subject-matter of the award. It is the subject-matter of the award, and not the subject-matter of the reference, that determines the jurisdiction of the Court under this paragraph A Court has therefore no jurisdiction to file an award and to pronounce judgment upon it and to frame a decree in accordance with the provisions thereof where the decree would not affect any person or property within the jurisdiction of the Court —*Ram Lal* v. *Kishan Chand*, 51 C. 361 · 51 I. A. 72: 83 I C 534 A I R 1924 P C. 95

Persons Competent to Apply under this Para.—The word " parties," as used in s. 525, C P Code, 1882 (r 20), should not be confined to persons who are actually before the arbitrators, as well as those who are likely to be affected by the award —If parties, by an agreement, have undertaken between themselves that, in the event of a certain state of things happening, a particular procedure shall be followed, which, under one set of circumstances, may be adapted *in invitum*, then, for the purposes of this paragraph, they should be regarded as parties to the arbitration.—*Jones* v. *Ledgard*, 8 A. 340

Where a matter has been referred to arbitration, without the intervention of the Court, by parties, one of whom is an agriculturist, and an award has been made thereon, any person interested in the award may, without obtaining the conciliator's certificate, apply for the filing of the award under s 525, C P Code, 1882 (r 20), the provisions of which are not superseded by s. 47 of the Dekhan Agriculturist's Relief Act, 1879 —*Gangadhar* v. *Mahadu Santaji*, 8 B 20

A natural guardian of a minor has power to submit to a private arbitration, provided the submission and the award are for the benefit of the minor —*Romon Kissen* v *Hurrolall*, 19 C. 334 But see, *Lakshmana* v. *Chinnathambi*, 24 M 326, where it has been held that submission and award by a minor's guardian without the sanction of the Court under s. 462, C P Code, 1882 (O XXXII, r 7), are invalid.

Proceedings taken to file and enforce a private award are of the nature of a suit, and a minor must be represented in such proceedings by a person holding a certificate of administration —*Vasudev Vishnu* v *Narayan Jagannath*, 9 Bom H C 289

The power given by Sch II, para 20 to any person interested to apply to a Court to have an award filed in Court does not override the general power under Or XXIII, r. 3 to adjust disputes by a lawful compromise at any time after the institution of a suit —*Chintalapalli* v. *Venkanna*, 76 I C. 502.

Small Cause Court.—When a matter has been referred to arbitration without the intervention of any Court, a Small Cause Court in the Mofussil has jurisdiction to entertain an application, under this section, to file the award, provided it relates to a debt not exceeding the amount cognizable by such Court, and the defendant resides within its jurisdiction.—*Flam Pramanick* v. *Sojaitullah*, 1 B. L. R. A. C. 43; 10 W. R. 85. *See also*, *Bridge* v. *Edalji*, 10 Bom. H. C. 54; and *Gangappa* v. *Kapinappa*, 5 Mad. H. C. 128. *See* also, *Simson* v. *McMaster*, 13 M. 341.

A Sub-Judge invested with powers of Small Cause Court, does not on that account become a Judge of a Court of Small Causes, nor his Court such a Court within the meaning of the Civil Procedure Code. He therefore has power, within limits of his ordinary pecuniary jurisdiction, to receive and file awards of arbitrators under s. 525, C. P. Code, 1882 (r. 20).—*Balkrishna* v. *Lakshman*, 3 B. 219.

The jurisdiction of a Court to file an awarrd depends on the reliefs awarded by the award. It is not open to a party to confer jurisdiction on a Court by asking for only one relief granted by the award and getting the award filed under para. 20 of Sch. II where the other reliefs granted are beyond the competence of the Court.—*Rathnmali* v. *Ramasuami*, 10 L. W. 57: 51 I. C. 53.

Rejection of Application Out of Court.—See, *Ramdhari* v. *Ramchantter*, 38 C. 143.

Effect of Refusal of an Application to File an Award.—The refusal of an application under para. 20 of Sch. II of the C. P. Code to file an award does not operate as *res judicata* in respect of a subsequent suit brought to enforce the award.—*Harakh Ram Jain* v. *Lakshmi Ram Jani*, 18 A. L. J. 960.

Filing and Enforcement of Private Awards.—Where there is no matter in difference between the parties which can be referred to arbitration, the valuation made by three persons appointed by the plaintiff is not an award within the meaning of s. 525, C. P. Code, 1882 (r. 20), and it cannot therefore be filed in Court.—*Macnaghten* v. *Romeshwar Singh*, 30 C. 831 (28 C. 155: 5 C. W. N. 242 *followed*).

In the case of a private award where the arbitrators granted a new trial and eventually disposed of the case in the absence of the defendant, and the award was signed by the arbitrators at different times. *Held*, that such an irregular award should not be enforced under this section.—*Nader Ali* v. *Majoo*, 21 W. R. 77.

A Court to which an application is made under this section, to file a private award, has no power to amend the award or remit it for reconsideration, but only possesses the power to file and enforce it or to reject the application.—*Mustafa Khan* v. *Phulji Bibi*, 27 A. 526.

Matters in dispute were referred to seven arbitrators without the intervention of a Court. The arbitrators held several sittings extending over some six months and at their last sitting they unanimously came to a decision and informed the parties of it. Subsequently the award was drawn up and signed by four out of the seven arbitrators. *Held*, that the actual award was an oral award made by all the arbitrators at their

last sitting, and the fact that the minority of the arbitrators did not sign the award was not fatal to the award —*Dandekar* v. *Dandekars*, 6 B. 663

An award made under s 525, C P. Code, 1882 (r. 20), which is partly within, and partly exceeds, the terms of the submission to arbitration, cannot be enforced by summary procedure under s. 526 as to such portion as does not exceed those matters.—*Mana Vikrama* v. *Mallichery*, 3 M. 68, followed in *Mustafa Khan* v *Phulji Bibi*, 27 A. 526

On an application to have the award filed in Court under s. 525, C. P Code, 1882 (r 20), the defendant amongst others objected that the agreement of submission was vague and indefinite The Sub-Judge, overruling the objection, directed the award to be filed and passed a decree upon it *Held*, that the objection was well-founded inasmuch as the agreement to refer was vague and indefinite, and the award should not be allowed to be enforced under s 525, C. P Code, 1882 (r. 20) —*Bindessari Pershad* v. *Jankee Pershad*, 16 C 482.

Under para 20 (1) of Sch II of the C P. Code, the Court cannot refuse to file the award for grounds other than those mentioned in paras. 14 and 15 of that Schedule. *Held*, therefore, that the lower Court was right in filing the award notwithstanding the objection of the defendant on the ground that everything that was to be performed under the award has been already performed by him —*Annamalay Chetti* v *Ramaswami Chetti*, 19 M L. T 228· (1916) 1 M W N 203

Held, where a private award determined a matter not referred to arbitration, that a claim under s 525, C P. Code, 1882 (r 20), that such award should be filed in Court was properly dismissed —*Juala Singh* v. *Narain Das*, 3 A. 541, followed in *Mustafa Khan* v *Phulji Bibi*, 27 A. 526. *See* also, *Thiruvengadathingar* v *Vaidhnatha Ayyar*, 29 M. 303, in which it has been held that where an award determines matters not referred to arbitration the Court is bound to refuse to file the award.

When a private award between parties is filed in a Court, the prescribed course is for the Court to give judgment upon it and pass a decree, not to order execution thereof before such decree has been passed — *Saheb Ram* v *Kashee Nath*, 21 W R 295 So also *Ishwardas* v. *Dosibai*, 7 B. 316, where it has been held that it is the duty of the Court to proceed to pass judgment according to the award as soon it is ordered to be filed, without waiting for an application that that should be done.

Where an Award is Delivered in parts.—If the agreement to refer provides that the matters in dispute may be taken up and dealt with *seriatim*, and that the award may be delivered bit by bit, each portion decided may be dealt with as a distinct award under this paragraph — *Shoshimukhi* v. *Nobin*, 4 C L R 92.

Withdrawal of an Application to File an Award.—Where an application has been made under s 525, C P Code, 1882 (r 20), to have a certain award filed in Court, which had been made without the intervention of the Court, the applicant is at liberty at any stage of the hearing prior to the delivery of judgment and preparation of the decree to withdraw the application under s 373, C. P. Code, 1882 (Or XXIII, r 1).— *Gauri Shanker* v *Maida Koer*, 31 C 516; *Mohes Chunder* v *Amar Chand*, 19 C. L. J. 260. But see, *Sheoamber* v. *Deodat*, 9 A. 168.

Award Determining Matters Not Referred.—See, *Muhammad Ibrahim* v. *Ahmed Said*, 32 A. 503; *Nagendra* v. *Harendra*, 16 C W. N. 34, *Dhanpat Rai* v. *Musst Khan Devi*, 30 P .R 109; *Theruvengadathingar* v. *Vaidhnath Ayyar*, 29 M. 303.

Court-fee upon an Application to File a Private Award.—The proper Court-fee upon an application to file an award under s 525, C. P. Code, 1882 (r. 20) is the Court-fee prescribed for applications, and not the Court-fee upon a plaint —*Byadhur Bhugut* v. *Monohur Bhugut*, 10 C 11. 13 C L. R 171.

An order directing a private award to be filed is a decree and ought to have a Court-fee in accordance with Art. 1, Sch. I of the Court-fees Act —*Hari Mohan* v. *Kali Prasad*, 33 C. 11.

In proceedings under para 20 of the Second Schedule to the C P. Code, an unstamped award may be admitted in evidence and filed in Court after payment of the penalty under the provisions of the Stamp Act, *Gowardhan Das* v. *Keshoram*, 66 P. R. 1913: 291 P L R. 1913

Loss of Private Award—Secondary Evidence as to its Contents.—In the absence of the original award a Court acting under this section is not at liberty to take secondary evidence of the award and pass decree accordingly; in such a case the plaintiff must be referred to a regular suit to enforce the terms of the award —*Gopi Reddi* v. *Mahanandi Reddi*, 12 M. 231; *Musst Khodija* v *Ghulam Nabi*, 1 L. 45: 55 I C. 845 In the same case after the rejection of an application under this section the plaintiff brought a regular suit to enforce the terms of the award, and it was held therein that secondary evidence of the contents of the award was admissible on proof of the loss of the original.—*Gopi Reddi* v *Mahanandi Reddi*, 15 M 99

Limitation for an Application to File an Award.—The period of limitation for an application to file a private award is six months —*See* Art 178 of the Limitation Act (IX of 1908), *Ram Ugram* v *Achraj*, 38 A 85, (91)

The date of the award means not the date the award bears, but the date on which it was given to the parties, *i e.*, the date of publication —*Kunj Lall* v *Banwari Lall*, 4 Pat. L. J. 394: 48 I. C. 711

It is clearly the intention of the Legislature that a party to an arbitration should have six months to enforce the award, under this section from the time when he is in a position to enforce it, that is, from the time when the award is delivered to the parties, and not from the date when the award is signed by the arbitrators —*Dutto Singh* v. *Dosad Bahadur*, 9 C. 575.

Filling and enforcement of such award.

21. (1) Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court shall order the award to

be filed and shall proceed to pronounce judgment according to the award. [S. 526.]

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award. [New.]

COMMENTARY.

Sub-rule (1), with some modification, corresponds to s. 526 of the C. P. Code of 1882, which ran as follows " *If no ground such as is mentioned or referred to in s. 520, or s 521, be shown against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter.*"

It would appear from a comparison of the provisions of the old section with sub-rule (1), that the language of the present rule has been changed to set at rest the conflicting rulings of the several High Courts which hitherto existed as to the proper course for the Court to pursue, when an objection is raised on grounds mentioned in rr. 14 and 15. In some of the cases it was held that where an objection to the *factum* or validity of the submission and award is raised, the Court had no jurisdiction to deal with them and must refer the parties to a regular suit. But in some other cases it was held that where objections are raised to the validity of an award on the ground mentioned in rr 14 and 15, the Court is not bound to hold its hand and reject the application, but it is the duty of the Court to enquire into the validity of the objections raised and thereupon to determine whether the award should be filed or not The conflicting rulings have been noted below to understand clearly the object of the amendment

Sub-rule (2) is new It has been framed adopting the view of the Judicial Committee as expressed in *Ghulam Khan's case* (29 C 167 6 C W. N. 226, P C). The main object of the insertions of the sub-rule will appear from the " *Report of the Special Committee* " noted under r. 16, and also from the conflicting rulings noted under the heading " APPEAL FROM ORDERS ALLOWING OR DISALLOWING APPLICATIONS TO FILE A PRIVATE AWARD IN COURT."

The provisions of ss. 523 to 526. C P Code, 1882, shall not apply to any submission to arbitration to which the provisions of the Indian Arbitration Act for the time being apply —*See* s 3 of the Indian Arbitration Act (IX of 1899)

Grounds of Objection under Paras. 14 and 15.—If an award in a matter referred to arbitration without the intervention of the Court determines any matter not referred to arbitration the only course open to the Court under the present rule is to refuse to file the award, even where the portion of the award open to exception can be separated from the rest — *Dinabandhu* v. *Chintamoni*, 19 C. W. N 476, *Kunj Lall* v *Banwari Lall*, 4 Pat. L. J 394, 401-402), *Dhanpat Rai* v. *Kahan Devi*, (1914) Punj

Rec. No 30, p. 108; *Allarakhia* v *Jehangir*, 10 Bom H. C. 391; *pha Khan* v *Phulja Bibi*, 27 A 526, *Dandekar* v. *Dandekar*, 6 I *Thiruvengada* v *Vaidnatha*, 29 M 303.

Objections to the Filing of Awards upon Any of the Grounds tioned in Paras. 14 and 15 and the Jurisdiction of the Courts to E into the Validity of the Objections.—When an application is mad Court to file an award under s 525, C P. Code, 1882 (r. 20), and tion is made to the filing of it upon any of the grounds mentio ss 520 and 521, C P Code, 1882 (rr 14, 15), the proper course Court to pursue is to dismiss the application and to leave the ap to bring a regular suit to enforce the award in which all the objecti its validity may be properly tried and determined —*Hurro N Nistarini*, 10 C 74; 13 C L R 14 *See* also, *Bijadhur Bha Monohur Bhagut*, 10 C 11, 13 C L R. 171; *Ichamoyee* v. *Pr Nath*, 9 C 557, *Sree Ram* v *Denobundhoo*, 7 C. 490: 9 C. L R *Bindessuri Pershad* v *Jankee Pershad*, 16 C. 482; and *Hussain* v *Mohsin Khan*, 1 A 156 But see, *Dendekar* v *Dandekars*, 6 B *Dhanjibhai* v *Mathurbhai*, 28 B 287, *Dutto Singh* v. *Dosad B* 9 C 575, *Jagan Nath* v. *Mannu Lal*, 16 A. 231; and *Jones* v. *L* 8 A 340 In these latter cases it has been held (dissenting fro former cases) that in ss 525 and 526, C P. Code, 1882 (rr. 20, 21 terms "*to show cause*" *does not mean merely to allege* cause no to make out that there is reason for argument, but both to allege and to prove it to the satisfaction of the Court. This view is sup by the Full Bench case of *Sujan Raot* v. *Bhikhari Raot*, 21 C 2 which it has been held that where objections are raised to the vali an award in a verified written statement, and the objections are as fall within s 521, C P Code, 1882 (r. 15), the Court is not bo hold its hand and reject the application, but it is the duty of the to enquire into the validity of the objections raised, and thereup determine whether the award should be filed or not. This view is f supported by the recent Full Bench case of *Mahomed Wahidud Hakiman*, 25 C 757, F B : 2 C W. N. 529, in which the Full case of *Amrit Ram* v *Dasrat Ram*, 17 A. 21, has been followed; ar case of *Tejpur* v *Mahomed Jamal*, 20 B 596, has been dissented and this Full Bench virtually overrules the former decisions report 10 C 74 13 C L R 14, 11 C. 11 13 C L R. 171, 9 C. 557, 7 C and 9 C L R 147 *See* also, *Ganesh Singh* v. *Kashi Singh*, 28 A and *Mani Lal* v *Vanmalidas*, 29 B 621, in which the principle laid in 25 C 757, F B has been followed

"Where the Court is satisfied that the matter has been referr arbitration and that an award has been made thereon."—These are new In the absence of these words in the corresponding sectio of the old Code, the Bombay High Court held that where an applic was made under that section to file an award, and the other party objections to the *factum* or validity of the submission and award Court had no jurisdiction to deal with them, and the Court should fore reject the application and refer the applicant to a regular su enforce the award —*Tejpur Deve Chand* v *Mahomed Jamal*, 20 B. On the other hand, it was held by the High Courts of Calcutta, Allal and Madras that the Court had the power under that section to mine all questions relating to the *factum* and validity of the a

agreement to refer and of the award, and that the applicant must not be referred to a regular suit.—*Mahomed* v. *Hakiman*, 25 C. 757, *Amrit Ram* v. *Dasrat Ram*, 17 A. 21; *Ganesh* v. *Kashi*, 28 A. 621; *Chintamallaya* v. *Thadi Gangireddy*, 20 M. 89.

Where on an application to file an award under ss. 525 and 526, C. P. Code, 1882 (rr. 20, 21), objections, which in the opinion of the Court are not merely frivolous or colourable, are raised to the *factum* or validity of the submission and award, the Court has no jurisdiction to deal with them, and must refer the parties to a regular suit.—*Tejpur Devechand* v. *Mahomed Jamal*, 20 B. 596. See also, *Samal Nath* v. *Jaisanker*, 9 B. 254; *Venkatesh* v. *Chanapgarda*, 17 B. 674; and also the judgment of Prinsep, Pigot, and Macpherson, JJ., in the Full Bench case of *Surjan Raot* v. *Bhikari Raot*, 21 C. 213, F. B. But see, *Mahomed Wahiduddin* v. *Hakiman*, 25 C. 757, F. B. 2 C. W. N. 529 F. B., *Amrit Ram* v. *Dasrat Ram*, 17 A. 21, F. B.; and *Chintamallayya* v. *Thadigangireddi*, 20 M. 89. In these cases a different view has been taken.

A Private Award is Valid and Binding though Proceedings under Para. 20 have Not been Taken to Enforce it.—An award made by private submission may be valid and binding though no proceedings under s. 525, C. P. Code, 1882 (r. 20) have been taken to enforce it.—*Surubjeet Narain* v. *Gouree Pershad*, 7 W. R. 260. See also, *Ramyad Sahoo* v. *Doolar Sahoo*, 9 W. R. 441, and *Nursingh* v. *Putto*, 20 W. R. 120.

An arbitration award may be valid without being enforced by the Courts, as for instance, where possession under the award is shown.—*Mohesh Chunder* v. *Buloram*, 6 W. R. 94.

The refusal of an application for the filing of an award under s. 525, C. P. Code, 1882 (r. 20), merely leaves the award to have its own ordinary legal effect, and it cannot be contended that an award is not to be relied upon as a defence in a suit relating to the subject-matter dealt with by it, only because such an application has not been granted.—*Muhammad Newaz Khan* v. *Alam Khan*, 18 C. 415, P. C.

Where an award which purported to be a considered award of the arbitrators framed after consideration of the statements of the parties and the evidence of witness, was found in reality to be merely the adoption by the arbitrators of an agreement arrived at and signed by the parties to the reference, it was held that this would not prevent the award being a valid and binding award between the parties.—*Gobardhan Das* v. *Jai Kishen Das*, 22 A. 224.

"A decree shall follow."—Sch. II of the C. P. Code is not complete in itself. A decree passed under para. 21 (2) of Sch. II is a decree in a suit and Or. IX, r. 13 applies to such a decree.—*Mahabir Prasad* v. *Balkishen Das*, 62 I. C. 927.

Suit to Enforce Private Award—Limitation.—The chapter of the Code on arbitration is not compulsory, but enabling, and provides certain courses of procedure to be followed if the parties desire to adopt its provisions, but it does not enact that no other course shall be pursued. So where an award is made otherwise than in a suit, the parties need not apply under s. 525, C. P. Code, 1882 (r. 20), but may file a suit to enforce it.—*Pragdas* v. *Girdhardas*, 26 B. 76.

A suit lies to enforce an award made without the intervention of a Court of justice The procedure provided by s 525, C. P. Code, 1882 (r. 20), is not imperative upon a plaintiff who seeks to enforce an award so made —*Palaniappa Chetti* v. *Rayappa Chetti*, 4 M. H. C. 119, and *Kota Seetamma* v *Kali Purla*, 8 M. H. C. 81. Followed in *Subbaraya Chetti* v. *Sada Siva Chetti*, 20 M 490 (15 M. 99 *followed*).

Where an award cannot be filed and a decree obtained upon it under s 525, C. P. Code, 1882 (r. 20), a party is not precluded from suing upon it.—*Gopi Reddi* v. *Mahanandi*, 15 M. 99. *See* also, *Narasayya* v. *Ramabadra*, 15 M 474, and *Jafri Begum* v. *Syed Ali Reza*, 5 C. W N. 585 P. C.

A suit is maintainable to enforce specific performance of a private award, where it is not possible to assess compensation in money for breach of the particular condition in the award.—*Brij Mohan Singh*, 24 A. 104

A suit to enforce an award cannot be treated as a suit for specific performance of contract within the meaning of article 113 of the Limitation Act, 1877, the article applicable, being Article 144 of the Act—*Sornavalli Ammal* v. *Muthayya Sastrigal*, 23 M. 593 (I. L R 5 A. 263, and 16 A 3 *distinguished*). Followed in *Sheo Narayan* v. *Beni Madho*, 23 A 285 See also, *Bhajahari* v *Behary Lal*, 33 C. 881: 4 C. L J 162

Whether Matters Heard and Determined in Proceedings under this Para. are Res Judicata and cannot be Re-opened in Subsequent Suit.—Matters heard and determined in proceedings under para. 21 of *Sch II* of the C P Code are *res judicata* and cannot be re-opened in a subsequent suit between the same parties and brought for the purpose of setting aside the award and the decree following upon the judgment pronounced in accordance therewith A proceeding under para. 21 of Sch II is a suit within the meaning of s 11 of the C. P. Code —*Guru Charan* v *Uma Charan*, 26 C W N 940 The Allahabad and Bombay High Courts have held that the refusal of a Court to file a private award on the ground of misconduct of the arbitrators does not operate as *res judicata* in respect of a suit subsequently brought to enforce the award.—*Kunji Lal* v. *Durga Prasad*, 32 A 484, *Harakh Ram* v *Lakshmi Ram*, 43 A. 108. 60 I C 628, *Rajmal* v *Maruti*, 45 B 329 59 I. C 755; *Abdul Aziz* v. *Chandu*, 27 Bom L. R 652. 89 I C 68. A. I. R. 1925 Bom 418

Appeal.—An appeal lies from an *order* under this rule filing or refusing to file an award —See s 104 sub-s. (1), cl. (*f*); *Shankar Das* v *Amir Chand*, 7 Lah L. J 91 88 I. C. 533: A I. R. 1925 Lah. 321; *Jagat Pande* v *Sarwan Pande*, 47 A. 743: 88 I C. 76: A. I. R. 1925 All. 404. But no appeal lies from the order passed in appeal —*Ahmed Din* v. *Atlas Trading Co.*, (1915) P. R. No. 66, p. 287. It must be noted however that though an appeal lies from an order made under this rule, no appeal lies from a decree passed on an award except in so far as the decree is in excess of or not in accordance with the award —*Bahadur Singh* v. *Negi Paran Singh*, 30 A. 151; *Kulsum* v. *Ali Akbar*, 39 A. 401 (411); *Maung Tunu* v *Maung Po.*, 1 Rang. 265: A I R. 1923 Rang 190

When an order is made directing an award to be filed, and a decree is passed on such award before an appeal is preferred from the order directing the award to be filed, it has been held that the right of appeal from

the order, is not lost and if the Appellate Court set aside the order, the previous decree based on such order is vacated.—*Kshetra Nath* v. *Ushabala*, 18 C. W. N. 381; *Saudamini* v. *Gopal*, 19 C. W. N. 948; *Hari* v. *Lakshmi*, 38 A. 380, 387, *Nihal Singh* v *Khusal Sing*, 38 A. 297; *Lachminarani* v. *Sheonath*, 42 A. 185; 54 I. C 443.

An appeal lies in case where the reference itself is impugned for want of consent of the parties interested.—*Fanindra Nath* v. *Dwarka Nath*, 25 C W. N. 832

Withdrawal of Suit.—An application filed under para. 20 has to be numbered and registered as a suit Such an application can therefore be withdrawn under Or XXIII, r 1 at any time prior to the pronouncement of judgment and preparation of the decree.—*Gouri Shankar* v. *Maida Koer*, 31 C. 516.

Exclusion of certain words in the Specific Relief Act, 1877.

22. The last thirty-seven words of section 21 of the Specific Relief Act, 1877, shall not apply to any agreement to refer to arbitration, or to any award, to which the provisions of this schedule apply. [New.]

COMMENTARY.

This para is new

" Shall not apply."—The proviso to section 21 of the Specific Act (I of 1877), of which the last 37 words shall not apply to any agreement to refer to arbitration, is reproduced below " And, save as provided by the Code of Civil Procedure (and the Indian Arbitration Act of 1892), no contract to refer (present or future differences) to arbitration shall be specifically enforced, *but if any person who has made such a contract and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit* "

The object of exclusion of the last 37 words of section 21 of the Specific Relief Act is to remove the bar whereby a party was precluded from bringing a separate suit in respect of any matter which he has agreed to refer to arbitration Reading this para with the new para 18 it would appear that although an agreement to refer to arbitration cannot be specifically enforced, a suit in respect of any matter agreed to be referred is maintainable, and where such a suit is instituted any party may apply to stay the suit under para 18 by adopting the procedure laid down in para 17 In this connection the exceptions 1 and 2 to section 28 of the Indian Contract Act (IX of 1872) and the case of *Bhajahari Shaha* v. *Behary Lal*, 33 C 881 4 C L. J 162, may be consulted *See* also, *Nathu Mal* v *Muhammad Shafi*, 12 P R 1917. 39 I C 349

In the case of *Bhajahari Shaha* v. *Behary Lal*, 33 C 881 4 C L J. 162, it has been held that a suit for recovery of possession of land on declaration of plaintiff's right thereto on the basis of an award made by arbitrators appointed by the parties is one to which Art 144 of the Limitation Act, 1877, applies and may be brought within 12 years from the

date of the award Such a suit cannot be regarded as a suit for the specific performance of a contract. A valid award is operative even though neither party has sought to enforce it under s. 525, C P. Code, 1882 (r 20) *Per* Mookerjee, J —As an ordinary rule, a valid award operates to merge and extinguish all claims embraced in the submission, and after it has been made the submission and award furnish the only basis by which the rights of the parties can be determined, and constitute a bar to any action on the original demand From the above case it is quite clear that a party can sue within 12 years for possession of his property, his title to which was declared in the award, although he has not filed any application to enforce the award under rule 20, and that such a suit cannot be regarded as a suit for specific performance of a contract within the meaning of s 21 of the Specific Relief Act (I of 1877).

The following rulings under s 21 of the Specific Relief Act and under s 28 of the Indian Contract Act will explain the meaning and object of this rule.

Contract to Refer to Arbitration, If Bars a Suit.—The proviso to s 21 of the Specific Relief Act (I of 1871) is intended to prevent persons, who of their own free will entered into contracts to refer matters in controversy to arbitration, from breaking them wilfully and capriciously. The Courts of Equity will not enforce the specific performance of a contract to refer a controversy to arbitration But before this para can be relied on as a bar to a suit upon a contract containing a stipulation that matters in dispute shall be referred to arbitration, it must be shown that the plaintiff *has refused* to refer to arbitration, and that the filing of the plaint was not such a refusal —*Koomud Chunder* v. *Chunder Kant*, 5 C. 498; 5 C L R 264 To bar a suit under s 21 of the Specific Relief Act, a refusal to arbitrate must be before the action is brought —*Crisp* v *Adlard*, 23 C 956.

Where parties to a suit have agreed to refer the matters in dispute between them in such suit to arbitration, such an agreement ousts the jurisdiction of the Courts to proceed with the suit, whether it is filed in Court under the provisions of section 523, C P Code, 1882, (r 17).—*Sheodat* v *Sheo Shankar*, 27 All 53 (9 A. 168, 4 A. 546 *followed*).

The wording of s 21 of Specific Relief Act (I of 1877) is wide enough to cover contracts to refer any matter which can legally be referred to arbitration, and one of such matters is a suit proceeding in Court.—*Sheomber* v Deodat, 9 A 168

23. The forms set forth in the Appendix, with such variations as the circumstances of each case require, shall be used for the respective purpose therein mentioned. [New.]

Forms.

APPENDIX TO SCHEDULE II.

No. 1.

APPLICATION FOR AN ORDER OF REFERENCE.

(*Title of suit*)

1 This suit is instituted for (*state nature of claim*)

2. The matter in difference between the parties is (*state matter of difference*).

3. The applicants being all the parties interested have agreed that the matter in difference between them shall be referred to arbitration.

4. The applicants therefore apply for an order of reference

A. B.
C. D.

Dated the day of 19 .

NOTE.—If the parties are agreed as to the arbitrators it should be so stated.

No. 2.

ORDER OF REFERENCE.

(*Title of suit*)

Upon reading the application presented on the day of 19 it is ordered the following matter in difference arising in this suit, namely —

be referred for determination to *X* and *Y*, or in case of their not agreeing then to the determination of *Z*, who is hereby appointed to be umpire, and such arbitrators are to make their award in writing on or before the day of 19 , and in case of the said arbitrators not agreeing in an award the said umpire is to make his award in writing within months after the time during which it is within the power of the arbitrators to make an award shall have ceased

Liberty to apply

GIVEN under my hand and the seal of the Court, this day of 19 . *Judge.*

No. 3.

ORDER FOR APPOINTMENT OF NEW ARBITRATOR.

(*Title of suit.*)

WHEREAS by an order, dated the day of 19 [*state order of reference and death, refusal, etc., of arbitrator*], it is by consent ordered that Z be appointed in the place of X deceased, (*or* as the case may be) to act as arbitrator with Y, the surviving arbitrator, under the said order, and it is ordered that the award of the said arbitrators be made on or before the day of 19 .

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 4.

SPECIAL CASE.

(*Title of suit.*)

In the matter of an arbitration between A. B. of and C. D. of the following special case is stated for the opinion of the Court —

[*Here state the facts concisely in numbered paragraphs*]

The questions of law for the opinion of the Courts are:—

First, whether ______________________________

____

Secondly, whether ______________________________

____

X

Y.

Dated the day 19 .

No. 5.

AWARD.

(*Title of suit.*)

In the matter of an arbitration between A. B. of and C. D. of :—

WHEREAS in pursuance of an order of reference made by the Court of and dated the day of 19 the

following matter in difference between A. B and C. D., namely,

____

has been referred to us for determination;

Now we, having duly considered the matter referred to us, do hereby make our award as follows:—

We award—

(1) that __________________________________

(2) that __________________________________

Dated the day of 19 X.

Y.

THE THIRD SCHEDULE

EXECUTION OF DECREES BY COLLECTORS.

Powers of Collector.

1. Where the execution of a decree has been transferred to the Collector under s. 68, he may—

(a) proceed as the Court would proceed when the sale of immoveable property is postponed in order to enable the judgment-debtor to raise the amount of the decree or

(b) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, or by mortgaging, the whole or any part of the property ordered to be sold; or

(c) sell the property ordered to be sold or so much thereof as may be necessary. [S. 321.]

COMMENTARY.

This para corresponds to s 321, C P. Code, 1882, with some additions and alterations The words "*when the sale of immoveable property is postponed in order to enable the judgment-debtor to raise the amount of the decree,*" have been added in cl. (a) after the word "proceed" The other changes are merely verbal

All the paras contained in this Schedule, are subject to the provisions contained in ss 68, 69, 70, 71 and 72 of the Code, so the notes under those sections should be referred to in addition to the cases noted under these rules

Payment by Instalments.—A Collector, to whom a decree for sale of mortgaged property has been transferred for execution under s 68, is limited to one of the three courses specified in this rule, and may not depart from them, much less may he do what the Court itself could not do in such a case—allow payment of the debt to be made by instalments—*Mahadaji* v *Hari*, 7 B 332, *referred to* in 19 M. 435 Nor has the Collector jurisdiction, when mortgaged property is sold under Or XXXIV, r. 12, free of a prior mortgage encumbrance, to settle accounts as to what is due on each mortgage —*Abdul Shakur* v *Muhammad Matadin*, 46 A 414: 78 I. C 429 A I R 1924 All 307. When the Collector receives sale proceeds, they are assets held by the Court, and so an application for rateable distribution must be made before receipt of sale proceeds by the Collector.—*Dattatraya* v. *Pundlik*, 22 Bom. L R 1001. 58 I. C 902.

2. Where the execution of a decree, not being a decree ordering the sale of immoveable property in pursuance of a contract specifically affecting the same, but being a decree for the payment of money in satisfaction of which the Court has ordered the sale of immoveable property, has been so transferred, the Collector if, after such inquiry as he thinks necessary, he has reason to believe that all the liabilities of the judgment-debtor can be discharged without a sale of the whole of his available immoveable property, may proceed as hereinafter provided. [S. 322.]

Procedure of Collector in special cases.

COMMENTARY.

This para corresponds to s 322, C P Code, 1882, with some verbal alterations only

Held, that the assignees of a decree for money obtained against a person whose property had been taken over by the Collector under s 72, whilst such property was under the management of the Collector, were not entitled to be placed on the list of creditors prepared by the Collector under this para, and that, in any case application to be placed on the said list of creditors should have been made to the Collector and not to the District Judge—*Murari Das* v *Collector of Ghazipur*, 18 A. 313.

3. (1) In any such case as is referred to in paragraph 2, the Collector shall publish a notice, allowing a period of sixty days from the date of its publication for compliance and calling upon—

Notice to be given to decree-holders and to persons having claims on property.

(*a*) every person holding a decree for the payment of money against the judgment-debtor capable of execution by sale of his immoveable property and which such decree-holder desires to have so executed, and every holder of a decree for the payment of money in execution of which proceedings for the sale of such property are pending, to produce before the Collector a copy of the decree, and a certificate from the Court which passed or is executing the same, declaring the amount recoverable thereunder;

(*b*) every person having any claim on the said property to submit to the Collector a statement of such claim, and to produce the documents (if any) by which it is evidenced

(2) Such notice shall be published by being affixed on a conspicuous part of the Court-house of the Court which made the

original order for sale, and in such other places (if any) as the Collector thinks fit; and where the address of any such decree-holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise. [S. 322-A.]

COMMENTARY.

This para. corresponds to s 322-A of the C. P. Code, 1882, with several additions and alterations

In sub-rule (1), the words "*allowing a period of sixty days from the date of publication for compliance*" have been transposed from the last para of the old section. The alterations have been made by transposition and substitution of words and phrases, as will appear on comparison

Power of Collector to Hear Objections.—Where a decree for money has been transferred for execution to the Collector under the provisions of s 68, the Collector is not authorized under this rule to hear any objection by the parties interested in the property advertised for sale to the sale of that property, nor is it any part of the Collector's duty to decide whether the property has or has not been properly attached.—*Onkar Singh* v. *Mohan Kuar*, 20 A 428

Amount of decrees for payment of money to be ascertained, and immoveable property available for their satisfaction.

4. (1) Upon the expiration of the said period, the Collector shall appoint a day for hearing any representations which the judgment-debtor and the decree-holders of claimants (if any) may desire to make, and for holding such inquiry as he may deem necessary for informing himself as to the nature and extent of such decrees and claims and of the judgment-debtor's immoveable property, and may, from time to time, adjourn such hearing and inquiry.

(2) Where there is no dispute as to the fact or extent of the liability of the judgment-debtor to any of the decrees or claims of which the Collector is informed, or as to the relative priorities of such decrees or claims, or as to the liability of any such property for the satisfaction of such decrees or claims, the Collector shall draw up a statement, specifying the amount to be recovered for the discharge of such decrees, the order in which such decrees and claims are to be satisfied, and the immoveable property available for that purpose.

(3) Where any such dispute arises, the Collector shall refer the same, with a statement thereof and his own opinion thereon, to the Court which made the original order for sale, and shall pending the reference, stay proceedings relating to the subject thereof. The Court shall dispose of the dispute if the matter

thereof is within its jurisdiction, or transmit the case to a competent Court for disposal, and the final decision shall be communicated to the Collector, who shall then draw up a statement as above provided in accordance with such decision. [S. 322-B.]

COMMENTARY.

This para. corresponds to s 322-B with some verbal alterations.

"Appeal from decision of a dispute under this rule."—An appeal from the decision of a dispute under s 322-B of the C P. Code, 1882 (this rule), is cognizable as a miscellaneous appeal, i e, an appeal from a decree not passed in a regular suit —*Srinivasa Ayyangar* v *Peria Tambi*, 4 M. 420 This case has been dissented from in *Ahmad Khan* v *Madho Das*, 7 A. 565, where it has been held that an appeal from the decision of a dispute under s 322-B (this rule) is to be regarded as an appeal from a decree in a suit and not a miscellaneous appeal, and should, therefore, be presented upon an *ad valorem* stamp *See* 18 A 313, noted under rule 2.

Where District Court may issue notices and hold inquiry.

5. The Collector may, instead of himself issuing the notices and holding the inquiry required by paragraphs 3 and 4, draw up a statement specifying the circumstances of the judgment-debtor and of his immoveable property so far as they are known to the Collector or appear in the records of his office, and forward such statement to the District Court; and such Court shall thereupon issue the notices, hold the inquiry and draw up the statement required by paragraphs 3 and 4 and transmit such statement to the Collector. [S. 322-C.]

COMMENTARY.

This para. corresponds to s 322-C of the C P Code, 1882, with some verbal alterations.

Effect of decision of Court as to dispute.

6. The decision by the Court of any dispute arising under paragraph 4 or paragraph 5 shall, as between the parties thereto, have the force of and be appealable as a decree. [S. 322-D.]

COMMENTARY.

This para. corresponds to s 322-D of the C P Code, 1882, with some verbal alterations.

Scheme for liquidation of decrees for payment of money.

7. (1) Where the amount to be recovered and the property available have been determined as provided in paragraph 4 or paragraph 5, the Collector may—

(a) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed to sell such property; or,

(b) if it appears that the amount with interest (if any) in accordance with the decree, and, when not decreed, with interest (if any) at such rate as he thinks reasonable, may be recovered without such sale, raise such amount and interest (notwithstanding the original order for sale)—

(i) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said property; or

(ii) by mortgaging the whole or any part of such property; or

(iii) by selling part of such property; or

(iv) letting on farm, or managing by himself or another, the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale; or

(v) partly by one of such modes, and partly by another or others of such modes.

(2) For the purpose of managing the whole or any part of such property, the Collector may exercise all the powers of its owner.

(3) For the purpose of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing, or for preserving the property from sale in satisfaction of an incumbrance, the Collector may discharge the claim of any incumbrancer whether it has become payable or not, and, for the purpose of providing funds to effect such discharge or composition, may mortgage, let or sell any portion of the property which he deems sufficient. If any dispute arises as to the amount due on any incumbrance with which the Collector proposes to deal under this clause, he may institute a

suit in proper Court, either in his own name or the name of the judgment-debtor, to have an account taken or he may agree to refer such dispute to the decision of two arbitrators, one to be chosen by each party or of an umpire to be named by such arbitrators.

(4) In proceeding under this paragraph the Collector shall be subject to such rules consistent with this Act as may, from time to time, be made in this behalf by the Local Government.
[S. 323.]

COMMENTARY.

This para. corresponds to s 323, C P Code, 1882, with some modifications

In sub-rule (4) the words " *Local Government* " have been substituted for the words " Chief Controlling Revenue Authority " The other alterations are verbal.

The powers under s 323, C P. Code, 1882, conferred on the Collector and those conferred on the Talukdari Settlement Officer by s. 31 of the Talukdari Act (VI of 1888), as amended by Act II of 1905, are both enabling or discretionary and are not necessarily of a mutually contradictory character.—*Purusottam v Harbhamji*, 33 B 443

Recovery of balance (if any) after letting or management.

8. Where, on the expiration of the letting or management under paragraph 7 the amount to be recovered has not been realized, the Collector shall notify the fact in writing to the judgment-debtor or his representatives in interest, stating at the same time that, if the balance necessary to make up the said amount is not paid to the Collector within six weeks from the date of such notice, he will proceed to sell the whole or a sufficient part of the said property, and, if on the expiration of the said six weeks the said balance is not so paid, the Collector shall sell such property or part accordingly

COMMENTARY.

This rule corresponds to s 324, C P Code, 1882, with verbal alterations

Mortgage.—Instead of selling, the Collector may mortgage the property —*Bechausang v Naran Moti*, 27 Bom L R 217 · 86 I C 810: A I R 1925 Bom. 277

Collector to render accounts to Court.

9. (1) The Collector shall, from time to time, render to the Court which made the original order for sale an account of all monies which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this schedule, and shall hold the balance at the disposal of the Court.

(2) Such charges shall include all debts and liabilities from time to time due to the Government in respect of the property or any part thereof, the rent (if any) from time to time due to a superior holder in respect of such property or part, and, if the Collector so directs the expense of any witnesses summoned by him.

(3) The balance shall be applied by the Court—

(*a*) in providing for the maintenance of such members of the judgment-debtor's family (if any) as are entirely to be maintained out of the income of the property, to such amount in the case of such member as the Court thinks fit; and,

(*b*) where the Collector has proceeded under paragraph 1, in satisfaction of the original decree in execution of which the Court ordered the sale of immoveable property, or otherwise as the Court may under section 73 direct; or

(*c*) where the Collector has proceeded under paragraph 2,—

(*i*) in keeping down the interest on incumbrances on the property;

(*ii*) where the judgment-debtor has no other sufficient means of subsistence, in providing for his subsistence to such amount as the Court thinks fit; and

(*iii*) in discharging rateably the claims of the original decree-holder and any other decree-holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered.

(4) No other holder of a decree for the payment of money shall be entitled to be paid out of such property or balance until the decree-holders who have obtained such order have been satisfied, and the residue (if any) shall be paid to the judgment-debtor or such other person as the Court directs. [S. 324-A.]

COMMENTARY.

This para. corresponds to s 324-A of the C P Code, 1882, with some verbal alterations.

Collector to Render Accounts.—Though the Collector is bound to render accounts under this rule, he cannot be compelled to deliver the account books in Court This rule also does not require him to pay the balance in Court.—*Rupali* v. *Kalyan Singh*, 6 Bom. L R. 825

Sales how to be conducted.

10. Where the Collector sells any property under this schedule, he shall put it up to public auction in one or more lots, as he thinks fit, and may—

(*a*) fix a reasonable reserved price for each lot;

(*b*) adjourn the sale for a reasonable time whenever, for reasons to be recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property;

(*c*) buy in the property offered for sale, and re-sell the same by public auction or private contract, as he thinks fit. [S. 325.]

COMMENTARY.

This para corresponds to s 325 of the C P Code, 1882 with verbal alterations

As soon as the Collector has exercised or performed the powers or duties conferred or imposed upon him by ss 321 to 325, C P Code, 1882 (para 1-10), he is *functus officio* If he has sold the property or re-sold it under the power given by s 325 (c) of that Code, he has completed the execution of the decree so far as he can legally complete it, and it is then his duty to retransmit the decree to the Court under rules prescribed in that behalf by Government under the second paragraph of s 320, C P Code, 1882 —*Lallu Trikam* v *Bhavla Mithia*, 11 B 487. *See*, 18 A 313 under paragraph 2 of this Schedule

Restrictions as to alienation by judgment-debtor or his representative, and prosecution of remedies by decree-holders.

11. (1) So long as the Collector can exercise or perform in respect of the judgment-debtor's immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment-debtor or his representative in interest shall be incompetent

to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money.

(2) During the same period no Civil Court shall issue any process of execution either against the judgment-debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7.

(3) The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree-holder has been temporarily deprived.

[S. 325-A.]

COMMENTARY.

This rule corresponds to s. 325-A of the C. P. Code, 1882, with some verbal alterations.

Object of the Para.—The object of Sch. III, para 11, C. P. Code is to protect the debtor as far as possible from the risk of losing his property wholly or for all time and mere attachment before judgment cannot defeat that object, for by such attachment alone the property is not exposed to the risk of such loss; *Bansilal* v. *Sitaram*, (1922) Nag 238, 68 I. C. 188.

Restrictions as to Alienation by Judgment-debtor.—A judgment-debtor is incompetent to mortgage his property when a decree against him has been transferred to the Collector for execution and his property is under the management of such Collector. In such a case a mortgage by him is absolutely void and not merely void as against the Collector and those claiming under him.—*Gourishanker* v. *Chinnumaya*, 46 C. 183 (*Magniram* v. *Bakubai* 36 B. 510, *dissented from*). *See also*, *Ganga Prasad* v. *Ganga Baksh*, 29 A. 415 A. W. N. (1907) 112. It is, however, competent to the judgment-debtor to transfer his property after the decree is satisfied by him and the fact of such adjustment is intimated by him to the Collector.—*Kushal Chand* v. *Nandram*, 35 B. 516.

Held, that the judgment-debtor was incompetent to make the transfer as until the sale by the Collector was confirmed, his power and duties under Sch. III, para 11, C. P. Code had not ceased and until then the property was under his management.—*Mahadeo* v. *Krishnaji*, 16 N. L. R. 194, 60 I. C. 310.

"Shall be incompetent to mortgage, charge, lease or alienate."—*A mortgage by a judgment-debtor of his property*, while it is under the management of the Collector, to whom decrees against *the judgment-debtor* have been transferred for execution, is absolutely *void, and not* merely void as against the Collector and those claiming under him—

Gaurishankar v. *Chinumaya*, 45 I. A. 219: 46 C 183: 48 I. C. 312; *Tikaram* v. *Narayan*, 92 I. C. 44: A I. R. 1926 Nag. 246.

Limitation.—When the property of the judgment-debtor was taken under management by the Collector and released more than 12 years after the date of the decree, that period was excluded in the computation of limitation both under the Limitation Act and under section 48 of the Code.—*Shayam Karan* v. *Collector of Benares*, 42 A. 118: 52 I. C. 742.

The word "alienate" contemplates a transfer which is to take effect immediately and not after death. A disposition of property by will does not therefore come under its purview, *Muhammad Sayed* v. *Muhammad Ismail*, 33 A. 233: 8 I. C. 834

The last clause of the first paragraph of s 325-A, C. P Code, 1882, (para. 11), prevents a Civil Court in execution of a decree for money from issuing any process against the judgment-debtor's immoveable property in the hands of the Collector.—*Girdhar Das* v *Har Shankar*, 20 A. 383, p 385.

"The same period shall be excluded in calculating the period of limitation."—The presentation of a *darkhast* for execution by one of the surviving coparceners of the deceased decree-holder cannot be said to be invalid so as to render the proceedings before the Collector invalid and so as to prevent the deduction of the time mentioned in sub-para. (3) of para 11 of the Third Schedule of the Code.—*Madhav Prabhakar* v *Balaji Govind*, A I R 1927 Bom 123 29 Bom L R 75

Provision where property is in several districts.

12. Where the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by paragraphs 1 to 10 shall be exercised and performed by such one of the Collectors of the said districts as the Local Government may by general rule or special order direct. [S. 325-B.]

COMMENTARY.

This rule corresponds to s. 325-B of the C P. Code, 1882, with verbal alterations only.

Powers of Collector to compel attendance and production.

13. In exercise of the powers conferred on him by paragraphs 1 to 10 the Collector shall have the powers of a Civil Court to compel the attendance of parties and witnesses and the production of documents. [S. 325-C.]

COMMENTARY.

This rule corresponds to s 325-C of the C P. Code, 1882, with verbal alterations.

THE FOURTH SCHEDULE

(*See Section 155.*)

ENACTMENTS AMENDED.

1	2	3	4
Year.	No.	Short title.	Amendment.
1870	VII	The Court-fees Act, 1870.	In Article 1 of Schedule I after the word "plaint" the words "written statement pleading a set-off or counter-claim" and after the word "Act" the words "or of cross-objection" shall be inserted. From Article 11 of Schedule II, the words "from an order rejecting a plaint or" shall be omitted. For the entry in the first column of Schedule II relating to Article 19, the following entry shall be substituted, namely:— "Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908"

THE FIFTH SCHEDULE

(*See Section 156.*)

ENACTMENTS REPEALED.

1	2	3	4
Year.	No.	Subject or short title.	Extent of repeal.
		Acts of the Governor-General in Council.	
1870	VII	The Court-fees Act, 1870.	Section 16, and Article 15 of Schedule II.
1882	IV	The Transfer of Property Act, 1882.	Sections 85 to 90 inclusive, 92 to 94 inclusive, 9, 97, 99 and in section 100 the words "and all the provisions herein-before contained as to a mortgagee instituting a suit for the sale of the mortgaged property.
,,	XIV	The Code of Civil Procedure.	The whole Act
,,	XV	The Presidency Small Cause Court, Act, 1882.	The last paragraph of section 3.
1888	VI	The Debtors Act, 1888	Sections 2 to 8
,,	VII	The Civil Procedure Code Amendment Act, 1888.	So much as is unrepealed, except section 1, section 65 and section 66, sub-sections (1), (3) and (4).
,,	X	The Presidency Small Cause Courts Law Amendment Act, 1888	So much as is unrepealed
1890	VIII	The Guardian and Wards Act, 1890.	Section 53.
1891	XII	The repealing and Amending Act, 1891.	So much as relates to Act XIV of 1882 and Act VII of 1888
1892	VI	The Indian Limitation Act and Civil Procedure Code Amendment Act, 1892	In the title and preamble the words "and the Code of Civil Procedure" and sections 2, 3 and 4.
1894	V	The Civil Procedure Code Amendment Act, 1894	The whole Act
1895	VII	The Punjab Laws Act Amendment Act, 1895	Sections 1 and 2
,,	XIII	The Civil Procedure Code Amendment Act, 1895	The whole Act
1900	VI	The Lower, Burma Courts Act, 1900.	So much of the schedules as relate to Act XIV of 1882

APPENDIX I

THE HIGH COURTS ACT OR THE CHARTER ACT, 1861

An Act for Establishing High Courts of Judicature in India (1)

(24 & 25 Vict., C. 104); (*6th August* 1861).

[Repealed and re-enacted with slight modifications by the Government of India Act, 1915 (5 & 6 Geo. V, C. 61.)

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same as follows:—

High Courts may be established in the several Presidencies of India.

1. It shall be lawful for Her Majesty, by Letters Patent under the great Seal of the United Kingdom to erect and establish a High Court of Judicature at *Fort William* in *Bengal* for the *Bengal* Division of the Presidency of *Fort William*, aforesaid, and by like Letters Patent to erect and establish like High Courts at *Madras* and *Bombay* for those Presidencies respectively. Such High Courts to be established in the said several Presidencies at such time or respective times as to Her Majesty may seem fit and the High Court to be established under any such Letters Patent in any of the said Presidencies shall be deemed to be established from and after the publication of such Letters Patent in the same Presidency, or such other time as in such Letters Patent may be appointed in this behalf

Constitution of High Courts.

2. The High Court of Judicature at *Fort William* in *Bengal* and at the Presidencies of *Madras* and *Bombay*, respectively shall consist of a Chief Justice and as many Judges not exceeding fifteen as Her Majesty may, from time to time, think fit and appoint who shall be selected from—

1st. Barristers of not less than five years standing, or

2nd. Members of the Covenanted Civil Service of not less than ten years' standing and who shall have served as Zillah Judges or shall have exercised the like powers as those of a Zillah Judge for at least three years of that period; or—

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(1) By the terms of this Act the exercise of jurisdiction in any part of Her Majesty's Indian Territories by the High Courts was meant to be subject to, and not exclusive of, the general legislative power of the Governor-General in Council. An exercise of legislative authority by the Governor-General in Council whereby any place or territory is removed from the jurisdiction of the High Courts is one expressly contemplated by this Statute, and by the Letters Patent issued under it—*Empress* v. *Burah* (1879) 4 C. 172, L. R. 5 I. A. 178

3rd Persons who have held judicial Office not inferior to that of Principal Sudder Ameen or Judge of a Small Cause Court for a period of not less than five years; or

4th. Persons who have been Pleaders of a Sudder Court or a High Court for a period of not less than ten years if such Pleaders of a Sudder Court shall have been admitted as Pleaders of a High Court.

Provided that not less than one-third of the Judges of such High Courts, respectively, including the Chief Justice, shall be Barristers, and not less than one-third shall be Members of the Covenanted Civil Service

Certain existing Judges herein named to be the first Judges of the High Court.

3. Provided always that the persons who at the time of the establishment of such High Court in any of the said Presidencies, are Judges of Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewany Adawlut or Sudder Adawlut of the same Presidency shall be and become Judges of such High Court without further appointment for that purpose, and the Chief Justice of such Supreme Court shall become the Chief Justice of such High Court.

Tenure of Office of High Courts.

4. All the Judges of the High Courts established under this Act shall *hold their offices during Her Majesty's pleasure* provided that it shall be lawful for any Judge of a High Court to resign such office of Judge to the Governor-General of *India* in Council or Governor in Council of the Presidency in which such High Court is established.

Precedence of Judges of High Court.

5. The Chief Justice of any such High Court shall have rank and precedence before the other Judges of the same Court and such of the other Judges of such Court as on its establishment shall have been transferred thereto from the Supreme Court shall have rank and precedence before the Judges of the High Court not transferred from the Supreme Court and except as aforesaid, all the Judges of each High Court shall have rank and precedence according to the seniority of their appointments unless otherwise provided in their Patents.

Salaries, etc., of Judges of the High Courts.

6. Any Chief Justice or Judge, transferred to any High Court from the Supreme Court, shall receive the like salary, and be entitled to the like retiring pension and advantage *as he would have been entitled* to for and in respect of service in the Supreme Court, if such Court had been continued, his service in the High Court being reckoned as service in the Supreme Court and except as aforesaid it shall be lawful for the Secretary of State in Council of *India* to fix the salaries, allowances, furloughs, retiring pensions, and (when necessary) expenses for equipment and voyage of the Chief Justices and Judges of the several High Courts under this Act, and from time to time to alter the same Provided always such alteration shall not affect the salary of any Judge appointed prior to the date thereof

Provision for vacancy of the office of Chief Justice or other Judge.

7. Upon the happening of a vacancy in the office of Chief Justice and during any absence of a Chief Justice, the *Governor*-General in Council or Governor in Council, as the case may be, shall appoint one of the Judges of the same High Court to perform the duties of Chief Justice of the said Court until some person has been appointed by Her Majesty to the

office of Chief Justice of the same Court, and has entered on the discharge of the duties of such office, or until the Chief Justice has returned from such absence, and upon the happening of a vacancy in the office of any other Judge of any such High Court and during any absence of any such Judge or on the appointment of any such Judge to act as Chief Justice, it shall be lawful for the Governor-General in Council or Governor in Council, as the case may be, to appoint a person, with such qualifications as are required in persons to be appointed to the High Court to act as a Judge of the said High Court, and the person so appointed shall be authorised to sit and to perform the duties of a Judge of the said Court until some person has been appointed by Her Majesty to the office of Judge of the same Court, and has entered on the discharge of the duties of such office, or until the absent Judge has returned from such absence, or until the Governor-General in Council or Governor in Council as aforesaid, shall see cause to cancel the appointment of such acting Judge

Abolition of Supreme Courts and Sudder Courts.

8. Upon the establishment of such High Court as aforesaid in the Presidency of *Fort William* in *Bengal*, the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Nizamut Adawlut at *Calcutta*, in the same Presidency, shall be abolished

And upon the establishment of such High Court in the Presidency of *Madras*, the Supreme Court and the Court of the Sudder Adawlut and Foujdarry Adawlut in the same Presidency shall be abolished:

And upon the establishment of such High Court in the Presidency of *Bombay*, the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Foujdarry Adawlut in the same Presidency shall be abolished:

And the records and documents of the several Courts so abolished in each Presidency shall become, and be, records and documents of the High Court established in the same Presidency

Jurisdiction and powers of High Courts.

9. Each of the High Courts to be established under this Act shall have and exercise all such Civil, Criminal, Admiralty, and Vice-Admiralty, Testamentary, Intestate, and Matrimonial Jurisdiction, original and appellate and all such powers and authority for, and in relation to, the administration of justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid, grant and direct subject, however, to such directions and limitations as to the exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency Towns as may be prescribed thereby, and save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of *India* in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last-mentioned Courts

High Courts to exercise same jurisdiction as Supreme Courts.

[10. *Until the Crown shall otherwise provide under the powers of this Act all jurisdiction now exercised by the Supreme Courts of Calcutta, Madras, and Bombay, respectively, over inhabitants of such parts of India as may not be comprised within the local limits of the Letters Patent to be issued under this Act establishing High Courts at*

Fort William, Madras and Bombay, shall be exercised by such High Courts, respectively.]

[*Repealed by* 28 *Vict*., *c*. 15, *s*. 2.]

11. Upon the establishment of the said High Courts in the said Presidencies respectively, all provisions then in force in *India* of Acts of Parliament or of any Orders of Her Majesty in Council, or Charters, or of any Acts of the Legislature of *India* which at the time or respective times of the establishment of such High Courts are respectively applicable to the Supreme Courts at *Fort William* in *Bengal*, *Madras and Bombay*, respectively, or to the Judges of those Courts shall be taken to be applicable to the said High Courts and the Judges thereof respectively, so far as may be consistent with the provisions of this Act, and the Letters Patent to be issued in pursuance thereof, and subject to the legislative powers in relation to the matters aforesaid of the Governor-General of *India* in Council

Existing provisions applicable to Supreme Courts to apply to High Courts.

12. From and after the abolition of the Courts abolished as aforesaid in any of the said Presidencies, the High Court of the same Presidency shall have jurisdiction over all proceedings pending in such abolished Courts at the time of the abolition thereof, and such proceedings and all previous proceedings in the said last-mentioned Courts shall be dealt with as if the same had been had in the said High Court, save that any such proceedings may be continued, as nearly as circumstances permit, under and according to the practice of the abolished Courts respectively

Provisions as to pending proceedings in abolished Courts.

13. Subject to any laws or regulations which may be made by the Governor-Genral in Council, the High Courts established in any Presidency under this Act may, by its own rules, provide for the exercise, by one or more Judges or by Division Courts constituted by two or more Judges of the said High Court of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice

Power to High Courts to provide for exercise of jurisdiction by single Judges or Division Courts

14. The Chief Justice of each High Court shall, from time to time, determine what Judge in each case shall sit alone, and what Judges of the Court, whether with or without the Chief Justice, shall constitute the several Division Courts as aforesaid.

Chief Justice to determine what Judges shall sit alone or in the Division Courts.

15. Each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction, and shall have power to call for returns, and to direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction, and shall have power to make and issue general rules for regulating the practice and proceedings of such Courts, and also to prescribe forms for every proceeding in the said Court for which it shall think necessary that a form be provided, and also for

High Court to superintend and to frame rules of practice for Subordinate Courts

keeping all books, entries, and accounts to be kept by the officers and also to settle tables of fees to be allowed to the Sheriff, Attorneys, and all clerks and officers of Courts and from time to time to alter any such rule or form or table; and the rules so made and the forms so framed, and the tables so settled, shall be used and observed in the said Court, provided that such general rules and forms and tables be not inconsistent with the provisions of any law in force, and shall before they are issued, have received the sanction, in the Presidency of *Fort William* of the Governor-General in Council, and in *Madras* or *Bombay*, of the Governor in Council of the respective Presidencies

Her Majesty may establish a High Court in the North-Western Provinces.

16. It shall be lawful for Her Majesty, if at any time hereafter Her Majesty sees fit so to do, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature in and for any portion of the territories within Her Majesty's dominions in *India*, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and of such number of other Judges with such qualifications as are required in persons to be appointed to the High Courts established at the Presidencies hereinbefore mentioned, as Her Majesty from time to time, may think fit and appoint; and it shall be lawful for Her Majesty by such Letters Patent to confer on such Court any such jurisdiction, powers, and authority as under this Act is authorized to be conferred on or will become vested in the High Court to be established in any Presidency hereinbefore mentioned, and, subject to the directions of such Letters Patent all the provisions of this Act having reference to the High Court established in any such Presidency, and to the Chief Justice and other Judges of such Court, and to the Governor-General or Governor of the Presidency in which such High Court is established, shall as far as circumstances may permit, be applicable to the High Court established, in the said territories, and to the Chief Justice and other Judges thereof, and to the person administering the Government of the said territories.

Other or supplementary Charters may be granted within three years after establishment of a Court.

17. It shall be lawful for Her Majesty, if Her Majesty shall so think fit, at any time within three years after the establishment of any High Court under this Act by Her Letters Patent, to revoke all or such parts or provisions as Her Majesty may think fit, of the Letters Patent by which such Court was established and to grant and make such other powers and provisions as Her Majesty may think fit and as might have been granted or made by such first Letters Patent, or, without any such revocation as aforesaid, by like Letters Patent to grant and make any additional or supplementary powers and provisions which might have been granted or made in the first instance

Territorial limits of jurisdiction of Court may be altered by order in Council.

18. *It shall be lawful for Her Majesty from time to time, by Her Order in Council, to transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts established under this Act and generally to alter and determine the territorial limits of the jurisdiction of the said several Courts as to Her Majesty, with the advice of Her Privy Council, may seem meet.*

Repealed by 28 Vict., c. 15, s. 2.

Interpretation of terms.

19 The word "Barrister" in this Act shall be deemed to includ Barristers of *England* or *Ireland*, or Members of th Faculty of Advocates in *Scotland;* and the words "Governor-General and Governor" shall comprehend the officer administering the Government.

GOVERNMENT OF INDIA ACT, 1915.

An Act to Consolidate Enactments relating to the Government of India.

(*29th July* 1915.)

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

* * * * *

Part IX.

The Indian High Courts.

Constitution.

101. [Ch. Act, ss. 2, 19.]—(1) The High Courts referred to in this Act are the High Courts of judicature for the time being established in British India by Letters Patent.

Constitution of High courts.

(2) Each High Court shall consist of a Chief Justice and as many other Judges as His Majesty may think fit to appoint: Provided as follows.—

(*i*) the Governor-General in Council may appoint persons to act as additional Judges of any High Court, for such period, not exceeding two years, as may be required; and the judges so appointed shall, whilst so acting, have all the powers of a judge of the High Court appointed by His Majesty under this Act;

(*ii*) the maximum number of judges of a High Court, including the Chief Justice and additional judges, shall be twenty

(3) A Judge of a High Court must be—

(*a*) a barrister of England or Ireland, or a member of the Faculty of Advocates in Scotland, of not less than five years' standing or

(b) a member of the Indian Civil Service of not less than ten years' standing, and having for at least three years served as, or exercised the powers of a District Judge; or

(c) a person having held judicial office, not inferior to that of a subordinate Judge or a Judge of a Small Cause Court, for a period of not less than five years; or

(d) a person having been a pleader of a High Court for a period of not less than ten years.

(4) Provided that not less than one-third of the Judges of a High Court, including the Chief Justice but excluding additional Judges, must be such Barristers or Advocates as aforesaid, and that not less than one-third must be members of the Indian Civil Service.

(5) The High Court for the North-Western Provinces may be styled the High Court of Judicature at Allahabad, and the High Court at Fort William in Bengal is in this Act referred to as the High Court at Calcutta.

Tenure of office of Judges of High Courts.

102. [Ch. Act, s. 4.]—(1) Every Judge of a High Court shall hold his office during His Majesty's pleasure.

(2) Any such Judge may resign his office, in the case of the High Court at Calcutta, to the Governor-General in Council, and in other cases to the local Government.

Precedence of Judges of High Courts.

103. [Ch. Act, s. 5.]—(1) The *Chief Justice* of a High Court shall have rank and precedence before the other Judges of the same court.

(2) All the other Judges of a High Court shall have rank and precedence according to the seniority of their appointments, unless otherwise provided in their patents.

Salaries, &c., of judges of High Courts.

104. [Ch. Act, s. 6.]—(1) The Secretary of State in Council may fix the salaries, allowances, furloughs, retiring pensions, and (where necessary) expenses for equipment and voyage, for the Chief Justices and other Judges of the several High Courts, and may alter them, but any such alteration shall not affect the salary of any Judge appointed before the date thereof.

(2) The remuneration fixed for a Judge under this section shall commence on his taking upon himself the execution of his office, and shall be the whole profit or advantage which he shall enjoy from his office during his continuance therein.

(3) If a Judge of a High Court dies during his voyage to India, or within six months after his arrival there, for the purpose of taking upon himself the execution of his office, the Secretary of State shall pay to his legal personal representatives, out of the revenues of India, such a sum of money, as will, with the amount received by or due to him at the time of his death on account of salary, make up the amount of one year's salary.

(4) If a Judge of a High Court dies while in possession of his office and after the expiration of six months from his arrival in India for the purpose of taking upon himself the execution of his office, the Secretary of State shall pay to his legal personal representatives, out of the revenues of India, over and above the sum due to him at the time of his death, a sum equal to six months' salary

Provision for vacancy in the office of Chief Justice or other Judge.

105. [Ch. Act., s. 7.]—(1) On the occurrence of a vacancy in the office of Chief Justice of a High Court, and during any absence of such a Chief Justice, the Governor-General in council in the case of the High Court at Calcutta, and the local Government in other cases, shall appoint one of the other Judges of the same High Court to perform the duties of Chief Justice of the Court, until some person has been appointed by His Majesty to the office of Chief Justice of the Court, and has entered on the discharge of the duties of that office, or until the Chief Justice has returned from his absence, as the case requires.

(2) On the occurrence of a vacancy in the office of any other Judge of a High Court and during any absence of any such Judge, or on the appointment of any such Judge to act as Chief Justice the Governor-General in Council in the case of the High Court at Calcutta, and the local Government in other cases, may appoint a person, with such qualifications as are required in persons to be appointed to the High Court, to act as a Judge of the Court; and the person so appointed may sit and perform the duties of a Judge of the Court until some person has been appointed by His Majesty to the office of Judge of the Court, and has entered on the discharge of the duties of the office or until

the absent Judge has returned from his absence, or until the Governor-General in Council or the local Government, as the case may be, sees cause to cancel the appointment of the acting Judge,

Jurisdiction.

Jurisdiction of High Courts

106. [Ch. Act, s. 9.]—(1) The several High Courts are Courts of record and have such jurisdiction, original and appellate, including admiralty jurisdiction in respect of offences committed on the high seas, and all such powers and authority over or in relation to the administration of justice, including power to appoint clerks and other ministerial officers of the Court, and power to make rules for regulating the practice of the Court, as are vested in them by Letters patent, and, subject to the provisions of any such Letters Patent, all such jurisdiction, powers and authority as are vested in those Courts respectively at the commencement of this Act.

(2) [21 Geo. 3, c. 70.]—The High Courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force.

Powers of High Court with respect to subordinate courts.

107. [Ch. Act, s. 15.]—Each of the High Courts has superintendence over all courts for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say,—

(*a*) call for returns;

(*b*) direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction;

(*c*) make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts;

(*d*) prescribe forms in which books, entries and accounts shall be kept by the officers of any such Courts; and

(*e*) settle tables of fees to be allowed to the sheriff, attorneys, and all clerks and officers of Courts :

Provided that such rules, forms and tables shall not be inconsistent with the provisions of any Act for the time being in force, and shall require the previous approval, in the case of the High Court at Calcutta, of the Governor-General in Council, and in other cases of the local Government.

Exercise of jurisdiction by single judges or division courts.

108. [Ch. Act, ss. 13, 14.]—(1) Each High Court may by its own rules provide as it thinks fit for the exercise, by one or more Judges, or by division Courts constituted by two or more Judges of the High Court of the original and appellate jurisdiction vested in the Court.

(2) The Chief Justice of the High Court shall determine what Judge in each case is to sit alone, and what Judges of the Court, whether with or without the Chief Justice, are to constitute the several division Courts.

Power of Governor-General in Council to alter local limits of Jurisdiction of High Courts.

109. [28 & 29 Vict., c. 15, ss. 3, 4, 6.]—(1) The Governor-General in Council may, by order, transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts, and authorise any High Court to exercise all or any portion of its jurisdiction in any part of British India not included within the limits for which the High Court was established, and also to exercise any such jurisdiction in respect of Christian subjects of His Majesty resident in any part of India outside British India.

(2) The Governor-General in Council shall transmit to the Secretary of State an authentic copy of every order made under this section.

(3) His Majesty may signify, through the Secretary of State in Council, his disallowance of any such order, and such disallowance shall make void and annul the order as from the day on which the Governor-General notifies that he has received intimation of the disallowance, but no act done by any High Court before such notification shall be deemed invalid by reason only of such disallowance.

110. [13 Geo. III, c. 63, ss. 15, 17; 21 Geo. III, c. 70, s. I; 37 Geo. III, c. 142. s. 11; 39 & 40, Geo. III c. 79, s. 3; 4 Geo. IV, c. 41, s. 7.]—(1) The Governor-General, each Governor, and each of the members of their respective executive councils, shall not—

Exemption from Jurisdiction of High Court.

(a) be subject to the original jurisdiction of any High Court by reason of anything counselled, ordered or done by any of them in his public capacity only; nor

(b) be liable to be arrested or imprisoned in any suit or proceeding in any High Court acting in the exercise of its original jurisdiction; nor

(c) be subject to the original criminal jurisdiction of any High Court in respect of any offence not being treason or felony.

(2) The exemption under this section from liability to arrest and imprisonment shall extend also to the Chief Justices and other Judges of the several High Courts.

111. [21 Geo. III, c. 70, ss. 2, 3, 4.]—The order in writing of the Governor-General in Council for any act shall, in any proceeding, civil or criminal, in any High Court acting in the exercise of its original jurisdiction, be a *full* justification of the act, except so far as the order extends to any *European* British subject; but nothing in this section shall exempt the Governor-General, or any member of his executive council, or any person acting under their orders, from any proceedings in respect of any such act before any competent Court in England.

Written order by Governor-General—Justification for act in any court in India.

Law to be administered.

112. [21 Geo. III, c. 70, s. 17; 37 Geo. III, c. 142, s. 13.]—The High Courts at Calcutta, Madras and Bombay, in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras or Bombay, as the case may be, shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to

Law to be administered in cases of inheritance and succession.

different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is subject.

Additional High Courts.

113. His Majesty may, if he sees fit, by Letters Patent, establish a High Court of Judicature in any territory in British India, whether or not included within the limits of the local jurisdiction of another High Court and confer on any High Court so established any such jurisdiction, powers and authority as are vested in or may be conferred on any High Court existing at the commencement of this Act; and where a High Court is so established in any area included within the limits of the local jurisdiction of another High Court, His Majesty may, by Letters Patent, alter those limits, and make such incidental, consequential and supplemental provisions as may appear to be necessary by reason of the alteration.

Power to establish additional High Courts.

Advocate-General.

114. [53 Geo. III, c. 155, s. III; 21 & 22 Vict., c. 106, s. 29]—(1) His Majesty may, by warrant under His Royal Sign Manual, appoint an Advocate-General for each of the presidencies of Bengal, Madras and Bombay

Appointment and powers of Advocate-General.

(2) The Advocate-General for each of those presidencies may take on behalf of His Majesty such proceedings as may be taken by His Majesty's Attorney-General in England.

DESPATCH THE FROM SECRETARY OF STATE.

SIR CHARLES WOOD'S DESPATCH ACCOMPANING THE FIRST LETTERS PATENT OR CHARTER.

Judicial, No. 24.

INDIA OFFICE,

London, 14th May, 1862.

To

HIS EXCELLENCY THE RIGHT HONOURABLE
THE GOVERNOR-GENERAL OF INDIA IN COUNCIL

MY LORD,

I HEREWITH transmit to you the Letters Patent or Charter (2), under the Royal Sign Manual, for the High Court of Judicature to be established in Bengal in accordance with the provisions of the Act 24 and 25 Victoria, Chapter 104, for establishing High Court of Judicature in India and request that you will take immediate measure for instituting the Court, the first Judges of which, including those appointed under the 3rd section of the Act, are designated in the second clause of the Charter Those appointed by the Crown will be severally informed by me of their appointments to the Court

2. This Charter will accomplish the great object which has so long been contemplated, of substituting for the Supreme and Sudder Courts abolished by the Act of High Court of Judicature, possessing the combined powers and authorities of the abolished Courts and exercising jurisdiction both over the Provinces under the Sudder Court and over the Presidency Town which forms the local jurisdiction of the Supreme Court

3. Before I review the provisions in detail, it is necessary that I should direct your attention to the general scope and main provisions of the Act in question.

4. It abolishes, in the first place (as soon as the Charter shall issue), the Supreme Court and the Court of Sudder Dewany Adawlut. It vests in the High Court (by the last provision of section 9) the powers and authorities of those Courts respectively, except so far as the Crown may by such Charter otherwise direct. And (by the first part of the same section) it invests the High Court with such Civil, Criminal, Admiralty, Vice-Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, and all such powers and authority in relation to the administration of justice in the Presidency, as the same Charter may confer. With respect, therefore, to the fusion of the Supreme and Sudder Courts, it

(2) The Letters Patent, dated the 14th May, 1862, forwarded with this despatch were afterwards revoked by further Letters Patent, dated 28th December, 18[illegible] for which see *post*

appears obvious that the Act itself speaks, and that to assume and effect the same purpose by affirmative declaration in the Charter would be superfluous. It has been, consequently, deemed unnecessary that the Charter should exhibit on the face of it an explicit statement of the powers and jurisdiction to be possessed by the new Court in consequence of the fusion as would have been the proper course if these powers and jurisdiction had been entirely new. Recourse has been had in some places in lieu of such explicit statement to reference to statutory provisions, and in others, to the Charter of the Supreme Court when the object of clearness appeared to require it. But wherever the Charter does not otherwise specify, the High Court will use the powers and administer the jurisprudence appertaining to those Courts respectively to whose authority it now succeeds

5. But the Charter is intended positively to declare all such Civil, *Criminal and other jurisdictions above specified as the Crown thinks* proper by this Charter to confer on it supplementary or additional to its main purpose, namely, the fusion of the aforesaid Courts.

6. Moreover, the words giving authority to confer on the Court such jurisdiction and such powers and authorities for the administration of justice as the Crown may direct, appear very large and such as, in point of fact, invest the Crown with extensive legislative powers, so far as "the administration of justice," within the meaning of the sections, may require It has been, however, thought best to use this power very sparingly and simply as ancillary to the real purpose of the Act, namely, the establishment of new Courts.

7. Another reason for the form which the present Letters Patent assume, is to be found in the provisions of section 17 of the Act of last Sessions By *that section power is given to the Crown to recall the* Letters Patent establishing the Court at any time within three years after its establishment, and to grant other Letters Patent in their stead. This provision was inserted in the Act, mainly with the view of enabling Her Majesty's Government to avail themselves of the advice and assistance of the Judges of the Court in framing the more perfect Charter by which the jurisdiction and authority of the Court is to be permanently fixed On this point, I request you will put yourselves in communication with the Judges of the Court, and, at any time previous to the expiration of two years from the date of establishment of the Court, furnish me with any suggestions they make, or any amendments they may propose in the Letters Patent now transmitted, and I shall be glad if, in proposing alterations, the Judges will put their recommendations as nearly as possible in the form in which they wish them to appear in the future Letters Patent.

8. I proceed to notice, in order, such of the provisions of the Charter as appear to me call for special remark.

9. By clause 6, power is given to the Chief Justice to appoint the officers of the Court, and to fix their salaries subject, however, in both cases, to the approval and confirmation of the Governor-General in Council.

Clause 6.

This provision does not refer to the settling of tables of fees, where fees are allowed, which, under section 15 of the Act, is required to be done by the Court.

10. The Supreme Court exercise an authority entirely independent of the Government in regard to its ministerial officers The Government, however, has always considered itself at liberty to receive representations from any of the officers of the Sudder or Subordinate Courts who felt themselves aggrieved by the orders of the Judicial Authorities, and to express its opinion on the propriety or otherwise of the proceedings of the Courts in such cases It will be expedient for you to take the question into your consideration, and, after communication with the Court, to adopt some rule in regard to it, which of course must be uniformly applicable to all the officers of the Court Constituted as the High Court will be, it will merit all the confidence you can repose in it; but as a question of policy, the extension of the liberty of application to the Government to those who have not hitherto enjoyed it appears to me preferable to taking it away from those who have heretofore been permitted to avail themselves of it, as a mode of obtaining redress against proceedings alleged by the applicants to be unjust and oppressive.

Clauses 7-10.

11. In regard to the admission of Advocates, Vakeels, and Attorneys, the recommendations of the Law Commissioners have been followed. Under the existing practice, the Advocate pleads, and the Attorney acts, for the suitors of the Supreme Court and the Vakeel both pleads and acts for the suitors of the Sudder Court, of which Court the Advocate and Attorney of the Supreme Court are *ex-officio* Vakeels. These terms are employed in the Charter simply to express the functions of these several classes of practitioners The *Advocate and Attorney* will respectively plead and act in the High Court and the Vakeel will both plead and act in the High Court as he did in the Sudder Court. Any person may apply to be admitted either as an Advocate, or Vakeel, or Attorney under the rules which the Court is authorized by the Charter to make, and there is nothing in the Charter to prevent the admission of Advocates and Attorneys to be also Vakeels of the High Court, should the Judges consider such a course to be expedient.

12. The provisions in the Act, section 2, clause 4, which declares that Pleaders of the Sudder Court, "who shall have been admitted as *Pleaders of the High Court*," *shall be eligible, under certain conditions*, to the Bench of the Court, implies that a discretionary power may be exercised as to the admission of the present Pleaders of the Sudder Court to the Bar of the High Court. This enactment will account to you for the omision from the Charter of any provision appointing all the present practitioners of the Supreme and Sudder Courts to the High Court. I conclude, however, that unless in any special cases, there are strong reasons to the contrary, the Court will admit the whole of the practitioners in the abolished Courts at the date of their abolition, to be the first Advocates, Vakeels, and Attorneys of the High Court.

Clause 10.

13. With reference to the concluding sentence of clause 10, it is to be observed that the Letters Patent contain no provision reserving to the Attorneys of the present Supreme Court the right of pleading after the issue of this Charter, in the Insolvent Court, as newly regulated by clause 17. No such provision, however, is necessary, as the Insolvent Court is a separate tribunal not affected by the Act authorising the Letters Patent and will continue a separate Court though, for the future, presided over

by a Judge of the High Court. The Attorneys, therefore, will, as heretofore, practice in accordance with the rules of the Insolvent Court itself.

14. By the important provisions contained in the clauses of the Charter, 11 to 38 inclusive, effect is given to the 9th section of the Act, respecting the jurisdictions and powers to be exercised by the High Court.

Civil Jurisdiction, Clause 11.

15. The original civil jurisdiction now exercised by the Supreme Court within the limits of the Presidency Town will henceforth be exercised under the Charter, by the High Court, including in that term (Clause 36 of the Charter) a Judge or Division Court of the High Court, appointed or constituted under the provisions of the 13th section of the Act

16. As it is very desirable that every suit should be instituted in the Court of the district in which the property forming the subject of dispute is situated, or in which the cause of action has its origin, or in which the defendant resides or carries on business, the jurisdiction hitherto exercised by the Supreme Court (on the ground of constructive inhabitancy or otherwise) over persons and property beyond the local limits of the Presidency Town, but within the limits of the Presidency or Division subject to the authority of the High Court has not been vested in the High Court. The concluding provision of clause 11 provides that the exercise of the ordinary original civil jurisdiction of the Court shall be confined to the local limits of the Presidency Town, with power, however, to the Court, under clause 13, to call for and try any suit instituted in any Court subject to its superintendence, when, for reasons to be recorded, it shall think proper to do so

Clause 12.

17. The terms *of clause 12, defining the original jurisdiction of the* High Court as to suits, are nearly similar to those employed in section 5 of the Code of Civil Procedure (Act VIII of 1859), and are intended to include every description of case over which the Mofussil Courts have jurisdiction. By the 8th section of the 21st George III, C 70, the Supreme Court is precluded from exercising any jurisdiction in any matter concerning the revenue. Further, a decision* of the Judicial Committee of the Privy Council, pronounced in April 1856, ruled against the exercise of the Ecclesiastical jurisdiction of the Supreme Court in matters matrimonial between others than Christians, and even expressed some hesitation as to whether that Court should administer a remedy in such cases on the Civil side It is one object of the present Charter to do away with all such restrictions and limitations as far as this can be done without trenching on the proper province of legislation. It has, therefore, been sought to invest the High Court, in the exercise of its original civil jurisdiction, with as ample powers in receiving and determining cases of every description, and in applying a remedy to every wrong as are exercised by the Courts not established by Royal Charter, and thus to place the Courts of first instance in the Presidency Towns and in the interior of the country in this respect, as nearly as may be, on the same footing.

*Ardaseer Cursetji v. Perozeboye.

* Reported in 6 Moo. I. A. 348.

18. I shall be glad to be furnished with your opinion, after consultation with the Judges of the Courts, as to the concluding portion of clause 12, excluding the jurisdiction of the Court in regard to cases falling within the jurisdiction of the Small Cause Court of Calcutta, in which the debt or damage or value of the property sued for does not exceed 100 Rupees Hitherto, I believe, there has been no tendency to bring into the Supreme Court cases cognizable by the Small Cause Court; but should it appear that under the new system, the time of the High Court is unnecessarily taken up with trying cases which might be instituted in the Small Cause Court, it may become a question for consideration whether the sum, excluding the jurisdiction of the High Court, might not be raised to, say, 300 or 500 Rupees.

19. It has been suggested that the Small Cause Court should be placed on the same footing as a Zillah Court in its subjection to the High Court as a Court of appeal and general superintendence. But I do not consider that it was the purpose of the Act of Parliament of last Session that the Crown, in framing a Charter under it for the High Court, should interfere with the present position and jurisdiction of other and independent Courts This subject, if desirable, is properly to be attained by legislation. Should you be of opinion that the Small Cause Court ought to be placed in the same relation to the High Court as any other Court subject to its appellate jurisdiction and general control, the measure can be carried into effect by an Act of the Governor-General in Council

Clause 13.

20. As already observed, the effect of clause 12 will be to confine the ordinary original civil jurisdiction of the High Court within narrower limits than the Civil jurisdiction exercised by the Supreme Court. By clause 13, however, the High Court is empowered to call for and to try, as a Court of first instance, any suit which the law requires to be instituted before some other tribunal. By the exercise of the power thus conferred on it, the High Court will be enabled to obviate all reasonable ground of complaint, when it shall deem that any hardship or injustice is likely to result from the compulsory institution in a Zillah Court of a suit which, but for the change in the system, might have been instituted in the Supreme Court.

21. The introduction of the words " whether within or without the Bengal Division of the Presidency of Fort William " in this and in several other clauses, may appear to require explanation The Court about to be established is called in section 2 of the Act, 24 and 25 Victoria, C. 104, a Court " for the Bengal Division of the Presidency of Fort William." That title is of course preserved in the Charter. By section 8, the Supreme and Sudder Courts are abolished and by section 9 all their jurisdiction, power, and authority, except when otherwise provided, are vested in the High Court. But the Supreme Court has various original jurisdictions, extending over the whole of the Presidency of Fort William, and also over some of the Non-Regulation Provinces under the Government of India, and the Sudder Court has various appellate jurisdictions extending over the Bengal Division of the Presidency, and also over the Province of Assam and others, which are not properly parts of the Presidency. The result is, that the High Court " for the Bengal Division," succeeding to the powers of both the Supreme and the Sudder Courts, has, in several respects, jurisdictions in territories not within the Bengal Division As this is the result of the Act, it might not have been necessary to notice it

in the Charter. But for the sake of clearness, and in order to show distinctly that the Charter is meant to apply to these extra local jurisdictions, as well as to the strictly local jurisdiction within the Bengal Division, it has been deemed advisable to introduce these words.

22. Clauses 14 and 15 give effect to the recommendation of the Law Commissioners, that the High Court shall have all the appellate jurisdiction which is now exercised by the Sudder Dewany Adawlut, and a new appellate jurisdiction in civil cases, from the Courts of original jurisdiction, constituted by one or more of its own Judges, except that in the case of a decision which has been passed by a majority of the full number of the judges of the Court, the appeal shall lie to Her Majesty in Council.

Clauses 14 and 15.

23. It will appear, from a subsequent clause on the Letters Patent, that the proceedings in the High Court in civil cases are to be regulated by the Code of Civil Procedure enacted by the Legislature of India, of which Act XXIII of 1861 forms a part By section 23 of the last mentioned Indian Act, provision has been made for a difference of opinion on the hearing of an appeal. A difficulty, however, may occur when two Judges, constituting a Division Court for the trial of cases in the exercise of original jurisdiction, differ as to the judgment to be given For such a case, the Code of Civil Procedure, which is adapted to Courts of first instance presided over by single Judges only, contains no provision. To call in a third Judge, and to re-try the case, with a view to a judgment from which there may be an appeal to the High Court under clause 14 would be productive of unnecessary delay and expense to the parties; and I am of opinion that the Court should make provision for such a contingency, by a rule made under the 13th section of the Act of Parliament, providing either that the judgment shall be in accordance with the opinion of the senior of the Judges constituting the Division Court, or that the final judgment shall be entered *pro forma*, according to such opinion, such judgment being a judgment for the purpose of an appeal against the same, but not for any other purpose.

24. The substantive civil law to be administered by the High Court within the jurisdiction of the Supreme and Sudder Courts, respectively, will, until otherwise provided, continue as at present. This, as I have said, it was no part of the purpose of the Act of Parliament or Charter to effect And the clauses on which I am now commenting are probably superfluous. But they have been introduced to obviate any apprehension which might have been entertained that in fusing the two Courts together, it was intended to fuse also the law which they have respectively hitherto administered, and thus to make a substantial innovation, not only in the tribunals for administration of the law but of the law itself. I trust, however, that measures may be taken ere long for effecting great improvements in this respect, by enacting for the British possessions in India a body of substantive law, by which all classes shall be governed, and all transactions shall be regulated except in cases to which our Judicatures are required to apply the personal laws of any classes of our Indian subjects.

Clauses 18, 19 and 20.

25. Under clauses 21, 22, and 38, no change will be effected by the Charter in the administration of criminal justice in the Presidency Town or in respect of persons subject to its criminal jurisdiction, residing in the interior of the country. It

Clauses 21, 22 and 38.

36. Clause 37 is a very important one, and there is little doubt, will prove a very salutary provision It has, therefore, been inserted, although the change introduced is somewhat greater and more substantial than is generally aimed at in this Charter It extends to the High Court the Code of Civil Procedure enacted by the Legislature of India for the Court, not established by Royal Charter, and thus accomplishes the object so long contemplated of substituting one simple Code of Procedure for the various systems (corresponding to its common law, equity and admiralty jurisdiction) which have been in operation in the Supreme Court since the date of its establishment

Clause 37

37. In regard to the rules respecting appeals to the Privy Council the object has been to avoid unnecessary innovation where so much of change, with its necessary inconvenience, is unavoidable. The existing rules which regulate these appeals are, therefore, left in force, with one or two additions only, which experience in the Court of the Judicial Committee has found advisable. For instance, clause 40 is introduced, as it had been commonly introduced, of late years in the appeal rules of other dependencies of Great Britain in order to remove all doubts as to the power of the High Court to allow an appeal to the Council from interlocutory judgments.

38. It will, however, be obvious to you that the rules, as now framed, will be liable to the reproach of confusion, and perhaps of uncertainty They will be compounded of those contained in the Charter and those already in force which will necessitate reference to several documents You will agree with me that a simple and intelligible Code of Rules, to regulate appeals to the Privy Council from the new High Courts, or rather from the High Courts in general which may be constituted under the Act of Parliament, will be of great advantage to the suitors and the public I should wish, therefore, that one of the first objects of the Judges, as soon as the amount of labour thrown on them by their new position may allow it, might be to prepare suggestions for such a Code of Rules, which might then be reduced into a complete shape by the authority of the Privy Council at Home.

39. In forwarding the Letters Patent to the Judges of the High Court, you are requested to furnish them with a copy of this despatch. I trust that the Letters Patent taken in connection with the Act for establishing the Court, will be found to contain everything requisite for enabling the Court to proceed at once to the discharge of its important duties It is possible that omissions may be discovered by the legal authorities in India, which may impede the proper action of the Courts, and should the Judges represent to you that such is the case you will take immediate steps for supplying what is wanting by such legislative measures as you may consider most expedient for remedying the defects brought under your consideration.

40. I cannot conclude this despatch without expressing the deep interest felt by Her Majesty's Government in the success of this important measure The Crown by its Letters Patent has sanctioned the establishment of a tribunal as the Chief Court of Justice in India, which in the trained learning of the Judges selected from the Bar, and in the knowledge of the language, feelings, and habits of the Natives of that country

possessed by the other members of the Court, combines the most material elements of success. And Her Majesty's Government look with confidence to the zealous exertions and cordial co-operation of the Judges to place the administration of Justice in India, under the controlling authority of the Court, in such a state of efficiency as will render it in very respect adequate to its ends, and satisfactory to the people and to the Government.

I have the honour to be,

My Lord,

Your Lordship's most obedient, humble Servant,

(*Signed*) C. WOOD.

APPENDIX II

LETTERS PATENT FOR THE HIGH COURT OF CALCUTTA.

(December 28, 1865.)

[N.B.—The Letters Patent for the High Courts of Madras and Bombay are mutatis mutandis in almost the same terms.]

Recital of Acts 24 & 25, Vic., c. 104.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To all to whom these presents shall come, greeting: Whereas by an Act of Parliament passed in the twenty-fourth and twenty-fifth years of Our reign, entitled An Act for establishing High Courts of Judicature in India " it was, amongst other things, enacted that it shall be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William, aforesaid, and that such High Court should consist of a Chief Justice and as many judges, not exceeding fifteen, as Her Majesty might, from time to time, think fit to appoint, who shall be selected from among persons qualified as in the said Act is declared: Provided always that the persons who at the time of the establishment of such High Court were Judges of the Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewany Adawlut or Sudder Adawlut of the same Presidency, should be and become Judges of such High Court without further appointment for that purpose, and the Chief Justice of such Supreme Court should become the Chief Justice of the High Court, and that upon the establishment of such High Court as aforesaid, the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Nizamut Adawlut at Calcutta, in the said Presidency, should be abolished.

And that the High Court of Judicature so to be established should have and exercise all such Civil, Criminal. Admiralty

and Vice-Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, original and appellate, and all such powers and authority for, and in relation to, the administration of justice in the said Presidency as Her Majesty might, by such Letters Patent as aforesaid, grant and direct subject, however, to such directions and limitations as to the exercise of original, civil and criminal jurisdictions beyond the limits of the Presidency Town as might be prescribed thereby: and save as by such Letters Patent might be otherwise directed subject and without prejudice to the legislative powers in relation to the matters aforsaid of the Governor-General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last-mentioned Courts.

Revocation of Letters Patent of *1862*.

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to revoke, and do by these presents (from and after the date of the publication thereof as hereinafter provided, and subject to the provisions thereof) revoke Our said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, except so far as the Letters Patent of the fourteenth year of His Majesty King George the Third, dated the twenty-sixth March, one thousand seven hundred and seventy-four, establishing a Supreme Court of Judicature at Fort William in Bengal were revoked or determined thereby.

High Court at Fort William to be continued.

2. And We do by these presents grant, direct and ordain that notwithstanding the revocation of the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, the High Court of Judicature, called the High Court of Judicature at Fort William in Bengal, shall be and continue, as from the time of the original erection and establishment thereof, the High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William aforesaid; and that the said Court shall be and continue a Court of record, and that all proceedings commenced in the said High Court prior to the date of the publication of these Letters Patent shall be continued and depend in the said High Court as if they had commenced in the said High Court after the date of such publication, and that all rules and orders in force in the said High Court, immediately before the date of the publication of these Letters Patent, shall

continuue in force, except so far as the same are altered hereby, until the same are altered by competent authority.

Judges of the said High Court to be continued.

3. And We do hereby appoint and ordain that the person and persons who shall immediately before the date of the publication of those Letters Patent, be the Chief Justice or Judges, or acting Chief Justice or Judges, if any, of the said High Court of Judicature at Fort William in Bengal, shall continue to be the Chief Justice and Judges or acting Chief Justice or Judges, of the said High Court, until further or other provision shall be made by Us or Our heirs and successors in that behalf, in accordance with the said recited Act for establishing High Courts of Judicature in India.

Clerks, etc., of the said High court to be continued.

4. And we do hereby appoint and ordain that every clerk and ministerial officer of the said High Court of Judicature at Fort William in Bengal, appointed by virtue of the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two shall continue to hold and enjoy his office and employment with the salary thereunto annexed until he be removed from such office and employment; and he shall be subject to the like power of removal, regulations, and provisions as if he were appointed by virtue of these Letters Patent.

Declaration to be made by Judges.

5. And We do hereby ordain that the Chief Justice and every Judge who shall be from time to time appointed to the said High Court of Judicature at Fort William in Bengal, previously to entering upon the execution of the duties of his office shall make and subscribe the following declaration before such authority or person as the Governor-General in Council may commission receive it :—

" I, *A.B.*, appointed Chief Justice [or a Judge] of the High Court of Judicature at Fort William in Bengal, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment."

Seal.

6. And We do hereby grant, ordain and appoint that the said High Court of Judicature at Fort Willam in Bengal shall have and use, as occasion may require, a seal bearing a device and impression of Our Royal Arms, within an exergue or label surrounding the same with this inscription, " The Seal of the High Court at Fort William in Bengal." And We do further grant, ordain, and appoint that the said Seal shall be delivered

to and kept in the custody of the Chief Justice, and in case of vacancy of the office of Chief Justice or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section 7 of the recited Act; and We do further grant, ordain and appoint that whensoever it shall happen that the office of Chief Justice or of the Judge to whom the custody of the said Seal be committed shall be vacant, the said High Court shall be and is hereby authorized and empowered to demand, seize, and take the said Seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her, or their possession.

Writs, etc., to issue in name of the Crown and under the Seal.

7. And We do hereby further grant, ordain, and appoint that all writs, summons, precepts, rules, orders and other mandatory process to be used, issued or awarded by the said High Court of Judicature at Fort William in Bengal, shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the Seal of the said High Court.

Appointment of Officers.

8. And We do hereby authorize and empower the Chief Justice of the said High Court of Judicature at Fort William in Bengal, from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed by the Governor-General in Council, to appoint so many and such clerks and other ministerial officers as shall be found necessary for the administration of Justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent. And it is our further will and pleasure, and We do hereby for Us, Our heirs and successors, give, grant, direct and appoint that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice shall from time to time appoint for each office and place respectively, and as the Governor-General in Council shall approve of: Provided always and it is Our will and pleasure, that all and every the officers, and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court so long they shall hold their respective offices; but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail him-

self of leave of absence under any rules prescribed by the Governor-General in Council, and to absent himself from the said limits during the term of such leave, in accordance with the said rules.

Admission of Advocates, Vakeels, and Attorneys.

9. And We do hereby authorize and empower the said Hig Court of Judicature at Fort William in Beng to approve, admit and enrol such and so man Advocates, Vakeels and Attorneys as to th said High Court shall seem meet; such Ad vocates, Vakeels and Attorneys shall be and are hereby authorize to appear for the suitors of the said High Court, and to plead o to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

Powers of High Court in admitting Advocates, Vakeels and Attorneys.

10. And We do hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have power to make rules for the qualifications and admission of proper persons to be Advocates, Vakeels, and Attorneys-at-law of the said High Court, and shall be empowered to remove, or to suspend from practice, on reasonable cause, the said Advocates, Vakeels, or Attorneys-at-law; and no person whatsoever but such Advocates, Vakeels, or Attorneys shall be allowed to act or to plead for, or on behalf of any suitor in the said High Court, except that any suitor shall be allowed to appear, plead, or act on his own behalf or on behalf of a co-suitor.

In making rules for the qualifications etc., of advocates, Vakeels and Attorneys.

Civil Jurisdiction of the High Court.

11. And We hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise ordinary original civil jurisdiction within such local limits as may, from time to time, be declared and prescribed by any law made by competent legislative authority for India and until some local limits shall be so declared and prescribed within the limit declared and prescribed by the proclamation fixing the limits of Calcutta issued by the Governor-General in Council, on the 10th day of September, in the year of Our

Local limits of the ordinary original jurisdiction of the High Court.

Lord, one thousand seven hundred and ninety-four and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction.

Original jurisdiction as to suits.

12. And We do further ordain that the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or property shall be situated, or, in all other cases, if the cause of action shall have arisen either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta, in which the debt or damage, or value of the property sued for does not exceed one hundred rupees.

Extraordinary original civil jurisdiction.

13. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have power to remove and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

Joinder of several causes of action.

14. And We do further ordain that, where plaintiff has several causes of action against a defendant, such causes of action not being for land or other immoveable property, and the said High Court shall have original jurisdiction in respect of one of such causes of action, it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit, and to make such order for trial of the same as to the said High Court shall seem fit.

15. And We do further ordain that an appeal shall l the said High Court of Judicature at Fort liam in Bengal, from the judgment (*not l an order made in the execution of reris jurisdiction and not being a sentence or passed or made in the revision of the pow superintendence under the provisions of section one hundred seven of the Government of India Act, 1915, or in the exerci criminal jurisdiction*) of one Judge of the said High Court or Judge of any Division Court, pursuant to section 13 of the re Act, and that an appeal shall also lie to the said High Court the judgment (not being a sentence or order as aforesaid) of tv more Judges of the said High Court, or of such Division Co whenever such Judges are equally divided in opinion, and do amount in number to a majority of the whole of the Judge the said High Court at the time being; but that the righ appeal from other judgments of Judges of the said High Court of such Division Court, shall be to Us, Our heirs or succes in Our or Their Privy Council, as hereinafter provided.

Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction.

16. And We do further ordain that the said High Cour Judicature at Fort William in Bengal shal a Court of Appeal from the Civil Courts the Bengal Division of the Presidency of I William, and from all other Courts subject to its superintender and shall exercise appellate jurisdiction in such cases as are s ject to appeal to the said High Court by virtue of any laws or re lations now in force

Appeal from Courts in the Province.

17. And We do further ordain that the said High Co of Judicature at Fort William in Bengal s have the like power and authority with res to the persons and estates of infants, idi and lunatics, within the Bengal Division of the Presidency Fort William, as that which is now vested in the said Supre Court at Calcutta.

Jurisdiction as to infants and lunatics

18. And We do further ordain that the Court for re of Insolvent Debtors at Calcutta shall be l before one of the Judges of the said H Court of Judicature at Fort William in Bengal, and the s High Court, and any such Judge thereof, shall have and exerc within the Bengal Division of the Presidency of Fort Willi such powers and authorities with respect to original and appel

jurisdiction, and otherwise, as are constituted by the laws relating to insolvent debtors in India.

Law to be administered by the High Court of Judicature at Fort William in Bengal.

19. And We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case, if these Letters Patent had not issued.

By the High Court in the exercise of ordinary original civil jurisdiction.

20. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal in the exercise of its extraordinary original civil jurisdiction such law or equity and rule of good conscience shall (until otherwise provided) be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein.

In the exercise of extraordinary original civil jursidiction.

21. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the said High Court of Judicature at Fort William in Bengal to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case.

By High Court in the exercise of appellate jurisdiction.

Criminal Jurisdiction.

22. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction; and also in respect of all such persons both within the limits of the Bengal Division of the Presidency of Fort William, and beyond such limits and not within the limits of the criminal jurisdiction of any other High Court or Court established by competent legislative authority for India as the said High Court of Judicature at Fort William in Bengal, shall have

Ordinary original jurisdiction of the High Court.

criminal jurisdiction over at the date of the publication of these Presents.

Jurisdiction as to persons.

23. And We do further ordain that the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

Extraordinary original criminal jurisdiction.

24. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the said High Court, and shall have authority to try at its discretion any such persons brought before it on charges preferred by the Advocate-General or by any Magistrate or other officer specially empowered by the Government in that behalf.

No appeal from High Court exercising original jurisdiction.

Court may reserve points of law.

25. And We do further ordain that there shall be no appeal to the said High Court of Judicature at Fort William in Bengal from any sentence or order passed or made in any criminal trial before the Courts of original Criminal Jurisdiction, which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

High Court to review on certificate of the Advocate-General.

26. And We do further ordain that on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate-General, that in his judgment there is an error in the decision of a point or points of law, decided by the Court of original Criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Courts shall have full power and authority to review the case or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

Appeals from criminal Courts in the Provinces.

27. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall be a Court of Appeal from the Criminal Courts of the Bengal Division of the Presidency of

Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force.

28. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges or by any other Officer now authorized to refer cases to the said High Court, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference to, or revision by, the said High Court.

Hearing of referred cases and revision of criminal trials

29. And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also direct the preliminary investigation or trial of any criminal case by any Officer or Court otherwise competent to investigate or try it, though such belongs, in ordinary course, to the jurisdiction of some other Officer or Court

High Court may direct the transfer of a case from one Court to another.

30. And We do further ordain that all persons brought for trial before the said High Court of Judicature at Fort William in Bengal, either in the exercise of its original jurisdiction or in the exercise of its jurisdiction as a Court of appeal, reference or revision, charged with any offence for which provision is made by Act No. XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act, which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

Offenders to be punished under Indian Penal Code.

Exercise of Jurisdiction elsewhere than at the ordinary place of sitting of the High Court.

31. And We do further ordain that whenever it shall appear to the Governor-General in Council convenient that the jurisdiction and power by these Our Letters Patent, or by the recited Act vested in the said High Court of Judicature at Fort William in Bengal, should be exercised in any place within the

Judges may be authorized to sit in any place or by way of circuit or special commission.

jurisdiction of any Court now subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court at such place or places shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Admiralty and Vice-Admiralty Jurisdiction.

Civil.

32. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice-Admiralty, and also such jurisdiction for the trial and adjudication of prize causes, and other maritime questions arising in India as may now be exercised by the said High Court.

Criminal.

33. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have and exercise criminal jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice-Admiralty, or otherwise in connection with maritime matters or matters of prize.

Testamentary and Intestate Jurisdiction.

Testamentary and intestate jurisdiction.

34. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have the like power and authority as that which may now be lawfully exercised by the said High Courts, except within the limits of the jurisdiction for that purpose of any other High Court established by Her Majesty's Letters Patent, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons, dying intestate, whether within or without the said Bengal Division, subject to the order of the Governor-General in Council, as to the period when the said High Court shall cease to exercise testamentary and intestate jurisdiction in any place or places beyond the limits of the provinces or places for which it was established: Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which

power is given to any other Court to grant such probates and letters of administration.

Matrimonial jurisdiction.

35. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have jurisdiction, within the Bengal Division of the Presidency of Fort William, in matters matrimonial between Our subjects, professing the Christian religion: Provided always that nothing therein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Royal Charter within the said Presidency lawfully possessed thereof.

Powers of single Judges and Division Courts.

Single Judges and Division Courts.

36. And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Fort William in Bengal, in the exercise of its original or appelate jurisdiction, may be performed by any Judge or by any Division Court thereof, appointed or constituted for such purpose in pursuance of section one hundred and eight of the Government of India Act, 1915; and if such Division Court is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any points, such point shall be decided accordingly to the opinion of the majority of the Judges, if there shall be a majority; but if the Judges should be equally divided, then the opinion of the senior Judge shall prevail.

Civil Procedure.

Regulation of proceedings—civil cases.

37. And We do further ordain that it shall be lawful for *the said High Court of Judicature at Fort* William in Bengal, from time to time, to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice-Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, respectively: Provided always that the said High Court shall be guided in making such rules and orders as far as possible by the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council, and being Act No VIII of 1859, and the provisions of any law which has been made, amending or altering the same, by competent legislative authority for India.

38. And We do further ordain that the proceedings in all criminal cases, which shall be brought before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal jurisdiction and also in all other criminal cases over which the said High Court had jurisdiction immediately before the publication of these presents, shall be regulated by the procedure and practice which was in use in the said High Court immediately before such publication, subject to any law which has been or may be made in relation thereto by competent legislative authority for India; and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, prescribed by an Act passed by the Governor-General in Council, and being Act No. XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

Regulation of proceedings — criminal cases.

Appeals to Privy Council.

39. And We do further ordain that any person or persons may appeal to Us, Our heirs and successors in Our or Their Privy Council, in any matter not being of criminal jurisdiction from any final judgment, decree or order of the said High Court of Judicature at Fort William in Bengal made on appeal and from any final judgment, decree, or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal shall not lie to the said High Court under the provisions contained in the 15th clause of these presents: Provided, in either case, that the sum or matter at issue is of the amount or value of not less than Rupees 10,000, or that such judgment, decree, or order *shall involve, directly or indirectly, some claim, demand,* or question to or respecting property amounting to or of the value of *not less than Rupees 10,000; or from any other* final judgment, decree or order made either on appeal or otherwise aforsaid, when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors, in Our or Their Privy Council. Subject always to such rules and orders as are now in force, or may from time to time, be made, respecting appeals to Ourselves in Council from the Courts of the said Presidency, except so far as the said existing rules and orders respectively are hereby varied, and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

Power to appeal.

40. And We do further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, at its discretion on the motion, or if the said High Court be not sitting then for any Judge of the said High Court upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order, or sentence of the High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors, in Our or Their Privy Council, subject to the same rules, regulations, and limitations, as are herein expressed respecting appeals from final judgments, decrees, orders and sentences.

Appeal from interlocutory judgment.

41. And We do further ordain that, from any judgment, order or sentence of the said High Court of Judicature at Fort William in Bengal made in the exercise of original criminal jurisdiction, or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided, by any Court which has exercised original jurisdiction, it shall be lawful for the persons aggrieved by such judgment, order, or sentence to appeal to Us, Our heirs or successors in Council, provided the said High Court shall declare that the case is a fit one for such appeal and under such conditions as the said High Court may establish or require, subject always to such rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

Appeal in criminal cases, etc.

42. And We do further ordain that in all cases of appeal made from any judgment, order, sentence, or decree of the said High Court of Judicature at Fort William in Bengal, to Us, Our heirs or successors, in Our or Their Privy Council a true and correct copy of all evidence, proceedings, judgments, decrees, and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court, and that the said High Court shall also certify and transmit to Us, Our heirs and successors in Our or Their Privy Council, a copy of the reasons given by the Judges of such Court, or by any such Judges, for or against the judgment or determination appealed against.

Rule as to transmission of copies of evidence and other documents.

And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and

execute or cause to be executed, such judgment and orders as We, Our heirs or successors in Our or Their Privy Council, shall think fit to make in the premises in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court should or might have been executed.

Calls for Records, etc., by the Government.

High Court to comply with requisition from Government for records, etc.

43. And it is Our further will and pleasure that the said High Court of Judicature at Fort William in Bengal shall comply with such requisitions as may be made by the Government for records, returns, and statements in such form and manner as such Government may deem proper.

Powers of the Indian Legislature preserved.

44. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council, and also of the Governor-General in Council under section seventy-one of the Government of India Act, 1915, and also of the Governor-General in cases of emergency under section seventy-two of that Act and may be in all respects amended and altered thereby.

Provisions of former Letters Patent inconsistent with these Letters Patent to be void.

45. And it is Our further will and pleasure that these Letters Patent shall be published by the Governor-General in Council, and shall come into operation from and after the date of such publication; and that from and after the date on which effect shall have been given to them, so much of the aforesaid Letters Patent granted by His Majesty, King George The Third, as was not revoked or determined by the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, and is inconsistent with these Letters Patent, shall cease, determine and be utterly void, to all intents and purposes whatsoever.

In Witness thereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster, the twenty-eighth day of December, in the twenty-ninth year of Our reign.

(Sd.) C. ROMILLY.

LETTERS PATENT FOR THE HIGH COURT OF ALLAHABAD.

(*March* 17, 1866.)

[The two first paragraphs of the Preamble are similar to those of the Calcutta Letters Patent of 1865.]

And whereas it is further declared by the said recited Act that it shall be lawful for Us by Letters Patent, to erect, and establish a High Court of Judicature in and for any portion of the territories, within Her Majesty's dominions in India, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and such number of other Judges, with such qualifications as were by the same Act required in persons to be appointed to the High Courts, established at the said Presidencies, as We from time to time might think fit and appoint, and that, subject to the directions of the Letters Patent, all the provisions of the said recited Act, relative to High Courts and to the Chief Justice and other Judges of such Courts and to the Governor-General or Governor of the Presidency, in which such High Courts were established shall, as far as circumstances may permit, be applicable to any new High Court which may be established in the said territories, and to the Chief Justice and other Judges thereof, and to the persons administering the Government of the said territories,

And whereas We did upon full consideration of the premises, think fit to erect and establish, and by Our Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the fourteenth day of May, in the twenty-fifth year of Our reign, in the year of Our Lord one thousand eight hundred and sixty-two, did accordingly, for Us, Our heirs and successors, erect and establish at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William, aforesaid, a High Court of Judicature which should be called the *High Court of Judicature at Fort William in Bengal*, and did thereby constitute the said Court to be a Court of Record.

Establishment of High Court for the North-Western Provinces.

1. Now know ye that We, upon full consideration of the premises and of Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly, for Us, Our heirs and successors, erect and establish, for the North-Western Provinces of the Presidency of the Fort William aforesaid, a High Court of Judicature, which shall be called the High Court of Judicature, for the North-Western Provinces, and We do hereby constitute the said Court to be a Court of Record.

Constitution and first Judges of the High Court.

2. And We do hereby appoint and ordain that the High Court of Judicature for the North-Western Provinces shall, until further or other provisions shall be made by Us, or Our heirs and successors, in that behalf, in accordance with the said recited Act, consist of a Chief Justice and five Judges, the first Chief Justice being Walter Morgan, Esquire, and the five Judges being Alexander Ross, Esquire, William Edwards, Esquire, William Roberts, Esquire, Francis Boyle Pearson, Esquire, and Charles Arthur Turner, Esquire, being respectively qualified as in the said Act is declared.

Declaration to be made by Judges.

3. And We do ordain that the Chief Justice and every Judge of the said High Court of Judicature, for the North-Western Provinces previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Governor General in Council may commission to receive it:—

"*I, A B*, appointed Chief Justice [*or a Judge*] of the High Court of Judicature, for the North-Western Provinces do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment."

4-8. [*These clauses are similar to clauses 6 to 10 of the Calcutta Letters Patent of 1865.*]

Civil Jurisdiction of the High Court.

Extraordinary original civil jurisdiction.

9. And we do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have power to remove and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purpose of justice, the reasons for so doing being recorded on the proceedings of the said High Court

10-11. [*These clauses are similar to clauses 15 and 16 of the Calcutta Letters Patent of 1865.*]

Jurisdiction as to infants and lunatics.

12. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have the like power and authority with respect to the persons and estates of infants; idiots, and lunatics within the North-Western Provinces, as that which is exercised in the Bengal Division of the Presidency of Fort William, by the High Court of Judicature at Fort William in Bengal, but subject to the provisions of any laws or regulations now in force.

13-14. [*These clauses are similar to clauses 20 and 21 of the Calcutta Letters Patent of 1865.*]

Criminal Jurisdiction.

Ordinary original jurisdiction of the High Court.

15. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have ordinary original criminal jurisdiction in respect of all such persons within the said Provinces as the High Court of Judicature at Fort William in Bengal, shall have criminal jurisdiction over at the date of the publication of these presents; and the criminal jurisdiction of the said last-mentioned High Court over such persons shall cease at such date. Provided, nevertheless that criminal proceedings which shall at such date have been commenced in the said last-mentioned High Court shall continue as if these presents had not been issued.

16. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law

Jurisdiction as to persons.

17. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the Sudder Nizamut Adawlut, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any Magistrate or other officer specially empowered by the Government in that behalf

Extraordinary original criminal jurisdiction.

18. [This clause is similar to clause 25 of the Calcutta Letters *Patent of 1865*]

19. And We do further ordain that, on such point or points of law being so reserved as aforesaid, the said High Court *shall have full power and authority to review the* case, or such part of it as may be necessary, and finally determine such point or points of law and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

High Court to review cases on points of law reserved by one or more Judges of the said High Court.

20. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall be a Court of Appeal from the Criminal Courts of the said Provinces, and from all other Courts from which there is now an appeal to the Court of Sudder Nizamut Adawlut for the said Provinces, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said Court of Sudder Adawlut by virtue of any law now in force.

Appeals from Criminal Courts in the Provinces.

21. And We do further ordain that the said High Court shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Session Judges or by any other Officers now authorized to refer cases to the Court of Sudder Nizamut Adawlut of the North-Western Provinces, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference or to revision by the said Court of Sudder Nizamut Adawlut.

Hearing of referred cases and revision of Criminal trials.

22. And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigations or trial of any criminal case by any Officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other Officer or Court.

High Court may direct the transfer of a case from one Court to another.

23. [This clause is similar to clause 29 of the Calcutta Letters Patent of 1865]

Exercise of Jurisdiction elsewhere, than at the ordinary place of sitting of the High Court.

Judges may be authorized to sit in any places by way of circuit or special commission.

24. And We do further ordain that whenever it shall appear to the Lieutenant-Governor of the North-Western Provinces, subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by the recited act, vested in the said High Court, should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of any Sudder Dewany Adawlut or the Sudder Nizamut Adawlut of the North-Western Provinces, other than the usual places of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court, at such place or places, shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Testamentary and Intestate Jurisdiction.

Testamentary and intestate jurisdiction.

25. And We do further ordain that the said High Court of Judicature for the North-Western Provinces, shall have the like power and authority as that which is now lawfully exercised within the said Provinces, by the said High Court of Judicature at Fort William in Bengal, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate; and that the jurisdiction of the said last-mentioned High Court in relation hereto shall cease from the date of the publication of these presents; Provided always that any proceedings already commenced in relation to any of the matters aforesaid in the said last-mentioned High Court shall continue as if these presents had not been issued: Provided also that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

26-27. [These clauses correspond to clauses 35 and 36 of the Calcutta Letters Patent of 1865]

Civil Procedure.

Regulation of proceedings.

28. And We do further ordain that it shall be lawful for the said High Court of Judicature for the North-Western Provinces from time to time to make rules and orders for the purpose of adapting as far as possible the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council and being Act No VIII of 1859, and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate, and matrimonial jurisdiction respectively.

Criminal Procedure.

29. And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court, in the exercise of its ordinary original criminal jurisdiction, shall be regulated by the procedure and practice which was in use in the High Court of Judicature for Fort William in Bengal, immediately before the publication of these presents, subjects to any law which has been or may be made in relation thereto by competent legislative authority for India; and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, prescribed by an Act passed by the Governor-General in Council, and being Act No XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid

Regulation of proceedings.

Appeals to Privy Council

30. And We do further ordain that any person or persons may appeal to us, Our heirs and successors, in Our or Their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree, or order of the said High Court Judicature for the North-Western Provinces, made on appeal, and from ny final judgment, decree, or order made in the exercise of original jurisdiction by the Judges of the said High Court, or of any Division Court, om which an appeal shall not lie to the said High Court under the ovision contained in the 10th Clause of these presents, Provided in either se, that the sum or matter at issue is of amount or value of not less an 10,000 rupees, or that such judgment, decree, or order shall involve, rectly or indirectly, some claim, demand or question to or respecting operty amounting to, or of the value of not less than 10,000 rupees, or om any other final judgment, decree or order made either on appeal otherwise as aforesaid when the said High Court shall declare that the se is a fit one for appeal to Us, Our heirs or successors in Our or Their ivy Council subject always to such rules and orders as are now in rce, or may from time to time be made respecting appeals to Ourselves Council from the Courts of the said Provinces except so far as the id existing rules and orders, respectively, are herby varied and subject so to such further rules and orders, as we may with the advice of our rivy Council, hereafter make in that behalf

Power to appeal.

31, 32, 33, 34, 35.—[These clauses are similar to clauses 40, 41, 42, and 44 of the Calcutta Letters Patent of 1865.]

By Warrant under the Queen's Sign Manual

(Sd) C. ROMILLY

LETTERS PATENT FOR THE HIGH COURT OF PATNA.

(February 9, 1916.)

Recital of Act 24 and 25 Vict., c. 104.

GEORGE THE FIFTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India. To all to whom these Presents shall come, greeting WHEREAS by an Act of Parliament passed in the Twenty-fourth and Twenty-fifth Years of the Reign of Her late Majesty Queen Victoria, and called the Indian High Courts Act, 1861, it was amongst other things, enacted, by section one, that it should be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William,

and, by section two, that such High Court should consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty might, from time to time, think fit to appoint, who should be selected from among persons qualified as in the said Act was declared;

and, by section eight, that upon the establishment of such High Court as aforesaid the Supreme Court and the Court of Diwani Adalat and Sadar Nizamat Adalat at Calcutta, in the said Presidency, should be abolished,

and, by section nine, that the High Court of Judicature so to be established should have and exercise all such civil, criminal, admiralty, and vice-admiralty, testamentary intestate and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the said Presidency as Her Majesty might by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and limitations, as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency town, as might be prescribed, thereby, and that, save as by such Letters Patent might be otherwise directed, and, subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last-mentioned Courts

And whereas it was further declared by section sixteen of the said recited Act that it should be lawful for Us by Letters Patent to erect and establish a High Court of a Judicature in and for any portion of territories within Our Dominions in India, not included within the limits of the local jurisdiction of another High Court, to consist of Chief Justice and such number of other Judges, with such qualifications as were by the said Act required in persons to be appointed to the High Courts established at the Presidencies of Fort William in Bengal, of Madras, and of Bombay, as We from time to time might think fit and appoint; and that it should be lawful for Us, by such Letters Patent, to confer on any new High Court which might be so established any such jurisdiction, powers and authority as under the same Act was authorized to be conferred on or would become vested in the High Court established in any of the said Presidencies; and

that subject to the directions of the Letters Patent, all the provisions of the said recited Act relative to High Courts and to the Chief Justice and other Judges of such Courts, and to the Governor-General or Governor of the Presidency in which such High Courts were established, should, as far as circumstances might permit, be applicable to any new High Court which might be established in the said territories, and to the Chief Justice and other Judges thereof, and to the persons administering the Government of the said territories:

Recital of establishment of High Courts at Fort William and Allahabad.

And whereas, upon full consideration of the premises, Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Fourteenth day of May, in the Twenty-fifth Year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty-two, did erect and establish a High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William aforesaid and did constitute that Court to be a Court of Record

And whereas Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Twenty-eighth day of December in the Twenty-ninth Year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty-five, did revoke the said Letters Patent bearing date the Fourteenth day of May in the Year of Our Lord one thousand eight hundred and sixty-two, but notwithstanding that revocation did continue the said High Court of Judicature at Fort William in Bengal and declared that the Court should continue to be a Court of Record

And whereas, upon full consideration of the premises, Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Seventeenth day of March, in the Twenty-ninth year of Her Reign in the Year of Our Lord One thousand eight hundred and sixty-six, did erect and establish a High Court of Judicature for the North-Western Provinces which said Court is situated at Allahabad in the Province of Agra and is now called the High Court of Judicature at Allahabad and did constitute that Court to be a Court of Record

Recital of Act 1 & 2 Geo. 5, c. 18.

And whereas by an Act of Parliament passed in the First and Second Years of Our Reign, and called the Indian High Courts Act, 1911, it was enacted, amongst other things, by section one that the maximum number of Judges of a High Court of Judicature in India, including the Chief Justice, should be twenty,

and, by section two that Our power under section sixteen of the Indian High Courts Act, 1861, might be exercised from time to time and that a High Court might be established under the said section sixteen in any portion of the territories within Our Dominions in India whether or not included within the limits of the local jurisdiction of another High Court; and that, where such a High Court was established in any part of such territories included within the limits of the local jurisdiction of another High Court, it should be lawful for Us by Letters Patent to alter the local jurisdiction of that other High Court, and to make such incidental, consequential and supplemental provisions as might appear to be necessary by reason of the alteration of those limits:

And whereas the said Indian High Courts Acts, 1861 and 1911, have been repealed and re-enacted by an Act of Parliament passed in the Fifth and Sixth Years of Our Reign, and called the Government of India Act, 1915;

Recital of Act 5 & 6 Geo. 5, c. 61.

And whereas certain territories formerly subject to and included within the limits of the Presidency of Fort William in Bengal were by proclamation made by the Governor-General of India on the Twenty-second day of March in the Year of Our Lord One thousand nine hundred and twelve, constituted a separate Province, called the Province of Bihar and Orissa, and are now governed by a Lieutenant-Governor in Council.

Recital of creation of Province of Bihar and Orissa.

Establishment of High Court at Patna.

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly for Us, Our Heirs and Successors, erect and establish, for the Province of Bihar and Orissa aforesaid, with effect from the date of the publication of these presents in the Bihar and Orissa Gazette, a High Court of Judicature, which shall be called the High Court of Judicature, at Patna, and We do hereby constitute the said Court to be a Court of Record.

Constitution and first Judges of the High Court.

2. And We do hereby appoint and ordain that the High Court of Judicature at Patna shall, until further or other provision be made by Us, or Our Heirs and Successors, in that behalf in accordance with section One hundred and one of the said recited Government of India Act, 1915, consist of a Chief Justice and six other Judges, the first Chief Justice being Sir Edward Maynard Des Champs Chamier, Knight, and the six other Judges being Saiyid Shurf-ud-din, Esquire, Edmund Pelly Chapman, Esquire, Basanta Kumar Mullick, Esquire, Francis Reginald Roe, Esquire, the Honourable Cecil Atkinson, and Jowala Persad, Esquire, being respectively qualified as in the said Act is declared

Declaration to be made by Judges.

3. And We do hereby ordain that the Chief Justice and every other Judge of the High Court of Judicature at Patna, previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Lieutenant-Governor in Council may commission to receive it —

"I, *A B*, appointed Chief Justice [*or a Judge*] of the High Court of Judicature at Patna, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment."

Seal.

4. And We do hereby grant, ordain and appoint that the High Court of Judicature at Patna shall have and use, as occasion may require, a seal bearing a device and impression of Our Royal arms, within an exergue or label surrounding the same, with this inscription, "The Seal of the High Court at Patna." And We do further grant, ordain and appoint that the said seal shall be delivered to and kept in the custody of the Chief Justice, and in

case of vacancy of the office of Chief Justice, or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section One hundred and five of the Government of India Act, 1915; and We do further grant, ordain and appoint that, whensoever the office of Chief Justice or of the Judge to whom the custody of the said seal be committed is vacant, the said High Court shall be, and is hereby authorised and empowered to demand, seize and take the said seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her or their possession.

Writs, etc., to issue in name of the Crown, and under seal.

5. And We do hereby further grant, ordain and appoint that all writs, summonses, precepts, rules, orders and other mandatory process to be used, issued or awarded by the High Court of Judicature at Patna shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the seal of the said High Court.

Appointment of officers.

6. And We do hereby authorize and empower the Chief Justice of the High Court of Judicature at Patna from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed from time to time by the Lieutenant-Governor in Council, to appoint so many and such clerks and other ministerial officers as may be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent And We do hereby ordain that every such appointment shall be forthwith submitted to the approval of the Lieutenant-Governor in Council and shall be either confirmed or disallowed by the Lieutenant-Governor in Council And it is Our further will and pleasure, and We do hereby, for Us, Our heirs and successors, give, grant, direct and appoint, that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice may, from time to time, appoint for each office and place respectively and as the *Lieutenant-Governor in Council subject to the control of the Governor-General* in Council, may approve of Provided always, and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they hold their respective offices, but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of *leave of absence under any rules prescribed from time* to time by the Governor-General in Council, and to absent himself from the said limits during the term of such leave in accordance with the said rules.

Admission of Advocates, Vakils and Attorneys.

Powers of High Court in admitting Advocates, Vakils and Attorneys.

7. And We do hereby authorize and empower the High Court of Judicature at Patna to approve, admit and enrol such and so many Advocates, Vakils and Attorneys as to the said High Court may seem meet, and such Advocates, Vakils and Attorneys shall be and are hereby authorized to appear for the suitors of the said *High Court and to plead or to act, or to*

plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions

Powers of High Court in making rules for the qualification, etc., of Advocates, Vakils and Attorneys.

8. And We do hereby ordain that the High Court of Judicature at Patna shall have power to make rules from time to time for the qualification and admission of proper persons to be Advocates, Vakils and Attorneys-at-law of the said High Court and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakils or Attorneys-at-law, and no person whatsoever but such Advocates, Vakils or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor in the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co-suitor

Civil Jurisdiction of the High Court

Extraordinary original civil Jurisdiction

9. And We do further ordain that the High Court of Judicature at Patna shall have power to remove, and *to try and determine, as a Court of extraordinary* original jurisdiction any suit being or falling within the jurisdiction of any Court subject to its superintendence, when the said High Court may think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court

Appeal to the High Court from Judges of the Court.

10. And We do further ordain that an appeal shall lie to the High Court of Judicature at Patna from the judgment (not being an order made in the exercise of revisional jurisdiction in a case which has been *called for* by the said Court, and not being a sentence or order passed or made in the exercise of criminal jurisdiction) of one Judge of the said High Court, or of one Judge of any Division Court constituted in pursuance of section One hundred and eight of the Government of India Act, 1915, and that an appeal shall also lie to the said High Court from the judgment (not being an order or sentence as aforesaid) of two or more Judges of the said High Court, or of any such Division Court wherever such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being; but that the right of appeal from other judgments of Judges of the said High Court, or of any such Division Court, in such case shall be to Us, Our heirs or successors, in Our or their Privy Council, as hereinafter provided

Appeal from other Civil Courts in the Province of Bihar and Orissa.

11. And We do further ordain that the High Court of Judicature at Patna shall be a Court of Appeal from the Civil Courts of the Province of Bihar and Orissa and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the High Court of Judicature at Fort William in Bengal by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India.

12. And We do further ordain that the High Court of Judicature at Patna shall have the like power and authority with respect to the persons and estates of infants, idiots and lunatics within the Province of Bihar and Orissa as that which was vested in the High Court of Judicature at Fort William in Bengal immediately before the publication of these presents

Jurisdiction as to Infants and Lunatics.

Law to be administered by the High Court

13. And We do further ordain that, with respect to the law or equity to be applied to each case coming before the High Court of Judicature at Patna in the exercise of its extraordinary original civil jurisdiction, such law or equity shall until otherwise provided, be the law or equity which would have been applied to such case by any local Court having jurisdiction therein

By the High Court in the exercise of extraordinary original civil jurisdiction.

14. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the High Court of Judicature at Patna to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law of equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case

By the High Court in the exercise of appellate jurisdiction.

Criminal Jurisdiction

15. And We do further ordain that the High Court of Judicature at Patna shall have ordinary original criminal jurisdiction in respect of all such persons within the Province of Bihar and Orissa as the High Court of Judicature at Fort William in Bengal had such criminal jurisdiction over immediately before the publication of these presents

Ordinary original criminal jurisdiction of the High Court.

16. And We do further ordain that the High Court of Judicature at Patna, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law

Jurisdiction as to persons.

17. And We do further ordain that the High Court of Judicature at Patna shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court subject to its superintendence, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any magistrate or other officer specially empowered by the Government in that behalf

Extraordinary original criminal jurisdiction.

18. And We do further ordain that there shall be no appeal to the High Court of Judicature at Patna from any sentence or order passed or made by the Courts or original criminal jurisdiction which may be constituted by one or more Judges of the said High Court But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

No appeal from High Court exercising original jurisdiction.

Court may reserve points of law.

High Court to review cases on points of law reserved by one or more Judges of the High Court.

19. And We do further ordain that, on such point or points of law being so reserved as aforesaid, the High Court of Judicature at Patna shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court may seem right.

Appeals from other Criminal Courts in the Province of Bihar and Orissa.

20. And We do further ordain that the High Court of Judicature at Patna shall be a Court of Appeal from the Criminal Courts of the Province of Bihar and Orissa and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the High Court of Judicature at Fort William in Bengal by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India

Hearing of referred cases and revision of criminal trials

21. And We do further ordain that the High Court of Judicature at Patna shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges, or by any other officers in the Province of Bihar and Orissa who were, immediately before the publication of these presents, authorized to refer cases to the High Court of Judicature at Fort William in Bengal and to revise all such cases tried by any officer or Court possessing criminal jurisdiction in the Province of Bihar and Orissa, as were, immediately before the publication of these presents, subject to reference to or revision by the High Court of Judicature at Fort William in Bengal.

High Court may direct the transfer of a case from one Court to another.

22. And We do further ordain that the High Court of Judicature at Patna shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other officer or Court.

Criminal Law.

Offenders to be punished under Indian Penal Code.

23. And We do further ordain that all persons brought for trial before the High Court of Judicature at Patna, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of appeal, reference or revision, charged with any offence for which provision is made by Act No. XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

Admiralty Jurisdiction.

Civil.

24. And We do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa, all such civil and maritime jurisdiction as was exercisable therein immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions as was so exercisable by the High Court of Judicature at Fort William in Bengal.

Criminal.

25. And We do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa all such criminal jurisdiction as was exercisable therein immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty, or otherwise in connection with maritime matters or matters of prize.

Testamentary and intestate Jurisdiction.

Testamentary and intestate jurisdiction.

26. And We do further ordain that the High Court of Judicature at Patna shall have the like power and authority as that which was immediately before the publication of these presents lawfully exercised within the Province of Bihar and Orissa by the High Court of Judicature at Fort William in Bengal, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate. Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration

Matrimonial Jurisdiction

Matrimonial jurisdiction.

27. And We do further ordain that the High Court of Judicature at Patna shall have jurisdiction, within the Province of Bihar and Orissa, in matters matrimonial between Our subjects professing the Christian religion Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court, not established by Letters Patent within the said Province, which is lawfully possessed of that jurisdiction

Powers of single Judges and Division Courts.

Single Judges and Division Courts.

28. And We do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Patna, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court, thereof, appointed or constituted for such purpose in pursuance of section One hundred and eight of the Government of India Act, 1915, and if such Division Court is composed of two or

more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there be a majority, but if the Judges be equally divided, then the opinion of the senior Judge shall prevail

Civil Procedure.

Regulation of proceedings

29. And We do further ordain that it shall be lawful for the High Court of Judicature at Patna from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adapting as far as possible the provisions of the Code of Civil Procedure, being an Act, No. V of 1908, passed by the Governor-General in Council, and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate and matrimonial jurisdiction, respectively.

Criminal Procedure

Regulation of proceedings.

30. And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Patna, in the exercise of its ordinary original criminal jurisdiction shall be regulated by the procedure and practice which was in use in the High Court of Judicature at Fort William in Bengal immediately before the publication of these presents, subject to any law which has been or may be made in relation thereto by competent legislative authority for India, and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, being an Act No V of 1898, passed by the Governor-General in Council, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

Appeals to Privy Council.

Power to appeal in civil cases.

31. And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree or order of the High Court of Judicature at Patna made on appeal, and from any final judgment decree or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal does not lie to the said High Court under the provisions contained in the 10th clause of these presents; provided in either case, that the sum or matter at issue is of the amount or value of not less than 10,000 rupees, or that such judgment, decree or order involves, directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than 10,000 rupees; or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid, when the said High Court declares that the case is a fit one for appeal to Us, Our heirs or successors, in Our or their Privy Council; but subject always to such rules and orders as are now in force, or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the Province of Bihar and Orissa, except so far as the said existing rules and orders respectively are hereby varied; and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

32. And We do further ordain that it shall be lawful for the High Court of Judicature at Patna, at its discretion on the motion, or, if the said High Court be not sitting then for any Judge of the said High Court, upon the petition, of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree or order of the said High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors in Our or their Privy Council subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees and orders

Appeal from interlocutory judgments.

33. And We do further ordain that from any judgment, order or sentence of the High Court of Judicature at Patna, made in the exercise of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court, in manner provided by the 18th clause of these presents, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our heirs or successors in Council, provided the said High Court declares that the case is a fit one for such appeal, and that the appeal be made under such conditions as the said High Court may establish or require, but subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Province of Bihar and Orissa

Appeal in criminal cases.

34. And We do further ordain that, in all cases of appeal made from any judgment, decree, order or sentence of the High Court of Judicature at Patna to Us, Our heirs or successors, in Our or their Privy Council, such High Court shall certify and transmit to Us, Our heirs and successors, in Our or their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made, in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court And that the said High Court shall also certify and transmit to Us, Our heirs and successors in Our or their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against And we do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute, or cause to be executed, such judgments and orders as We, Our heirs or successors, in Our or their Privy Council, may think fit to make in the premises, in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court, should or might have been executed

Rule as to transmission of copies of evidence and other documents.

Exercise of jurisdiction elsewhere than at the usual place of sitting of the High Court

35. And We do further ordain that, unless the Governor-General in Council otherwise directs one or more Judges of the High Court of Judicature at Patna shall visit the Division of Orissa, by way of circuit, whenever the Chief Justice from time to time appoints, in order to exercise in respect of cases arising in that Division the jurisdiction and power by these Our

Judges to visit Orissa by way of circuit.

Letters Patent, or by or under the Government of India Act, 1915, vested in the said High Court Provided always that such visits shall be made not less than four times in every year, unless the Chief Justice, with the approval of the Lieutenant-Governor in Council otherwise directs: Provided also that the said High Court shall have power from time to time to make rules with the previous sanction of the Lieutenant-Governor in Council, for declaring what cases or classes of cases arising in the Division of Orissa shall be heard at Patna and not in that Division, and that the Chief Justice may, in his discretion, order that any particular case arising in the Division of Orissa shall be heard at Patna or in that Division.

Special Commissions and circuits.

36. And We do further ordain that whenever it appears to the Lieutenant-Governor in Council, subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, 1915, vested in the High Court of Judicature at Patna should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court other than the usual place of sitting of the said High Court, or at several such places by way of circuit, one or more Judges of the Court shall visit such place or places accordingly

Proceedings of Judges on special commission or circuit

37. And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Patna visit any place under the 35th or the 36th clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Delegation of Duties to Officers.

Power to delegate duties.

38. The High Court of Judicature at Patna may from time to time make rules for delegating to any Registrar, Prothonotary or Master or other official of the Court any judicial, quasi-judicial and non-judicial duties

Cessation of jurisdiction of the High Court of Judicature at Fort William in Bengal.

Cessation of jurisdiction of the High Court of Judicature at Fort William over the Province of Bihar and Orissa.

39. And We do further ordain that the jurisdiction of the High Court of Judicature at Fort William in Bengal in any matter in which jurisdiction is by these presents given to the High Court of Judicature at Patna shall cease from the date of the publication of these presents and that all proceedings pending in the former Court on that date in reference to any such matter shall be transferred to the latter Court.

Provided, first, that the High Court of Judicature at Fort William in Bengal shall continue to exercise jurisdiction—

(a) in all proceedings pending in that Court on the date of the publication of these presents in which any decree or order, other than an order of an interlocutory nature, has been passed or made by that Court, or in which the validity of any such decree or order is directly in question; and

(b) in all proceedings [not being proceedings referred to in paragraph (a) of this clause] pending in that Court, on the date of the publication of these presents, under the 13th, 15th, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 32nd, 33rd, 34th, or 35th clause of the Letters Patent bearing date at Westminster the Twenty-eighth day of December, in the Year of Our Lord One thousand eight hundred and sixty-five, relating to that Court and

(c) in all proceedings instituted in that Court, on or after the date of the publication of these presents, with reference to any decree or order passed or made by that Court

Provided, secondly, that, if any question arises as to whether any case is covered by the first proviso to this clause, the matter shall be referred to the Chief Justice of the High Court of Judicature at Fort William in Bengal, and his decision shall be final.

Calls for Records, etc , by the Government

High Court to comply with requisitions from Government for records, etc.

40. And it is Our further will and pleasure that the High Court of Judicature at Patna shall comply with such requisitions as may be made by the Lieutenant-Governor in Council for records, returns and statements, in such form and manner as he may deem proper.

Powers of Indian Legislatures

Powers of Indian Legislatures preserved.

41. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative power of the Governor-General in Legislative Council, and also of the Governor-General in Council under section Seventy-one of the Government of India Act, 1915, and also of the Governor-General in cases of emergency under section Seventy-two of that Act, and may be in all respects amended and altered thereby

In Witness whereof we have caused these Our Letters to be made Patent Witness Ourself at Westminster the Ninth day of February, in the Year of Our Lord One thousand nine hundred and sixteen and in the sixth year of Our Reign.

By warrant under the King's Sign Manual

(Signed) SCHUSTER

LETTERS PATENT FOR THE HIGH COURT OF LAHORE.

(*March* 21, 1919.)

GEORGE THE FIFTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India: To all to whom these Presents shall come, greeting Whereas by an Act of Parliament passed in the Fifth and Sixth years of Our Reign and called the Government of India Act, 1915, it was amongst other things enacted that it should be lawful for Us by Letters Patent to establish a High Court of Judicature in any territory in British India whether or not included within the limits of the local jurisdiction of another High Court and to confer on any High Court so established any such jurisdiction powers and authority as were vested in or might be conferred on any High Court existing at the commencement of that Act

And whereas the Provinces of the Punjab and Delhi are now subject to the Jurisdiction of the Chief Court of the Punjab which was established by an Act of the Governor-General of India in Council, being Act No. XXIII of 1865, and was continued by later enactments and no part of the said provinces is included within the limits of the local jurisdiction of any High Court

Establishment of High Court at Lahore

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly for Us, Our heirs and successors, erect and establish, for the Province of the Punjab and Delhi aforesaid, with effect from the date of the publication of these presents in the *Gazette of India*, a High Court of Judicature, which shall be called the High Court of Judicature at Lahore, and We do hereby constitute the said Court to be a Court of Record.

Constitution and first Judges of the High Court.

2. And We do hereby appoint and ordain that the High Court of Judicature at Lahore shall, until further or other provision be made by Us, or Our heirs and successors, in that behalf in accordance with section one hundred and one of the said recited Government of India Act, 1915, consist of a Chief Justice and six other Judges, the first Chief Justice being Sir Henry Adolphus Rattigan, Knight, and the six other Judges being William Chevis, Esquire, Henry Scott-Smith, Esquire, Shadi Lal, Esquire, Rai Bahadur, Walter Aubin le Rossignol, Esquire, Leycester Hudson Leslie Jones, Esquire, and Alan Brice Broadway, Esquire, being respectively qualified as in the said Act is declared.

Declaration to be made by Judges

3. And We do hereby ordain that the Chief Justice and every other Judge of the High Court of Judicature at Lahore, previously to entering in the execution of the duties of his office, shall make and subscribe the following

declaration before such authority or person as the Lieutenant-Governor of the Punjab may commission to receive it:—

"I, *A. B.*, appointed Chief Justice [*or a Judge*] of the High Court of Judicature at Lahore do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment

4. And We do hereby grant, ordain and appoint that the High Court of Judicature at Lahore shall have and use as occasion may require, a Seal bearing a device and impression of Our Royal arms, within an exergue or label surrounding the same, with this inscription, "The Seal of the High Court at Lahore" And We do further grant, ordain and appoint that the said seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the Office of Chief Justice, or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section one hundred and five of the Government of India Act, 1915, and We do further grant, ordain and appoint that, whensoever the office of Chief Justice or of the Judge to whom the custody of the said seal be committed is vacant, the said High Court shall be, and is hereby, authorized and empowered to demand, seize and take the said seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her or their possession

Seal

Writs, etc., to issue in name of the Crown, and under seal.

5. And We do hereby further grant, ordain and appoint that all writs, summonses, precepts, rules, orders and other mandatory process to be used, issued or awarded by the High Court of Judicature at Lahore shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the seal of the said High Court.

Appointment of officers.

6. And We do hereby authorize and empower the Chief Justice of the High Court of Judicature at Lahore from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed from time to time by the Lieutenant-Governor of the Punjab, to appoint so many and such clerks and other ministerial officers as may be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent. And it is our further will and pleasure, and we do hereby, for Us, Our heirs and successors give, grant direct and appoint, that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice may, from time to time, appoint for each office and place respectively, and as the Lieutenant-Governor of the Punjab, subject to the control of the Governor-General in Council, may approve of; Provided always, and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they hold their respective offices, but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed from time to time by the Governor-General in Council, and to absent himself from the said limits during the term of such leave in accordance with the said rules.

Admission of Advocates, Vakils and Attorneys.

Powers of High Court in admitting Advocates, Vakils and Attorneys

7. And We do hereby authorize and empower the High Court of Judicature at Lahore to approve, admit and enrol such and so many Advocates, Vakils and Attorneys as to the said High Court may seem meet, and such Advocates, Vakils and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions

Power of High Court in making rules for the qualifications etc., of Advocates, Vakils and Attorneys.

8. And We do hereby ordain that the High Court of Judicature at Lahore shall have power to make rules from time to time for the qualification and admission of proper persons to be Advocates, Vakils and Attorneys-at-Law of the said High Court, and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakils or Attorneys-at-Law; and no person whatsoever but such Advocates, Vakils or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor in the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co-suitor

Civil Jurisdiction of the High Court.

Extraordinary original civil jurisdiction.

9. And We do further ordain that the High Court of Judicature at Lahore shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court subject to its superintendence, when the said High Court may think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

Appeal to the High Court from Judges of the Court.

10. And We do further ordain that an appeal shall lie to the High Court of Judicature at Lahore from the judgment (not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the powers of superintendence under the provisions of section one hundred and seven of the Government of India Act, 1915, or in the exercise of criminal jurisdiction) of one Judge of the said High Court, or of one Judge of any Division Court constituted in pursuance of section one hundred and eight of the Government of India Act, 1915, and that an appeal shall also lie to the said High Court from the judgment (not being an order or sentence as aforesaid) of two or more Judges of the said High Court, or of any such Division Court, wherever such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being; but that the right of appeal from other judgments of Judges of the said High Court, or of any such Division Court, in such case shall be to Us, Our heirs or successors, in Our or their Privy Council, as hereinafter provided.

11. And We do further ordain that the High Court of Judicature at Lahore shall be a Court of Appeal from the Civil Courts of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents subject to appeal to the Chief Court of the Punjab by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent legislative authority for India.

Appeal from other Civil Courts in the Provinces of the Punjab and Delhi.

12. And We do further ordain that the High Court of Judicature at Lahore shall have the like power and authority with respect to the persons and estates, of infants, idiots and lunatics within the Provinces of the Punjab and Delhi as that which was vested in the Chief Court of the Punjab immediately before the publication of these presents.

Jurisdiction as to Infants and Lunatics.

Law to be administered by the High Court.

13. And We do further ordain that, with respect to the law or equity to be applied to each case coming before the High Court of Judicature at Lahore in the exercise of its extraordinary original civil jurisdiction, such law or equity shall, until otherwise provided, be the law or equity which would have been applied to such case by any local Court having jurisdiction therein.

By the High Court in the exercise of extraordinary original civil jurisdiction.

14. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the High Court of Judicature at Lahore to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case

By the High Court in the exercise of appellate jurisdiction.

Criminal Jurisdiction.

15. And We do further ordain that the High Court of Judicature at Lahore shall have ordinary original criminal jurisdiction in respect of all such persons within the Provinces of the Punjab and Delhi as the Chief Court of the Punjab had such criminal jurisdiction over immediately before the publication of these presents

Ordinary original criminal jurisdiction of the High Court.

16. And We do further ordain that the High Court of Judicature at Lahore, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

Jurisdiction as to persons.

17. And We do further ordain that the High Court of Judicature at Lahore shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court subject to its superin-

Extraordinary original criminal jurisdiction.

tendence, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any magistrate or other officer specially empowered by the Government in that behalf.

No appeal from High Court exercising original jurisdiction.

18. And We do further ordain that there shall be no appeal to the High Court of Judicature at Lahore from any sentence or order passed or made by the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court

Court may reserve points of law.

But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

High Court to review cases on points of law reserved by one or more Judges of the High Court.

19 And We do further ordain that, on such point or points of law being so reserved as aforesaid, the High Court of Judicature at Lahore shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court may seem right.

Appeals from other criminal Courts in the Provinces of the Punjab and Delhi.

20. And We do further ordain that the High Court of Judicature at Lahore shall be a Court of Appeal from the Criminal Courts of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the Chief Court of the Punjab by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent legislative authority for India.

Hearing of referred cases, and revision of criminal trials.

21. And We do further ordain that the High Court of Judicature at Lahore shall be a court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges, or by any other officers in the Provinces of the Punjab and Delhi who were, immediately before the publication of these presents, authorized to refer cases to the Chief Court of the Punjab and to revise all such cases tried by any officer or Court possessing criminal jurisdiction in the Provinces of the Punjab and Delhi, as were, immediately before the publication of these presents, subject to reference to or revision by the Chief Court of the Punjab

High Court may direct the transfer of a case from one Court to another.

22. And We do further ordain that the High Court of Judicature at Lahore shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other officer or Court.

Criminal Law.

23. And We do further ordain that all persons brought for trial before the High Court of Judicature at Lahore, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a court of appeal, reference or revision, charged with any offence for which provision is made by Act No. XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

Offenders to be punished under Indian Penal Code.

Testamentary and Intestate Jurisdiction.

24. And We do further ordain that the High Court of Judicature at Lahore shall have the like power and authority as that which was immediately before the publication of these presents lawfully exercised within the Provinces of the Punjab and Delhi by the Chief Court of the Punjab in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate: Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

Testamentary and intestate jurisdiction.

Matrimonial Jurisdiction.

25. And We do further ordain that the High Court of Judicature at Lahore shall have jurisdiction, within the Provinces of the Punjab and Delhi, in matters matrimonial between Our subjects professing the Christian religion: Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court, not established by Letters Patent within the said Provinces, which is lawfully possessed of that jurisdiction.

Matrimonial jurisdiction.

Powers of Single Judges and Division Courts.

26. And We do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Lahore in the exercise of its original or appellate jurisdiction may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose in pursuance of section one hundred and eight of the Government of India Act, 1915, and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges if there be a majority, but if the Judges be equally divided, then the opinion of the senior Judge shall prevail.

Single Judges and Division Courts.

Civil Procedure.

27. And We do further ordain that it shall be lawful for the High Court of Judicature at Lahore from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adapting as far as possible the provisions of the Code of Civil Procedure, being an Act, No. V of 1908, passed by the Governor-General in Council and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate and matrimonial jurisdiction, respectively.

Regulation of proceedings.

Criminal Procedure.

28. And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Lahore shall be regulated by the Code of Criminal Procedure, being an Act, No. V of 1898, passed by the Governor-General in Council, or by such further or other laws in relation to criminal procedure as may have been or may be made by competent legislative authority for India.

Regulation of proceedings.

Appeals to Privy Council.

29. And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or their Privy Council, *in any matter* not being of criminal jurisdiction, from any final judgment, decree or order of the High Court of Judicature at Lahore made on appeal, and from any final judgment, decree or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from *which an appeal does not lie to the said High Court* under the provisions contained in the 10th clause of these presents: Provided in either case, that the sum or matter at issue is of the amount or value of not less than 10,000 rupees, or that such judgment, decree or order involves, directly or indirectly, some claim, demand or question to or *respecting property amounting to or of the value of not less than* 10,000 rupees; or from any other final judgment, decree or order made either on appeal or *otherwise* as aforesaid, when the said High Court declares that the case is *a fit one* for appeal to Us, Our heirs or successors, in Our or their Privy Council; but subject always to such rules and orders as are now in force, or may from time to time be made, *respecting* appeals to Ourselves in Council from the Courts of the Provinces of the Punjab and Delhi, except so *far as* the said existing rules and orders respectively are hereby varied; and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

Power to appeal in civil cases.

30. And We do further ordain that it shall be lawful *for the* High Court of Judicature at Lahore at its discretion, on the motion, or, if the said High Court, be not sitting, then for any Judge of the said High Court, upon the petition, of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree or order *of the* said High

Appeal from interlocutory judgments.

Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors, in Our or their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees and orders.

Appeal in criminal cases.

31. And We do further ordain that from any judgment, order or sentence of the High Court of Judicature at Lahore, made in the exercise of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court, in manner provided by the 18th clause of these presents, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our heirs or successors, in Council, provided the said High Court declares that the case is a fit one for such appeal, and that the appeal be made under such conditions as the said High Court may establish or require, but subject always to such rules and orders, as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Provinces of the Punjab and Delhi.

Rule as to transmission of copies of evidence and other documents.

32. And We do further ordain that, in all cases of appeal made from any judgment, decree, order or sentence of the High Court of Judicature at Lahore to Us, Our heirs or successors, in Our or their Privy Council, such High Court shall certify and transmit to Us, Our heirs and successors, in Our or their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made, in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court And that the said High Court shall also certify and transmit to Us, Our heirs and successors, in Our or their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against. And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors conform to and execute, or cause to be executed, such judgments and orders as We, Our heirs or successors, in Our or their Privy Council, may think fit to make in the premises, in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court, should or might have been executed

Exercise of Jurisdiction elsewhere than at the usual place of sitting of the High Court.

Special commissions and circuits.

33. And We do further ordain that whenever it appears to the Lieutenant-Governor of the Punjab, subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, 1915, vested in the High Court of Judicature at Lahore should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, one or more Judges of the Court shall visit such place or places accordingly

of the Star of India, Maung Kin, Esquire, Charles Philip Radford Young, Esquire, Henry Sheldon Pratt, Esquire, Benjamin Herbert Heald, Esquire, John Guy Rutledge, Esquire, one of Our Counsel learned in the Law, and Hugh Ernest MacColl, Esquire, being respectively qualified as in the said Act is declared.

Declaration to be made by Judges.

3. And We do hereby ordain that the Chief Justice and every other Judge of the High Court of Judicature at Rangoon previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Governor of Burma in Council may Commission to receive it.—

"I, *A. B*, appointed Chief Justice [or a Judge] of the High Court of Judicature at Rangoon, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment."

Seal.

4. And We do hereby grant, ordain and appoint that the High Court of Judicature at Rangoon shall have and use as occasion may require, a seal bearing a device and impression of Our Royal Arms, within an exergue or label surrounding the same, with this inscription, "The Seal of the High Court at Rangoon" And We do further grant, ordain and appoint that the said seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the office of Chief Justice, or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section one hundred and five of the Government of India Act And We do further grant, ordain and appoint that, whensoever the office of Chief Justice or of the Judge to whom the custody of the said seal be committed is vacant, the said High Court shall be, and is hereby, authorized and empowered to demand, seize and take the said seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her or their possession.

Writs, etc., to issue in name of the Crown, and under seal.

5. And We do hereby further grant, ordain and appoint that all writs, summonses, precepts, rules, orders and other mandatory process to be used issued or awarded by the High Court of Judicature at Rangoon shall run and be in the name and style of Us, or of Our Heirs and Successors, and shall be sealed with the seal of the said High Court.

Appointment of officers

6. And We do hereby authorize and empower the Chief Justice of the High Court of Judicature at Rangoon from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed from time to time by the Governor of Burma in Council, to appoint so many and such clerks and other ministerial officers as may be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent. And it is Our further will and pleasure, and We do hereby, for Us, Our Heirs and Successors, give, grant, direct and appoint, that all and every the officers and clerks to be appointed as aforesaid shall have and receive

respectively such reasonable salaries as the Chief Justice may, from time to time, appoint for each office and place respectively, and as the Governor of Burma in Council, subject to the Control of the Secretary of State in Council, may approve: Provided always, and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they hold their respective offices; but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence permissible by or under any rules made by the Secretary of State in Council, and to absent himself from the said limits during the term of such leave in so far as may be permitted by or under the said rules

Admission of Advocates and Pleaders

Powers of High Court in admitting Advocates, Pleaders, and Attorneys.

7. And We do hereby authorize and empower the High Court of Judicature at Rangoon to approve, admit and enrol such and so many Advocates, Pleaders and Attorneys as to the said High Court may seem meet and such Advocates, Pleaders and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

Power of High Court in making rules for the qualifications, etc., of advocates, Pleaders and Attorneys.

8. And We do hereby ordain that the High Court of Judicature at Rangoon shall have power to make rules from time to time for the qualification and admission of proper persons to be Advocates, Pleaders and Attorneys of the said High Court, and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Pleaders or Attorneys, and no person whatsoever but such Advocates, Pleaders or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor of the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co-suitor

Civil Jurisdiction of the High Court

Local limits of the ordinary original civil jurisdiction.

9. And We do hereby ordain that the High Court of Judicature at Rangoon shall have and exercise ordinary original civil jurisdiction within such local limits as may from time to time be declared and prescribed by any law made by the local legislature and until some local limits shall be so declared and prescribed, within the limits of the ordinary original civil jurisdiction of the Chief Court of Lower Burma immediately before the publication of these presents, and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction.

Original jurisdiction as to suits.

10. And We do further ordain that the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction shall be empowered to receive, try and determine suits of every description if, in the case of suits for land or other immovable property such land or property shall

be situated, or in all other cases if the cause of action shall have arisen, either wholly, or in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original civil jurisdiction of the said High Court, of if the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Rangoon Small Cause Court

Extraordinary original civil jurisdiction.

11. And We do further ordain that the High Court of Judicature at Rangoon shall have power to remove, and to try and determine, as a Court of extraordinary original civil jurisdiction, any suit being or falling within the jurisdiction of any Court subject to its superintendence, when the said High Court may think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court

Joinder of several causes of action.

12. And We do further ordain that when the plaintiff has several causes of action against the defendant, such causes of action not being for land or other immoveable property, and the High Court of Judicature at Rangoon shall have original jurisdiction in respect of one such cause of action, it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit and to make such order for trial of the same as to the said High Court shall seem fit.

Appeal to the High Court from Judges of the Court.

13. And We do further ordain that an appeal shall lie to the High Court of Judicature at Rangoon, from the Judgment (not being a judgment made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court, subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act made in the exercise of appellate jurisdiction made in respect of a decree or order made in the exercise of appellate jurisdiction by a Court, subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; and that an appeal shall also lie to the said High Court from the judgment (not being a sentence or order as aforesaid) of two or more Judges of the said High Court, or of such Division Court, whenever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being; but that the right of appeal from other judgments of Judges of the said High Court of such Division

Court shall be to Us, Our Heirs or Successors in Our or Their Privy Council, as hereinafter provided.

Appeal from other Civil Courts.

14. And We do further ordain that the High Court of Judicature at Rangoon shall be a Court of Appeal from the Civil Courts of the Province of Burma for which, immediately before the publication of these presents, the Chief Court of Lower Burma or the Court of the Judicial Commissioner of Upper Burma was a Court of Appeal, and from all other Civil Courts, whether within or without the Province of Burma, for which the said High Court is declared to be a Court of Appeal by any law made by the local legislature or by competent legislative authority for India, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the Chief Court of Lower Burma or to the Court of the Judicial Commissioner of Upper Burma by virtue of any law then in force, or as may after that date be declared subject to appeal to the said High Court by any law made by the local legislature or by competent legislative authority for India

Jurisdiction as to Infants and Lunatics.

15. And We do further ordain that the High Court of Judicature at Rangoon shall have the like power and authority with respect to the persons and estates of infants, idiots and lunatics within the Province of Burma, as that which was vested in the Chief Court of Lower Burma, and the Court of the Judicial Commissioner of Upper Burma immediately before the publication of these presents.

Provision with respect to the Insolvent Court.

16. And We do further ordain that the Court for relief of insolvent debtors at Rangoon shall be held before one of the Judges of the High Court of Judicature at Rangoon and the said High Court, and any such Judge thereof, shall have and exercise within the Province of Burma, such power and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in the Province of Burma.

Law to be administered by the High Court in the exercise of ordinary original civil jurisdiction.

17. And We do further ordain that, with respect to the law to be applied to each case coming before the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction, such law shall be the law which would have been applied by the Chief Court of Lower Burma to such case if these Letters Patent had not issued

Equity to be administered by the High Court in the exercise of ordinary original civil jurisdiction.

18. And We do further ordain that, with respect to the equity to be applied to each case coming before the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction, such equity shall be the equity as nearly as may be which the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction is authorized to apply to such case

Law and equity to be administered by the High Court in the exercise of extraordinary original civil jurisdiction.

19. And We do further ordain that with respect to the law or equity and rule of good conscience to be applied to each case coming before the High Court of Judicature at Rangoon, in the exercise of its extraordinary original civil jurisdiction, such law or equity and rule of good conscience shall, until otherwise provided, be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein.

Law and equity to be administered by the High Court in the exercise of appellate jurisdiction.

20. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the High Court of Judicature at Rangoon, to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case

Criminal Jurisdiction.

Ordinary original criminal jurisdiction of the High Court.

21. And We do further ordain that the High Court of Judicature at Rangoon shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction; and also in respect of all persons beyond such limits over whom the Chief Court of Lower Burma has such criminal jurisdiction immediately before the publication of these presents

Jurisdiction as to Persons.

22. And We do further ordain that the High Court of Judicature at Rangoon, in the exercise of its ordinary original criminal jurisdiction shall be empowered to try all persons brought before it in due course of law.

Extraordinary original criminal jurisdiction.

23. And We do further ordain that the High Court of Judicature at Rangoon shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court subject to its superintendence, and shall have authority to try at its discretion any such persons brought before it on charges preferred by the Government Advocate, or by any magistrate or other officer specially empowered by the Government in that behalf.

No appeal from High Court exercising original criminal jurisdiction.

24. And We do further ordain that there shall be no appeal to the High Court of Judicature at Rangoon, from any sentence or order passed or made in any criminal trial before the Courts of original criminal jurisdiction, which may be constituted by one or more Judges of the said High Court

Court my reserve points of law.

But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

High Court to review on certificate of the Government Advocate.

25. And We do further ordain that on such point or points of law being so reserved as aforesaid, or on its being certified by the Government Advocate that in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jursidiction, or that

a point or points of law which has or have been decided by the said Court, should be further considered, the High Court of Judicature at Rangoon shall have full power and authority to review the case, or such part of it as, may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

Appeals from Criminal Courts.

26. And We do further ordain that the High Court of Judicature at Rangoon shall be a Court of Appeal from the Criminal Courts for which immediately before the publication of these presents the Chief Court of Lower Burma or the Judicial Commissioner of Upper Burma was a Court of Appeal and from all other Criminal Courts, whether within or without the Province of Burma, for which the said High Court is declared to be a Court of Appeal by any law made by the local legislature or by competent legislative authority for India, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the Chief Court of Lower Burma or to the Judicial Commissioner of Upper Burma by virtue of any law then in force, or as may after that date be declared subject to appeal to the said High Court by any law made by the local legislature or by competent legislative authority for India

Hearing of referred cases, and revision of criminal trials.

27. And We do further ordain that the High Court of Judicature at Rangoon shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges, or by any other officers, who were, immediately before the publication of these presents, authorized to refer cases to the Chief Court of Lower Burma or to the Judicial Commissioner of Upper Burma, and to revise all such cases tried by any officer or Court possessing criminal jurisdiction, as were, immediately before the publication of these presents, subject to reference to or revision by the Chief Court of Lower Burma or the Judicial Commissioner of Upper Burma

High Court may direct the transfer of a case from one Court to another.

28. And We do further ordain that the High Court of Judicature at Rangoon shall have power to direct, the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise compentent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other officer or Court.

Criminal Law

Offenders to be punished under Indian Penal Code.

29. And We do further ordain that all persons brought for trial before the High Court of Judicature at Rangoon either in exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of Appeal, reference or revision, charged with any offence for which provision is made by the Indian Penal Code, being an Act passed by the Gover-

nor-General in Council and being Act No. XLV of 1860, or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

Admiralty Jurisdiction.

Civil

30. And We do further ordain that the High Court of Judicature at Rangoon shall have and exercise all such civil and maritime jurisdiction as might be exercised by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty immediately before the date of the publication of these presents, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions arising in India as might be exercised by the said High Court at the said date.

Criminal.

31. And We do further ordain that the High Court of Judicature at Rangoon shall have and exercise all such criminal jurisdiction as might immediately before the publication of these presents be exercised by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty or otherwise in connection with maritime matters or matters of prize.

Testamentary and Intestate Jurisdiction.

Testamentary and intestate jurisdiction

32. And We do further ordain that the High Court of Judicature at Rangoon shall have the like power and authority as that which was immediately before the publication of these presents lawfully exercised within the Province of Burma by the Chief Court of Lower Burma and the Court of the Judicial Commissioner of Upper Burma in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate: Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

Matrimonial Jurisdiction.

Matrimonial jurisdiction.

33. And We do further ordain that the High Court of Judicature at Rangoon shall have jurisdiction, within the Province of Burma, in matters matrimonial between Our subjects professing the Christian religion: Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Letters Patent within the said Province which is lawfully possessed of that jurisdiction.

Powers of Single Judges and Division Courts.

Single Judges and Division Court.

34. And We do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Rangoon in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court, thereof, appointed or constituted for such purpose in pursuance of section one hundred and eight of the Government

of India Act; and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there be a majority, but, if the Judges be equally divided, then the opinion of the senior Judge shall prevail

Civil Procedure.

Regulation of proceedings.

35. And We do further ordain that it shall be lawful for the High Court of Judicature at Rangoon from time to time to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, testamentary, intestate and matrimonial jurisdiction, respectively: Provided always, that the said High Court shall be guided in making such rules and orders as far as possible by the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General of India in Legislative Council, and being Act No V of 1908, and the provisions of any law which has been or may be made, amending or altering the same by the local legislature or by competent legislative authority for India.

Criminal Procedure.

Regulation of proceedings.

36. And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Rangoon shall be regulated by the Code of Criminal Procedure, being an Act, No. V of 1898, passed by the Governor-General of India in Legislative Council, or by such further or other laws in relation to criminal procedure as have been or may be made by the local legislature or by competent legislative authority for India.

Appeals to Privy Council

Power to appeal in civil cases.

37. And We do further ordain that any person or persons may appeal to Us, Our Heirs and Successors, in Our or Their Privy Council, in any matter not being of criminal jurisdiction from any final judgment, decree or order of the High Court of Judicature at Rangoon made on appeal and from any final judgment, decree or order, made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal shall not lie to the said High Court under the provisions contained in the 13th clause of these presents

Provided in either case that the sum or matter at issue is of the amount or value of not less than 10,000 rupees, or that such judgment, decree or order involves, directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than 10,000 rupees, or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid, when the said High Court declares that the case is a fit one for appeal to Us, Our Heirs and Successors, in Our or Their Privy Council, but subject always to such rules and orders as are now in force or may from time to time be made,

respecting appeals to Ourselves in Council from the Courts of the Province of Burma, except so far as the said existing rules and orders respectively are hereby varied, and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

Appeal from interlocutory judgment.

38. And We do further ordain that it shall be lawful for the High Court of Judicature at Rangoon at its discretion, on the motion, or, if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition, of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree or order of the said High Court in any such proceeding as aforesaid, not being of criminal jurisdiction to grant permission to such party to appeal against the same to Us, Our Heirs and Successors, in Our or Their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees and orders.

Appeal in criminal cases.

39. And We do further ordain that from any judgment, order or sentence of the High Court of Judicature at Rangoon made in the exercise of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court, in manner provided by the 24th clause of these presents, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our Heirs and Successors, in Our or Their Privy Council, provided the said *High Court shall declare* that the case is a fit one for such appeal, and that the appeal be made under such conditions as the said High Court may establish or require, but subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Province of Burma

Rules as to transmission of copies of evidence and other documents.

40. And We do further ordain that, in all cases of appeal made from any judgment, decree, order or sentence of the High Court of Judicature at Rangoon to Us, Our Heirs and Successors, in Our or Their Privy Council, such High Court shall certify and transmit to Us, Our Heirs and successors in Our or Their Privy Council a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made, in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court And that the said High Court shall also certify and transmit to Us, Our Heirs and Successors, in Our or Their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against. And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our Heirs and Successors, in Our or Their Privy Council, conform to and execute, or cause to be executed, such judgments and orders as We, Our Heirs and Successors, in Our or Their Privy Council, may think fit to make in the premises, in such manner as any original judgment, decree or decretal order, or other order or rule of the said High Court, should or might have been executed.

Exercise of Jurisdiction elsewhere than at the usual place of sitting of the High Court.

41. And We do further ordain that, unless the Governor of Burma in Council otherwise directs, one or more Judges of the High Court of Judicature at Rangoon, as the Chief Justice may from time to time direct, shall sit at Mandalay, in order to exercise in respect of cases arising in such areas in Upper Burma as the Governor of Burma in Council may direct the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, vested in the said High Court provided that the Chief Justice may, in his discretion, order that any particular case arising in the said areas in Upper Burma shall be heard at Rangoon.

Special commission and circuits.

42. And We do further ordain that whenever it appears convenient to the Governor of Burma in Council, that the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, vested in the High Court of Judicature at Rangoon should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court or at several such places by way of circuit, one or more Judges of the said High Court shall visit such place or places accordingly.

Proceedings of Judges on special commission or circuit.

43. And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Rangoon shall visit or sit at any place under the 41st or the 42nd clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by the local legislature or by a competent legislative authority for India

Provisions regarding Pending Proceedings

44. And We do further ordain that all suits, appeals, revisions, applications, reviews' executions and other proceedings whatsoever pending immediately before the publication of these presents in the Chief Court of Lower Burma, or before the Judicial Commissioner of Upper Burma, or in the Court of the Judicial Commissioner of Upper Burma, in the exercise of any jurisdiction vested in them by any law, shall be continued and concluded in the High Court of Judicature at Rangoon as if the same had been instituted in the said High Court, and the High Court shall in relation to all such proceedings exercise the jurisdiction given to it by these presents

Delegation of Duties to Officers

Power to delegate duties.

45. The High Court of Judicature at Rangoon may, from time to time, make rules for delegating to any Registrar, Prothonotary or Master or other official of the Court any judicial, quasi-judicial and non-judicial duties

Calls for Records, etc., by the Government.

High Court to comply with requisitions from Government for records, etc.

46. And it is Our further will and pleasure that the High Court of Judicature at Rangoon shall comply with such requisitions as may be made by the Governor-General of India in Council or by the Governor of Burma in Council for records, returns and statements, in such form and manner as he may deem proper.

Powers of Indian Legislatures.

Powers of Indian Legislatures preserved.

47. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the local legislature and of the Indian legislature, and also of the Governor-General in Council under section seventy-one of the Government of India Act; and also of the Governor-General under section seventy-two of that Act; and may be in all respects amended and altered thereby.

IN WITNESS whereof We have caused these Our Letters to be made Patent.

WITNESS Ourself at Westminster the eleventh day of November in the Year of our Lord one thousand nine hundred and twenty-two and in the thirteenth Year of Our reign.

BY WARRANT under the King's Sign Manual.

(Signed) SCHUSTER.

RULES MADE BY THE HIGH COURT OF CALCUTTA UNDER S. 122.

CALCUTTA HIGH COURT.

I. *Cancel* Clause (1), Rule 9, Order VII and *substitute* therefor the following.—

"(1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it.

(1) (*a*) The plaintiff shall present with his plaint:—

(*i*) as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements;

(*ii*) a petition for service of summons to appear and answer together with the fees and draft forms of summons" (P 1056.)

CALCUTTA HIGH COURT.

II *Add* the following as Clause (*e*) to Rule 11, Order VII —

"(*e*) Where any of the provisions of Rule 9 (*1*) (*a*) is not complied with and the plaintiff on being required by the Court to comply therewith within a time to be fixed by the Court, fails to do so" (P 1066)

CALCUTTA HIGH COURT

III. *Cancel* Rule 15, Order V, and *substitute* therefor the following.—

"15. Where in any suit the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time, then unless he has an agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him

Provided that where such adult male member has an interest in the suit and such interest is adverse to that of the defendant, a summons so served shall be deemed for the purposes of the third column of Article 164 of Schedule I of the Limitation Act, 1908, not to have been duly served.

Explanation —A servant is not a member of the family within the meaning of this rule" (P. 978.)

Cancel Rule 17, Order V, and *substitute* therefor the following:—

" 17. Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person upon whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed." (P. 979)

CALCUTTA HIGH COURT.

IV *Cancel* Rule 19, Order V, and *substitute* therefor the following:—

" 19 Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the declaration of the serving officer, and may, if it has been so verified, examine the serving officer, on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit, and shall either declare that the summons has been duly served or order such service as it thinks fit." (P. 985)

CALCUTTA HIGH COURT

V. *Insert* the following after Rule 19, Order V:—

" 19A A declaration made and subscribed by a serving officer shall be received as evidence of the facts as to the service or attempted service of the summons " (P 986)

CALCUTTA HIGH COURT

VI *Insert* the words " (or proof of the above having been duly made by the declaration of) " *after* the words " proof of the above having been duly taken by me on the oath of " in Form No 10, Appendix B (P 2117)

CALCUTTA HIGH COURT.

VIII *Cancel* Clauses (1) and (2) of Rule 2, Order XVI, and *substitute* therefor the following —

" (*1*) The Court shall fix in respect of each summons such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

(*2*) In fixing such an amount the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case " (P. 1177.)

CALCUTTA HIGH COURT.

IX. *Cancel* Rule 3, Order XVI, and *substitute* therefor the following:—

"3. The sum so fixed shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally." (P. 1165.)

CALCUTTA HIGH COURT.

X. *Cancel* Clause (1) of Rule 4, Order XVI, and *substitute* therefor the following:—

"(1) Where it appears to the Court or to such officer as it appoints in this behalf that the sum so fixed is not sufficient to cover such expenses or reasonable remuneration, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and in case of default in payment, may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons; or the Court may discharge the person summoned, without requiring him to give evidence, or may both order such levy and discharge such person as aforesaid" (P 1178)

CALCUTTA HIGH COURT.

XI. *Insert* the following after Rule 7, Order XVI —

"Rule 7 (*a*) (*i*). Except where it appears to the Court that a summons under this Order should be served by the Court in the same manner as a summons to a defendant, the Court shall make over for service all summonses under this Order to the party applying therefor The service shall be effected by or on behalf of such party by delivering or tendering to the witness in person a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the Court

(*ii*) Rules 16 and 18 of Order V shall apply to summons personally served under this rule, as though the person effecting service were a serving officer.

(*iii*) If such summons, when tendered, is refused or if the person served refuses to sign an acknowledgment of service or if for any reason such summons cannot be served personally, the Court shall, on the application of the party, re-issue such summons to be served by the Court in like manner as a summons to a defendant" (P 1181)

CALCUTTA HIGH COURT

XII *Cancel* Rule 8, Order XVI, and *substitute* therefor the following.—

"8 (*1*) Every summons under this Order not being a summons made over to a party for service under Rule 7 (*a*) (*i*) of this Order, shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in Order V as to proof of service shall apply thereto

(*2*) The party applying for a summons to be served under this rule shall, before the summons is granted and within a period to be fixed, pay into Court the sum fixed by the Court under Rule 2 of this Order." (P 1181.)

CALCUTTA HIGH COURT.

XIII. *Insert* the following after Rule 14, Order VI:—

" 14A. Every pleading when filed shall be accompanied by a statement in a prescribed form, signed as provided in rule 14 of this Order of the party's address for service. Such address may from time to time be changed by lodging in Court a form duly filled up and stating the new address of the party and accompanied by a verified petition. The address so given shall be called the registered address of the party and shall, until duly changed as aforesaid, be deemed to be the address of the party for the purpose of service of all processes in the suit or in any appeal from any decree or order therein made and for the purposes of execution, and shall hold good subject as aforesaid for a period of two years, after the final determination of the cause or matter. Service of any process may be effected upon a party at his registered address in like manner in all respects as though such party resided thereat." (P. 1008)

CALCUTTA HIGH COURT.

XIV *Insert* the following as Clause (3) to Rule 14, Order XLI.—

" (3) It shall be in the discretion of the Appellate Court to make an order, at any stage of the appeal whether on its own motion, or *ex parte*, dispensing with service of such notice on any respondent who did not appear, either at the hearing in the Court whose decree is complained of or at any proceeding subsequent to the decree of that Court or on the legal representatives of any such respondent:

Provided that—

(*a*) The Court may require notice of the appeal to be published in any newspaper or newspapers as it may direct.

(*b*) No such order shall preclude any such respondent or legal representative from appearing to contest the appeal." (P. 1928)

CALCUTTA HIGH COURT.

XV. *Add the following to* Rule 11, Order XXII —

" Provided always that where an Appellate Court has made an order dispensing with service of notice of appeal upon legal representatives of any person deceased under Order XLI, Rule 14 (3), the appeal shall not be deemed to abate as against such party and the decree made on appeal shall be binding on the estate or the interest of such party." (P. 1577.)

APPENDIX III

Rules made by the High Court of Calcutta, under s. 122.

Or. VII, r. 3.—*After Or VII, r. 3, add the words*—

and when the area is mentioned, such description shall further state the area according to the notation used in the record of settlement or survey, with or without, at the option of the party, the same as in terms of the local measures

Or. XVI, r. 2 (1).—*Add the following proviso to Or XVI, r (2) (i)*:—

Provided that when a Government officer is summoned on behalf of Government, the Court shall not require his travelling and other expenses to be paid under this rule.

Or. XVI, r. 3.—*Add the following proviso to Or. XVI, r 3* —

Provided that money shall not be tendered under this rule to Government officers whose pay exceeds Rs 10 per mensem, or whose head-quarters are situate more than 5 miles from the Court, when they are summoned to appear as witness in their official capacity in cases to which Government is a party

Schedule I—Appendix A—Form No. 13.—In the form of " Breach of agreement to purchase land," No 13 of Appendix A to the First Schedule, *cancel* the word " bighas " and *substitute* there for the words "acres" / "bighas"

Schedule I—Appendix G—Form No. 9.—In the form of " Decree in Appeal," No 9 of Appendix G to the First Schedule ,*cancel* the words from " Memorandum of Appeal " to " the following reasons, namely:—."

APPENDIX IV

Rules made by the High Court of Bombay under s. 122.

Or. III, r. 2, clause (a).—*Or III, r 2, cl. (a) be amended to read follows:—*

Persons holding general powers-of-attorney from parties not residei within the local limits of the jurisdiction of the Court within which limi the appearance, application or act is made or done, authorising them t make and do such appearances, applications and acts on behalf of suc parties*

Or. V, r. 22.—*The following proviso be added to Or. V, r. 22.—*

Provided that where any such summons is to be served within the limits of the town of Bombay, it may be addressed to the defendant at the place within such limits where he is residing and may be sent to him by the Court by post registered for acknowledgment. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary.

Or. XIII, r. 9.—*Between the first and second proviso to sub-rule (1) of rule 9 of Order XIII, the following proviso shall be inserted, namely:—*

Provided also that a copy of the decree and of the judgment filed with the memorandum of appeal under Order XLI, rule 1, may be returned after the appeal has been disposed of by the Court.

Or. XVI, r. 1, clause (a).—*The following shall be added as rule 1-A to Order XVI:—*

1-A (1) The Court may, on the application of any party for a summons for the attendance of any person, permit that service of such summons shall be effected by such party

(2) When the Court has directed service of the summons by the party applying for the same and such service is not effected, the Court may, if it is satisfied that reasonable diligence has been used by such party to effect such service, permit service to be effected by an officer of the Court

Or. XVI, r. 2 (1).—*The following shall be inserted as proviso to sub-rule (1) of rule 2 of Order XVI:—*

Provided that where Government or a public officer being a party to a suit or proceeding as such public officer supported by Government in the

* See *Vardan v. Chandrappa*, (1917) 41 B 40, 36 I C. 803

litigation, applies for a summons to any public officer to whom the Civil Service Regulations apply to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal, as a public officer, or to produce any document from public records, the Government or the aforesaid officer shall not be required to pay any sum of money on account of the travelling and other expenses of such witness.

Or. XVI, r. 3.—*The following shall be inserted as proviso to rule 3 of Order XVI*:—

Provided that where the witness is a public officer to whom the Civil Service Regulations apply and is summoned to give evidence of facts which have come to his notice or of facts with which he has had to deal, in his official capacity, or to produce a document from public records, the sum payable by the party obtaining the summons on account of his travelling and other expenses shall not be tendered to him.

Or. XXI, r. 22.—In rule 22 of Order XXI the words " two years " shall be substituted for the words " one year " wherever they occur.

Or. XXI, r. 44-A.—*After r. 44 of Or. XXI, the following shall be inserted, namely*:—

'44-A Where the property to be attached is agricultural produce, a copy of the warrant or order of attachment shall be sent by post to the Office of the Collector of the District in which the land is situate.

Or. XXI, r. 45.—*The following words shall be added to sub-rule (1) of rule 45 of Order XXI, after substituting a semi-colon for the full stop*:—

and the applicant shall deposit in Court at the time of the application such sum as the Court shall deem sufficient to defray the cost of watching and tending the crop till such time.

Or. XXI, r. 54.—*The following shall be added to sub-rule (1) of rule 54 of Order XXI* —

Such order shall take effect, where there is no consideration for such transfer or charge, from the date of such order, and where there is consideration for such transfer or charge, from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged

Or. XXI, r. 69 (2).—In sub-rule (2) of rule 69 of Order XXI " thirty days " shall be substituted for " seven days."

Or. XXI, r. 72-A.—*After r 72 of Or XXI, the following shall be inserted, namely* —

72-A If leave to bid is granted to the mortgagee of immoveable property, a reserve price as regards him shall be fixed of not less than the amount then due for principal, interest and costs in case the property is sold in one lot, and not less in respect of each lot (in case the property is sold in lots) than such sum as shall appear to be properly attributable to it in relation to the amount aforesaid

Or. XXI, r. 91-A.—*The following rule shall be added as rule 91-A in Order XXI of the Code of Civil Procedure.*—

Where the execution of a decree has been transferred to the Collector and the sale has been conducted by the Collector or by an officer subordi-

nate to the Collector, an application under rules 89, 90 or 91, and in the case of an application under rule 89, the deposit required by that rule if made to the Collector or the officer to whom the decree is referred for execution in accordance with any rule framed by the local Government under *section 70 of the Code*, shall be deemed to have been made to or in the Court within the meaning of rules 89, 90 and 91.

Or. XXXII, r. 3 (4).—*The words* " to the minor and " in line 2 of sub-rule (4) of rule 3 of Order XXXII shall be deleted.

Or. XXXIII, r. 1,—*The following sentence shall be added to the Explanation to rule 1 of Order XXXIII, Civil Procedure Code, namely*—

In determining whether he is possessed of sufficient means the subject-matter of the suit shall be excluded.

Or. XXXIV, r. 2 (d).—*Substitute for clause (d) of rule 2 of Order XXXIV, the following:*—

(*d*) that, if such payment is not made on or before the day to be fixed by the Court the plaintiff shall be entitled to apply for a final decree for foreclosure under rule 3.

Or. XXXIV, r. 4 (1).—In sub-rule (1) of rule 4 of Order XXXIV, after the words " as therein mentioned " substitute " the plaintiff shall be entitled to apply for a final decree for sale under rule 5."

Or. XXXIV, r. 5 (2).—In sub-rule (2) of rule 5 of Order XXXIV, after the words " proceeds of the sale," *substitute:*—

" (After defraying the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest at such rate as the Court deems reasonable and subsequent costs, and that the balance (if any) be paid to the defendants or other persons entitled to the same:

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for such payment.

Or. XXXIV, r. 7 (d).—*For clause (d) of rule 7 of Order XXXIV, substitute:*—

(*d*) that, if such payment is not made on or before the day to be fixed by the Court, the defendant shall be entitled to apply for a final decree for sale or foreclosure under rule 8.

Or. XXXVII, r. 2.—*In sub-rule (1) of rule 2 of Order XXXVII, after the words " promissory notes " the following words shall be inserted, namely:*—

and all suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest, arising on a contract express or implied, or on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty, or on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only.

(3) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1).

Or. XXXVII, r. 3.—*In rule 3 of Order XXXVII, the following sub-rule (3) shall be inserted.*—

(3) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1).

Or. XLI, r. 3-A.—*After rule 3 of Order XLI, the following rule shall be inserted, namely* —

3-A. Where an appellant applies for delay to be excused, notice to show cause shall at once be issued to the respondent and the matter shall be finally decided before notice is issued to the Court from whose decree the appeal is preferred under rule 13

In sub-rule (2) of rule 3 of Order XLV, after the words " to show cause why the said certificate should not be granted " the following words shall be inserted, namely —" unless it thinks fit to refuse the certificate "

Or. XLIII, r. 1.—Clause (w) of rule 1 of Order XLIII shall be deleted.

Or. XLV, r. 3 (2).—*In sub-rule (2) of rule 3 of Order XLV, after the words " to show cause why the said certificate should not be granted " the following words shall be inserted, namely:*—

Or. XLV, r. 7-A—*After rule 7 of Order XLV the following rule shall be inserted, namely* —

7-A No such security as is mentioned in rule 7 (1), clause (a), shall be required from the Secretary of State for India in Council or, where the local Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.

Or. XLIX, r. 4.—*The following rule made under s. 128 (2) (i) to be added as r. 4 in Or. XLIX:*—

Where on a memorandum of appeal presented within the time prescribed for the same, the whole or any part of the fee prescribed by the law for the time being in force relating to Court-fees has not been paid; the Registrar may in his discretion allow the appellant to pay the whole or part as the case may be of such Court-fees and may admit the appeal to the register even though the subsequent payment of Court-fee may have been made after the time prescribed for presentation of the appeal.

Schedule 1, Appendix B, Form No. 10.—*Form No. 10 in Appendix B, Schedule I be amended to read as follows*·—

To accompany Returns of Summons of another Court (Order V, r.

(Title.)

Read proceeding from the forwarding for service on in Suit No. of 19 of that

Read Serving Officer's endorsement stating that the proof of the above having been duly taken by me on the oath of and it is ordered that the be returned to the with this proceeding.

I hereby declare that the said summons on has been duly served.

Judge.

NOTE.—This form will be applicable to process other than summons the service of which may have to be effected in the same manner.

Schedule 1, Appendix D, Form No. 4.—In line 4 of Form No. 4 in Appendix D, for " realization " substitute " the day hereinafter referred to."

For clause (2) of the said form, substitute " (2) That if such payment is not made on or before the said day of 19 , the plaintiff shall be entitled to apply to the Court for a final decree for sale ".

Delete clause (3) of the said form

Schedule 1, Appendix D, Form No. 5.—For clause (2) of Form No 5 in Appendix D, substitute " (2) That if such payment is not made on or before the said day of 19 , the defendant shall be entitled to apply for a final decree for foreclosure or sale."

Schedule, 1, Appendix D, Form No. 10-A.—*Add the following form No. 10-A* —

No. 10-A.

Final Decree for Sale.

(Title)

Upon reading the decree passed in the above suit on the day of 19 , and the application of the plaintiff, dated the day of 19 , and after hearing pleader for the plaintiff and pleader for the defendant, and it appearing that the payment directed by the said decree has not been made.

It is hereby decreed as follows —

(1) That the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest at per cent. per annum and subsequent costs, and that the balance, if any, be paid to the defendant

(2) That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

APPENDIX V

Rules made by the High Court of Allahabad under s. 122.

ORDER V.

27. *To Or. V., r. 27, add the following as note 1 and note 2:—*

1. A list of heads of offices to whom summonses shall be sent for service on the servants of Railway Companies working in whole or in part in these Provinces is given in Appendix (2) to the General Rules (Civil) of 1911.

2. In every case where a Court sees fit to issue a summons direct to any public servant other than a soldier under Order XVI, simultaneously with the issue of the summons notice shall be sent to the head of the office in which the person concerned is employed in order that arrangements may be made for the performance of the duties of such person.

Illustration. If the Court sees fit to issue a summons to a kanungo or patwari it shall inform the Collector of the district, and if to a sub-registrar it shall inform the District Registrar to whom the sub-registrar is subordinate.

Add the following rules at the end of Or V.—

31. An application for the issue of a summons for a party or a witness shall be made in the form prescribed for the purpose No other forms shall be received by the Court

32. Ordinarily every process, except those that are to be served on Europeans, shall be written in the Court vernacular But where a process is sent for execution to the Court of a district where a different language is in ordinary use, it shall be written in English and shall be accompanied by a letter in English requesting its execution

In cases where the return of service is in a language different from that of the district from which it is issued, it shall be accompanied by an English translation.

ORDER VII.

Add the following rules at the end of Or VII —

19. Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner Plaintiffs or petitioners subsequently added shall immediately on being so added, file a proceeding of this nature.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or peti-

tion is filed, or of the District Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served, is present, a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

23. Where a party engages a pleader, notices or processes for service on him shall be served in the manner prescribed by Order III, rule 5, unless the Court directs service at the address for service given by the party

24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit

25. Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so

26. Nothing in these rules shall apply to the notice prescribed by Order XXI, rule 22

ORDER VIII.

Add the following rules at the end of Or. VIII.—

11. Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons or notice served on him as the date of hearing, file in Court a proceeding stating his address for service, and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just.

12. Rules 20, 22, 23, 24, 25 and 26 of Order VII shall apply, so far as may be to addresses for service filed under the preceding rule.

ORDER XIII.

Add the following rules at the end of Or. XIII —

12. Every document not written in the Court vernacular or in Eng-

at any other time tendered in evidence in any suit, appeal, or proceeding, shall be accompanied by a correct translation of the document into the Court vernacular. If any such document is written in the Court vernacular but in characters other than the ordinary Persian or Nagri characters in use, it shall be accompanied by a correct transliteration of its contents into the Persian or Nagri character.

13. When a document included in the list, prescribed by rule 1, has been admitted in evidence, the Court shall, in addition to making the endorsement prescribed in rule 4 (1) mark such document with serial figures in the case of documents admitted as evidence for a plaintiff, and with serial letters in the case of documents admitted as evidence for a defendant, and shall initial every such serial number or letter. When there are two or more parties defendants, the documents of the first party defendant may be marked A1, B1, C1, etc., AA1, BB1, etc., and those of the second A2, B2, C2, etc., AA2, BB2, etc. When a number of documents of the same nature is admitted, as for example a series of receipts for rent, the whole series shall bear one figure or capital letter or letters and a small figure or small letter shall be added to distinguish each paper of the series.

ORDER XVI.

Add the following to Or XVI, r. 2 —

2. (4) This rule shall not apply, in cases to which Government is a party, in the case of witnesses who are Government servants whose salary exceeds Rs 10 per mensem and who are summoned to give evidence in their public capacity at a Court situated more than five miles from their headquarters.

Add the following rules at the end of Or. XVI —

22. (1) Save as provided in this rule and in rule 2, the Court shall allow travelling and other expenses on the following scale —

(*a*) In the case of witnesses of the class of cultivators, labourers, and menials, six annas a day;

(*b*) In the case of witnesses of a better class, such as zamindars, traders, pleaders, and persons of corresponding rank, from eight annas to two rupees a day, as the Court may direct; and

(*c*) In the case of witnesses of superior rank, including officers of Government in receipt of salary of not less than Rs 200 a month, from three to five rupees a day

(2) If a witness demands any sum in excess of what has been paid to him, such sum shall be allowed if he satisfies the Court that he has actually and necessarily incurred the additional expense

Illustration.

A post office employee summoned to give evidence is entitled to demand from the party, on whose behalf or at whose instance he is summoned, the travelling and other expenses allowed to witnesses of the class or rank to which he belongs, and in addition the sum for which he is liable

as payment to the substitute officiating during his absence from duty. The sum so payable in respect of the substitute will be certified by the official superior of the witness on a slip, which the witness will present to the Court from which the summons was issued

(3) If a witness be detained for a longer period than one day the expenses of his detention shall be allowed at such rate, not usually exceeding that payable under clause (1) of this rule, as may seem to the Court to be reasonable and proper

Provided that the Court may, for reasons stated in writing, allow expenses on a higher scale than that hereinbefore prescribed.

23. In cases to which Government is a party, Government servants, not being police constables, whose salary exceeds Rs. 10 per mensem, and who are summoned to give evidence in their official capacity at a Court situated more than five miles from their headquarters, shall be given a certificate of attendance by the Court in lieu of travelling and other expenses

ORDER XVIII.

Add the following rules at the end of Or. XVIII.—

19. (1) The Judge shall record in his own hand in English all orders passed on applications, other than orders of a purely routine character

(2) The Judge shall record in his own hand in English all admissions and denials of documents, and the English proceedings shall show how all documents tendered in evidence have been dealt with from the date of presentation down to the final order admitting them in evidence or rejecting them.

(3) The Judge shall record the issues in his own hand in English, and the issues shall be signed by the Judge and shall form part of the English proceedings

ORDER XIX.

Add the following rules at the end of Or. XIX:—

4. Affidavits shall be entitled in the Court of at (naming such Court). If the affidavit be in support of or in opposition to, an application respecting any case in the Court, it shall also be entitled in such case. If there be no such case, it shall be entitled *In the matter of the petition of*

5. Affidavits shall be divided into paragraphs, and every paragraph shall be numbered consecutively and, as nearly as may be, shall be confined to a distinct portion of the subject.

6. Every person making any affidavit shall be described therein in such manner as shall serve to identify him clearly; and where necessary for this purpose, it shall contain the full name, the name of his father, of his caste or religious persuasion, his rank or degree in life, his profession, calling, occupation or trade, and the true place of his residence

7. Unless it be otherwise provided, an affidavit may be made by any person having cognizance of the facts deposed to Two or more persons may join in an affidavit: each shall depose separately to those facts which are within his own knowledge, and such facts shall be stated in separate paragraphs

8. When the declarant in any affidavit speaks to any fact within his own knowledge he must do so directly and positively, using the words "I affirm" or "I make oath and say."

9. Except in interlocutory proceedings, affidavits shall strictly be confined to such facts as the declarant is able of his own knowledge to prove. In interlocutory proceedings, when the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant shall use the expression "I am informed," and, if such be the case, "and verily believe to be true," and shall state the name and address of, and sufficiently describe for the purposes of identification, the person or persons from whom he received such information When the application or the opposition thereto rests on facts disclosed in documents or copies of document produced from any Court of Justice or other source, the declarant shall state what is the source from which they were produced, and his information and belief as to the truth of the facts disclosed in such documents.

10. When any place is referred to in an affidavit, it shall be correctly described. When in an affidavit any person is referred to, such person, the correct name and address of such person, and such further description as may be sufficient for the purpose of the identification of such person, shall be given in the affidavit

11. Every person making an affidavit for use in a Civil Court, shall, if not personally known to the person before whom the affidavit is made, be identified to that person by some one known to him, and the person before whom the affidavit is made shall state at the foot of the affidavit the name, address, and description of him by whom the identification was made as well as the time and place of such identification

12. No verification of a petition and no affidavit purporting to have been made by a *pardahnashin* woman who has not appeared unveiled before the person before whom the verification or affidavit was made, shall be used unless she has been identified in manner already specified and unless such petition or affidavit be accompanied by an affidavit of identification of such woman made at the time by the person who identified her

13. The person before whom any affidavit is about to be made shall, before the same is made, ask the person proposing to make such affidavit if he has read the affidavit and understands the contents thereof, and if the person proposing to make such affidavit state that he has not read the affidavit or appears not to understand the contents thereof. or appears to be illiterate, the person before whom the affidavit is about to be made shall read and explain, or cause some other competent person to read and explain in his presence, the affidavit to the person proposing to make the same, and when the person before whom the affidavit is about to be made is thus satisfied that the person proposing to make such affidavit understands the contents thereof, the affidavit may be made

14. The person before whom an affidavit is made, shall certify at the foot of the affidavit the fact of the making of the affidavit before him and

the time and place when and where it was made and shall for the purpose of identification mark and initial any exhibits referred to in the affidavit

15. If it be found necessary to correct any clerical error in any affidavit, such correction may be made in the presence of the person before whom the affidavit is about to be made, and before, but not after, the affidavit is made Every correction so made shall be initialled by the person before whom the affidavit is made and shall be made in such manner as not to render it impossible or difficult to read the original word or words, figure or figures, in respect of which the correction may have been made.

ORDER XX.

Add the following rule at the end of Or. XX:—

21. (1) Every decree and order as defined in section 2, other than a decree or order of a Court of Small Causes, or of a Court in the exercise of the jurisdiction of a Court of Small Causes, shall be drawn up in the Court vernacular As soon as such decree or order has been drawn up, and before it is signed, the Munsarim shall cause a notice to be posted on the notice board stating that the decree or order has been drawn up, and that any party or the pleader of any party may, within six working days from the date of such notice, persue the draft decree or order and may sign it, or may file with the Munsarim an objection to it on the ground that there is in the judgment a verbal error or some accidental defect not affecting a material part of the case, or that such decree or order is at variance with the judgment or contains some clerical or arithmetical error Such objection shall state clearly what is the error, defect, or variance alleged, and shall be signed and dated by the person making it

(2) If any such objection be filed on or before the date specified in the notice, the Munsarim shall enter the case in the earliest weekly list practicable, and shall, on the date fixed, put up the objection together with the record before the Judge who pronounced the judgment, or, if such Judge has ceased to be the Judge of the Court, before the Judge then presiding.

(3) If no objection has been filed on or before the date specified in the notice, or if an objection has been filed and disallowed, the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(4) If an objection has been duly filed and has been allowed, the correction or alteration directed by the Judge shall be made Every such correction or alteration in the judgment shall be made by the Judge in his own handwriting. A decree amended in accordance with the correction or alteration directed by the Judge shall be drawn up, and the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(5) When the Judge signs the decree he shall make an autograph note

ORDER XXI

22. In Order XXI *substitute* the words "two years" *for* "one year" both in rule 22 (1) (*a*) and in the second line of the proviso to rule 22.

Substitute the following for paragraph (2) in rule 25:—

25 (2). "2 Where the endorsement is to the effect that such officer is unable to execute the process, the Court may examine him personally or upon affidavit touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result."

Substitute the following for rule LV —

55. (1) Notice shall be sent to the sale officer executing a decree of all applications for rateable distribution of assets made under section 73 (1) in respect of the property of the same judgment-debtor by persons other than the holder of the decree for the execution of which the original order was passed.

(2) Where—

(*a*) the amount decreed (which shall include the amount of any decree passed against the same judgment-debtor), notice of which has been sent to the sale officer under sub-section (1), with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or

(*b*) satisfaction of the decree (including any decree passed against the same judgment-debtor), notice of which has been sent to the sale officer under sub-section (1), is otherwise made through the Court or certified to the Court, or

(*c*) the decree (including any decree passed against the same judgment-debtor), notice of which has been sent to the sale officer under sub-section (1), is set aside or reversed.

the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

Add the following rules at the end of Or. XXI:—

104. When the certificate prescribed by section 41 is received by the Court which sent the decree for execution, it shall cause the necessary details as to the result of execution to be entered in its register of civil suits before the papers are transmitted to the record room.

105. Every attachment of moveable property under rule 43, of Negotiable Instruments under rule 51, and of immoveable property under rule 54, shall be made through a Civil Court Amin, or bailiff, unless special reasons render it necessary that any other agency should be employed; in which case those reasons shall be stated in the handwriting of the presiding Judge himself in the order for attachment.

106. When the property which it is sought to bring to sale is immoveable property within the definition of the same contained in the law

the time and place when and where it was made and shall for the purpose of identification mark and initial any exhibits referred to in the affidavit

15. If it be found necessary to correct any clerical error in any affidavit, such correction may be made in the presence of the person before whom the affidavit is about to be made, and before, but not after, the affidavit is made Every correction so made shall be initialled by the person before whom the affidavit is made and shall be made in such manner as not to render it impossible or difficult to read the original word or words, figure or figures, in respect of which the correction may have been made

ORDER XX.

Add the following rule at the end of Or. XX:—

21. (1) Every decree and order as defined in section 2, other than a decree or order of a Court of Small Causes, or of a Court in the exercise of the jurisdiction of a Court of Small Causes, shall be drawn up in the Court vernacular As soon as such decree or order has been drawn up, and before it is signed, the Munsarim shall cause a notice to be posted on the notice board stating that the decree or order has been drawn up, and that any party or the pleader of any party may, within six working days from the date of such notice, persue the draft decree or order and may sign it, or may file with the Munsarim an objection to it on the ground that there is in the judgment a verbal error or some accidental defect not affecting a material part of the case, or that such decree or order is at variance with the judgment or contains some clerical or arithmetical error Such objection shall state clearly what is the error, defect, or variance alleged, and shall be signed and dated by the person making it.

(2) If any such objection be filed on or before the date specified in the notice, the Munsarim shall enter the case in the earliest weekly list practicable, and shall, on the date fixed, put up the objection together with the record before the Judge who pronounced the judgment, or, if such Judge has ceased to be the Judge of the Court, before the Judge then presiding.

(3) If no objection has been filed on or before the date specified in the notice, or if an objection has been filed and disallowed, the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(4) If an objection has been duly filed and has been allowed, the correction or alteration directed by the Judge shall be made. Every such correction or alteration in the judgment shall be made by the Judge in his own handwriting. A decree amended in accordance with the correction or alteration directed by the Judge shall be drawn up, and the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(5) When the Judge signs the decree he shall make an autograph note stating the date on which the decree was signed.

conduct the sale whether there are any persons, in addition to the decree-holder, entitled to share in the sale proceeds.

114. Whenever any Civil Court has sold, in execution of a decree or other order, any house or other building situated within the limits of a Military Cantonment or station, it shall, as soon as the sale has been confirmed, forward to the Commanding Officer of such cantonment or station for his information and for record in the Brigade or other proper office, a written notice that such sale has taken place, and such notice shall contain full particulars of the property sold and of the name and address of the purchaser.

115 Whenever guns or other arms in respect of which licenses have to be taken by purchasers under the Indian Arms Act (Act No. XI of 1878) are sold by public auction in execution of decrees by order of a Civil Court, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act.

116. When an application is made for the attachment of live-stock or other moveable property, the decree-holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for fifteen days. If within three clear days before the expiry of any such period of fifteen days the amount of such costs for such further period as the Court may direct be not paid into Court, the Court, on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

117. Live-stock which has been attached in execution of a decree shall ordinarily be left at the place where the attachment is made either in custody of the judgment-debtor on his furnishing security, or in that of some landholder or other respectable person willing to undertake the responsibility of its custody and to produce it when required by the Court.

118. If the Custody of live-stock cannot be provided for in the manner described in the last preceding rule, the animals attached shall be removed to the nearest pound established under the Cattle Trespass Act, 1871, and committed to the custody of the pound-keeper, who shall enter in a register—

(a) the number and description of the animals

(b) the day and hour on and at which they were committed to his custody;

(c) the name of the attaching officer or his subordinate by whom they were committed to his custody; and shall give such attaching officer or subordinate a copy of the entry.

119. For every animal committed to the custody of the pound-keeper as aforesaid, a charge shall be levied as rent for the use of the pound for each fifteen or part of fifteen days during which such custody continue, according to the scale prescribed under section 12 of Act No. I of 1871.

And the sum so levied shall be sent to the Treasury for credit to Municipal or District Board, as the case may be, under whose

the pound is. All such sums shall be applied in the same manner as fines levied under section 12 of the said Cattle Trespass Act.

120 The pound-keeper shall take charge of, feed and water, animals attached and committed as aforesaid until they are withdrawn from his custody as hereinafter provided and he shall be entitled to be paid for their maintenance at such rates as may be, from time to time, prescribed under proper authority Such rates shall, for animals specified in the section mentioned in the last preceding rule, not exceed the rates for the time being fixed under section 5 of the same Act In any case, for special reasons to be recorded in writing, the Court may require payment to be made for maintenance at higher rates than those prescribed.

121. The charges herein authorized for the maintenance of live-stock shall be paid to the pound-keeper by the attaching officer for the first fifteen days at the time the animals are committed to his custody, and thereafter for such further period as the Court may direct, at the commencement of such period Payments for such maintenance so made in excess of the sum due for the number of days during which the animals may be in the custody of the pound-keeper shall be refunded by him to the attaching officer.

122. Animals attached and committed as aforesaid shall not be released from custody by the pound-keeper except on the written order of the Court, or of the attaching officer, or of the officer appointed to conduct the sale, the person receiving the animals, on their being so released, shall sign a receipt for them in the register mentioned in rule 118.

123 For the safe custody of moveable property other than live-stock while under attachment, the attaching officer shall, subject to approval by the Court, make such arrangements as may be most convenient and economical.

124. With the permission of the Court the attaching officer may place one or more persons in special charge of such property.

125. The fee for the services of each such person shall be payable in the manner, prescribed in rule 116. It shall not be less than two annas, and shall ordinarily not be more than three and a half annas per diem The Court may at its discretion allow a higher fee; but if it do so, it shall state in writing its reasons for allowing an exceptional rate.

126. When the services of such person are no longer required the attaching officer shall give him a certificate on a counterfoil form of the number of days he has served and of the amount due to him; and on the presentation of such certificate to the Court which ordered the attachment, the amount shall be paid to him in the presence of the presiding Judge Provided that, where the amount does not exceed Rs. 5, it may be paid to the Sabna by money order on requisition by the Amin, and the presentation of the certificate may be dispensed with.

127. When in consequence of an order of attachment being withdrawn or for some other reasons, the person has not been employed or has remained in charge of the property for a shorter time than that for which payment has been made in respect of his services, the fee paid shall be refunded in whole or in part, as the case may be.

128. Fees paid into Court under the foregoing rules shall be entered in the Register of Petty Receipts and Repayments

129. When any sum levied under rule 110 is remitted to the treasury, it shall be accompanied by an order in triplicate (in the form given as form 9 of the Municipal Account Code), of which one part will be forwarded by the Treasury Officials to the District or Municipal Board, as the case may be A note that the same has been paid into the Treasury as rent for the use of the pound, will be recorded on the extract from the pass book.

130 The cost of repairing attached property for sale, or of conveying it to the place where it is to be kept or sold, shall be payable by the decree-holder to the attaching officer. In the event of the decree-holder failing to provide the necessary funds, the attaching officer shall report his default to the Court, and the Court may thereupon issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

131. Nothing in these rules shall be deemed to prevent the Court from issuing and serving on the judgment-debtor simultaneously the notices required by Order XXI, rules 22, 66 and 107.

132. For the purpose of all proceedings under this order service on any party shall be deemed to be sufficient if effected at the address for service referred to in Order VIII, rule 11, subject to the provisions of Order VII, rule 24

ORDER XXVII.

Add the following rule at the end of Or XXVII:—

9. In every case in which the Government Pleader appears for the Government as a party on its own account, or for the Government as undertaking, under the provisions of rule 8 (1), the defence of a suit against an officer of the Government, he shall in lieu of a vakalatnama, file a memorandum on unstamped paper signed by him and stating on whose behalf he appears Such memorandum shall be, as nearly as may be, in the terms of the following form :—

TITLE OF THE SUIT, ETC.

I. A. B., Government Pleader, appear on behalf of the Secretary of State for India in Council (*or* the Government of the United Provinces, *or* as the case may be) Respondent (*or* etc.), in the suit:

or, on behalf of the Government [which under Order XXVII, rule 8 (1) of Act No V of 1908, has undertaken the defence of the suit], respondent (*or*, etc.), in the suit.

ORDER XXXII.

4. (3) *In r 4 (3) substitute a comma for the full stop and add the following words.—*

Unless a notice under rule 3 (4) of this order has been duly served on him and he has failed to reply to that notice within the time specified therein.

ORDER XLI.

Substitute the following for r. 3 (1) —

Rejection or amendment of memorandum.

3. (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, or accompanied by the copies mentioned in rule 1 (1), it may be rejected, or where the memorandum of appeal is not drawn up in the manner prescribed, it may be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

Add the following rule at the end of Or XLI.—

38. (1) An address for service filed under Order VII, rule 19, or Order VIII, rule 11, or subsequently altered under Order VII, rule 24, or Order VIII, rule 12, shall hold good during all appellate proceedings arising out of the original suit or petition

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the appellate Court to such addresses.

(3) Rules 21, 22, 23 and 24 of Order VII shall apply, so far as may be, to appellate proceedings

ORDER XLII.

Substitute the following for r. 1 —

Procedure

1. The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees, subject to the following provision —

Every memorandum of appeal from an appellate decree shall be accompanied by a copy of the decree appealed from and (unless the Court dispenses therewith) of the judgment on which it is founded, and also of the judgment of the Court of first instance

ORDER XLIII.

Add the following rule at the end of Or XLIII:—

3. In every appeal under rule 1, in every miscellaneous case, and *in every suit dismissed for default*, a formal order shall be drawn up stating clearly the determination of the appeal or case, the costs incurred, and the parties, if any, by whom such costs are to be paid.

ORDER XLVI.

Add the following rule at the end of Or XLVI—

8. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under this order

ORDER XLVII.

Add the following rule at the end of Or. XLVII —

10. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under this order

ORDER LII. [*New*]

1. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under section 115 of the Code.

Forms.

APPENDIX B.

No. 7.

Form No 7—an order for transmission of summons for service in the jurisdiction of another Court (Order V, rule 21) is hereby cancelled.

APPENDIX B.

No. 10

Form No.—10—a form to accompany return of summons of another Court (Order V, rule 23), is cancelled.

APPENDIX B.

No 20.

APPLICATION FOR ISSUE OF SUMMONS TO A PARTY OR WITNESS

No. of suit.

Names of parties
In the Court of the
Date fixed for hearing

1	2	3	4		5		6
Number of witnesses to be summoned.	Name and full address of each person to be summoned.	Rank or occupation.	Distance of residence from Court.		Cash paid for.		Name and address of person to whom unexpended travelling expenses and diet money should be returned.
			Rail.	Road.	Travelling expenses.	Diet expenses.	

APPENDIX E.

No. 43

The security to be furnished under section 55 (4) shall be, as nearly as may be, by a bond in the following form:—

In the Court of at

Suit No of 19 .

against

. . Plaintiff.

C. D of . . Defendant

WHEREAS in execution of the decree in the suit aforesaid, the said C D has been arrested under a warrant and brought before the Court of , and whereas the said C D. has applied for his discharge on the ground that he undertakes within one month to apply under section 5 of Act No III of 1907, to be declared an insolvent, and the said Court has ordered that the said C D shall be released from custody if the said C D furnish good and sufficient security in the sum of Rs. that he will appear when called upon, and that he will within one month from this date apply under section 5 of Act No. III of 1907, to be declared an insolvent Therefore I E F, inhabitant of have voluntarily become security, and do hereby bind myself, my heirs and executors, to as Judge of the said Court and his successors in office that the said C D, will appear at any time when called upon by the said Court, and will apply in the manner and within the time hereinbefore set forth, and in default of such appearance or of such application, I bind myself, my heirs and executors, to pay to the said Court, on its order, the sum of Rs.

Witness my hand at this day of 19 .

(Sd) E. F.,

Witnesses Surety.

APPENDIX F

No. 11.

The security to be furnished under Order XXXVIII, rule 0, shall be, as nearly as may be, by a bond in the following form:—

In the Court of at

Suit No. of 19 .

. . Plaintiff.

. . Defendant.

Amount of suit, Rupees

WHEREAS in the suit above specified the plaintiff aforesaid, has applied to the said Court that the said defendant, , may be called on to furnish sufficient security to fulfil any decree that may be passed

gainst him in the said suit, or that on his failure so to do, certain property the said defendant, , may be attached:

And whereas, on the failure of the said defendant, , to furnish such security, or, show cause why it should not be furnished, the property aforesaid of the said defendant, has been attached by order of the Court:

Therefore I , inhabitant of , have voluntarily become security and hereby bind myself, my heirs and executors, to as Judge of the said Court, and his successors in Office, that the said defendant,

shall produce and place at the disposal of the said Court, when required, the property herein below specified, (*here give description of property or refer to an annexed schedule*), or the value of the same, or such portion thereof as may be sufficient to fulfil such decree and shall when required pay the costs of the attachment, and in default of his so doing I bind myself, my heirs and executors, to pay to as Judge of the said Court and his successors in office on its order such sum to the extent of rupees (*here enter a sufficient sum to cover the amount of suit with costs and the costs of the attachment*) as the said Court may adjudge against the said defendant.

Witness my hand at this day of 19 .

(Signed)

Surety.

Witnesses (Signed)

No. 12.

The security to be furnished under Order XXXIX, rule 2 (2), shall be, as far as may be, by a bond in the following form:—

In the Court of at

Suit No of 19 .

. . Plaintiff.

. Defendant.

Whereas, in the suit above specified, instituted by the said plaintiff, to restrain the said defendant, , from (*here state the breach of contract or other injury*), the said Court has, on the application of the said plaintiff, granted an injunction to restrain the said defendant from the repetition (*or the continuance*) of the said breach of contract (*or wrongful act complained of*), and required security from the said defendant against such repetition (*or continuance*):

Therefore I, , inhab'tant of , have voluntarily become security and do hereby bind myself, my heirs and executors to as judge of the said Court and his successors in office that the said defendant shall abstain from the repetition (*or continuance*) of the breach of contract aforesaid (*or wrongful act, or from the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right*), and in default of his so abstaining,

I bind myself, my heirs and executors to pay into Court, on the order of the Court such sum to the extent of rupees , as the Court shall adjudge against the said defendant.

Witness my hand at this day of

Witnesses: 19 .

Surety

APPENDIX H

No 4

Notice to show cause. (General Form.)

IN THE COURT OF

AT DISTRICT

CIVIL SUIT No OF 19 .

Miscellaneous No of 19 .

resident of

versus

resident of

To

WHEREAS the abovenamed has made application to this Court that you are hereby warned to appear in this Court in person or by a pleader duly instructed on the day of 19 , at o'clock in the forenoon to show cause against the application, failing wherein, the said application will be heard and determined *ex parte*, and it will be presumed that you consent to be appointed guardian for the suit

Given under my hand the seal of the Court this day of

19 *Judge*

APPENDIX H

No. 5.

(List of documents produced by plaintiff/defendant Order XIII, rule 1.)

IN THE COURT OF AT DISTRICT

SUIT No OF 19 .

.. Plaintiff.

versus.

.. Defendant.

List of documents produced with the plaint (or at first hearing) on behalf of plaintiff (or defendant).

This list was filed by this day of 19 .

1	2	3			4
Serial number.	Description and date, if any, of the document	What became of the document.			Remarks.
		If brought on the record the exhibit mark put on the document	If rejected, date of return to party, and signature of party or pleader to whom the document was returned	If it remains on the record after decision of the case and is enclosed in an envelope, under rule 24, Chapter III, the date of enclosure in the envelope	

Signature of party or pleader producing the list.

APPENDIX H

No. 11

Notice to minor defendant and guardian.

IN THE COURT OF AT DISTRICT.

SUIT NO. OF 19 .

resident of

plaintiff.

versus.

resident of

To plaintiff.

Minor defendant.

Natural guardian.

WHEREAS an application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant, you , the said minor, and you (1) , are hereby required to take notice that unless within days from the service upon you of this notice, an application is made to this Court for the appointment of you (1) or of some friend of you, the minor, to act as guardian for the suit, the Court will proceed to appoint you or some other person to act as guardian to the minor for the purposes of the said suit.

Given under my hand and the seal of the Court this day of 19 .

Judge.

APPENDIX H.

No. 16

The security to be furnished under Order XXV, rule 1 shall nearly as may be, by bond in the following form:—

In the Court of at

SUIT No. OF 19 .

. . Plaintiff.

. . Defendant.

WHEREAS a suit has been instituted in the said Court by the plaintiff to recover from the said defendant the sum of rupees and the said plaintiff is resi out of British India (or is a woman) and does not possess any suffic immoveable property within British India independent of the property the suit.

Therefore, I, inhabitant of , have voluntarily become securi and do hereby bind myself, my heirs and executors, to as Judge of t said Court and to his successors in office that the said plaintiff his heirs and executors, shall, whenever called on by the said Court, p all costs that may have been or may be incurred by the said defenda , in the said suit, and in default of such payment I bind mysel my heirs and executors, to pay all such costs to the said Court on it order.

Witness my hand at this day of 19 .

Witnesses (Signed)

Surety.

APPENDIX H.

No 17.

ADDRESS FOR SERVICE.

Under Order VII, rules 19 to 26; Order VIII, rules 11 and 12; Order XLI, rule 38; Order XLVI, rule 8; Order XLVII, rule 10; Order LII, rule 1.

IN THE COURT OF THE OF

ORIGINAL Suit/or Case No. OF 192 .

Plaintiff.

versus

. . Defendant.

This address shall be within the local limits of the district Court within which the suit is filed, or of the district Court within which the party

ordinarily resides, if within the limits of the United Provinces of Agra and Oudh, but not within the limits of any other province:—

Name, parentage, and caste	Residence.	Pargana or tahsil.	Post office.	District.

Dated

Any summons, notice, or process in the case may, henceforward, be issued to me at the above address until I file notice of change. If this address is changed I shall forthwith file a notice of change containing all the new particulars

Signature of party {Plaintiff. Defendant. Appellant. Respondent

Or

I file the above address according to the instructions given by my client, (name)————(and capacity)————.

Signature of pleader.

N.B.—This form when received by the Court must be stamped with the date of its receipt and filed with the record of the pending suit or matter.

APPENDIX H.

No. 18.

NOTICE OF CHANGE OF ADDRESS FOR SERVICE.

Under Order VII, rules 19 to 26; Order VIII, rules 11 and 12; Order XLI, rule 38; Order XLVI, rule 8; Order XLVII, rule 10; Order LII, rule 1.

IN THE COURT OF THE OF

ORIGINAL Suit/or Case No. OF 192 .

. . Plaintiff.

versus.

. . Defendant.

This address shall be within the local limits of the district Court within which the suit is filed, or of the district Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh, but not within the limits of any other provinces :—

Name, parentage, and caste	Residence.	Pargana or tahsil	Post office.	District.

Dated

Any summons, notice, or process in the case may, henceforward, be issued to me at the above address until I file notice of change. If this address is again changed I shall forthwith file a notice of change containing all the new particulars

Signature of party { Plaintiff. Defendant Appellant. Respondent

Or

I file the above address according to the instructions given by my client. (name)——————(and capacity)——————

Signature of pleader.

N.B —This form when received by the Court must be stamped with the date of its receipt and filed with the record of the pending suit or matter.

APPENDIX VI

Rules made by the High Court of Madras under s. 122.

ORDER III.

4. *Insert the following words at the commencement of sub-rule* (3) *of rule 4 of Order III in the First Schedule.*

No Government or other Pleader appearing on behalf of the Secretary of State for India in Council and

Add the following as sub-rule (4) *to Or. III, r* 4 :—

(4) Notwithstanding the termination of all proceedings in the suit so far as regards the client, the appointment of a pleader shall, unless otherwise provided therein or determined by the death of the client or the pleader or by revocation in accordance with the provisions of clause (2) of this rule, be deemed to authorise him to appear or to make any application or to do any act in connection with getting copies of documents, and obtaining return of documents produced or filed in the suit or refund of money paid into Court in the suit.

ORDER IV.

2. *In Or IV, r* 2, *number the present rule* 2 (1), *and add as rule* 2 (2)—

Registers in accordance with Forms Nos 14, 15, 16, 17 and 18 in Appendix here prescribed for use in all Civil Courts having jurisdiction over the classes of suits and cases specified therein.

[NOTE —*For the New Forms Nos.* 14, 15, 16, 17 *and* 18, *see below Appendix H*]

ORDER V.

Substitute the following for rr. 25 *and* 26 *in Or. V.*—

Service where defendant resides out of British India and has no Agent.

25. Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons may be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate.

Provided that, if, by any arrangement between the Local Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides, it

summons can be served by an officer of the Government of such territory, the summons may be sent to such officer in such manner as by the said arrangement may have been agreed upon.

26. Where—

Service in foreign territory through Political Agent or Court or by special arrangement.

(*a*) in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor-General in Council, a Political Agent has been appointed or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

Substituted Act XVIII of 1914.

(*b*) the Governor-General in Council has, by notification in the *Gazette of India*, declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be valid service, or

(*c*) by any arrangement between the Local Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides the summons can be served by an officer of the Government of such territory,

the summons may be sent to such Political Agent or Court, or in such manner as may have been agreed upon to proper officer of the Government of the foreign territory by post or otherwise, for the purpose of being served upon the defendant, and, if the summons is returned with an endorsement signed by such Political Agent or by the Judge or other officer of the Court or by the officer of the Government of foreign territory that the summons has been served on the defendant in manner herein-before directed, such endorsement shall be deemed to be evidence of service

Make the following amendments and additions to Or. V:—

27. *In rule* 27 *after the words* " send it " *insert the words* " by registered post prepaid for acknowledgment."

28. *In rule* 28 *after the words* " shall send " *insert the words* " by registered post prepared for acknowledgment."

29-A. Insert as rule 29-*A*—

Notwithstanding anything contained in the foregoing rules, where the defendant is a public officer (not belonging to His Majesty's Military or Naval forces of His Majesty's Indian Marine Service) sued in his official capacity, service of summons shall be made by sending a copy of the summons to the defendant by registered post prepaid for acknowledgment together with the original summons, which the defendant shall sign and return to the Court which issued the summons.

ORDER IX.

7.—*Make the following amendments to Or. IX, r.* 13:—

(1) Re-number rule 13 as rule 13 (1).

(2) Add the following as sub-rule (2) to rule 13:—

"(2) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)."

ORDER XIII.

7.—*Add the following proviso to rule 7 (2):*—

'Provided that no document shall be returned which by force of the decree has become wholly void or useless'

9.—*Add the following as sub-rule (3)* —

Every application under the first proviso to sub-rule (1) above shall be made by a verified petition setting forth facts justifying the immediate return of the original and the Court may make such order as it thinks fit for costs of any or all the parties to the application, including any costs "incidental to the preparation of the certified copy to be substituted for the original" and may further direct that any party against whom any order for costs is made shall have such costs, if paid, "included as costs in the cause"

ORDER XVI.

Insert as rule 4-A:—

Special provision for dublic servants summoned as witnesses in suits to which the Government is a party.

4-A. (1) Notwithstanding anything contained in the foregoing rules, in any suit by or against the Secretary of State for India in Council, no payment in accordance with rule 2 or rule 4 shall be required when an application on behalf of Government is made for summons to a Government servant whose salary exceeds Rs 10 per mensem and whose attendance is required in a Court situate more than five miles from his headquarters; and the expenses incurred by Government in respect of the attendance of the witness shall not be taken into consideration in determining costs incidental to the suit

(2) When any other party to such a suit applies for a summons to such an officer, he shall deposit in Court along with his application a sum of money for the travelling and other expenses of the officer according to the scale prescribed in the Civil Service Regulations and shall also pay any further sum that may be required under rule 4 according to the same scale, and the money so deposited or paid shall be credited to Government.

(3) In all cases where a Government servant appears in accordance with this rule the Court shall grant him a certificate of attendance.

ORDER XX.

1.—*Make the following amendments to Or. XX, r. 1.*—

(1) Re-number rule 1 as sub-rule (1).

(2) Add the following as sub-rule (2):—

(2) The judgment may be pronounced by dictation to a shorthand writer in open Court, where the presiding Judge has been specially empowered in that behalf by the High Court.

3.—*For Or XX, r 3, substitute the following rule*:—

The judgment shall bear the date on which it is pronounced and shall be signed by the Judge and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review, provided also that, where the presiding judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the judge

12.—*Add the following to Or XX, r 12*:—

(3) Where an Appellate Court directs such an inquiry, it may direct the Court of first instance to make the inquiry; and in every case the Court of first instance shall, on the application of the decree holder, inquire and pass the final decree

ORDER XXI.

17.—*In Or XXI, r 17, add as r 17 (5)* --

5. Registers in accordance with Forms Nos. 19, 20 and 21 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of cases specified therein

[NOTE —*For the new Forms Nos 19, 20 and 21, see below Appendix H*]

25 (2)—(1) *Amend Or XXI, r 25 (2), as follows*:—

Insert the words "or cause him to be examined by any other Court" *after* the words "examine him"

(2) *Add the following proviso to r 25 (2)*:—

Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with the requirements of this clause

39. *Delete* the present sub-rules 4 and 5 of rule 39 of Order XXI and *substitute* the following —

(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for his journey from the Court house to the civil prison and from the civil prison, on his release, to his usual place of residence together with the first of the payments in advance under sub-rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be paid to the officer in charge of the civil prison

(5) Sums disbursed under this rule by the decree-holder for the subsistence and cost of conveyance (if any) of the judgment-debtor shall be deemed to be costs in the suit.

40. *Add the following as a proviso to Or XXI, r. 40 (5) —*

Provided that, in order to give the judgment-debtor an opportunity of satisfying the decree, the Court before making the order of committal may leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding ten days, or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied

Add the following as sub-rule (6) to Or. XXI, r. 40 —

(6) No judgment-debtor shall be committed to the civil prison or brought before the Court from the prison to which he has been committed pending the consideration of any of the matters mentioned in sub-rule (2) unless and until the decree-holder pays into Court such sum as the judge may think sufficient to meet the travelling and subsistence expenses of the judgment-debtor and the escort for the journey to and from the prison.

Sub-rule (5) of rule 39 shall apply to such payments.

For Or XXI, r 43, substitute the following rules, viz —

43. (1) Where the property to be attached is moveable property other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof,

provided that, when the property seized is subject to speedy and natural decay or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once, and

provided also that, when the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(*a*) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in the Form No 15-A of Appendix E to this schedule with one or more sufficient sureties for its production when called for, or

(*b*) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in rule 55 or rule 57 or rule 60 of this order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment.

Insert the following rules:—

43-A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report

the fact to the Court and shall with his report forward a list of the p perty seized.

(2) If attached property is not sold under the first proviso to r 43 or retained in the village or place where it is attached under second proviso to that rules it shall be brought to the Court-house delivered to the proper officer of the Court.

43-B. (1) Whenever attached property kept in the village or pl where it is attached is live-stock, the person at whose instance it retained shall provide for its maintenance, and, if he fails to do so if it is in charge of an officer of the Court, it shall be removed to Court-house

Nothing in this rule shall prevent the judgment-debtor, or any per claiming to be interested in such stock from making such arrangeme for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expen by the attaching officer or are payable to him, if not duly deposited paid, be recovered from the proceeds of property, if sold, or be paid the person declared entitled to delivery before he receives the sa The Court may also order that any sums deposited or paid under th rules be recovered as costs of the attachment from any party to proceedings

[NOTE —*An additional Form, being Form No.* 15-A, *has been serted in Appendix E*

53. *Add the following as sub-rule* 1 (c) *to Or. XXI, r.* 53:—

(c) If the decree sought to be attached has been sent for execut to another Court, the Court which passed the decree shall send a co of the said notice to the former Court, and thereupon the provisions clause (b) shall apply in the same manner as if the former Court h passed the decree and the said notice had been sent to it by the Co which issued it.

5 *Add the following as a proviso to Or. XXII, r.* 5:—

Provided that an appellate Court before determining it may dir any lower Court to take evidence thereon and to return the evidence taken together with its finding and reasons and may take such findi and reasons into consideration in determining the question.

11-A.—*In Or. XXII, after r.* 11, *add the following as r* 11-*A*:—

11-A. The entry on the record of the name of the representative a deceased appellant or respondent in a matter pending before the Hi Court in its appellate jurisdiction, except in cases under appeal to t King in Council, shall be deemed to be a quasi-judicial act within t meaning of section 128 (2) (i) of the Code of Civil Procedure and may performed by the Registrar, provided that contested applications a applications presented out of time shall be posted before a Judge disposal

ORDER XXVI-A.

1. The Court may in any suit issue a commission to such perso as it thinks fit to translate accounts and other documents which a not in the language of the Court.

2. The report of the Commissioner shall be evidence in the suit and [sh]all form part of the record

3. Before issuing any commission under this Order, the Court may [or]der such sum (if any) as it thinks reasonable for the expense of the [co]mmission to be, within a time to be fixed, paid into Court by the party [at] whose instance or for whose benefit the commission is issued.

ORDER XXVII.

5.—*For Or. XXVII, r. 5, substitute the following rule*:—

The Court in fixing the day for the Secretary of State for India in Council to answer the plaint shall allow not less than three months' time from the date of summons for the necessary communication with the Government through the proper channel and for the issue of instructions to the Government Pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government and may extend the time at its discretion

ORDER XXIX.

1-A.—*Insert as Rule 1-A of Or XXIX*:—

In suits against a Local Authority the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the day of summons and the date for appearance.

ORDER XXXII.

3.—*For Or XXXII, r 3, substitute the following rule*:—

3. (1) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for the minor.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) The application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed The affidavit shall further state the name of the person or persons on whom notice has to be served under the provisions of sub-rule (5).

(4) An application for the appointment of a guardian for the suit of a minor shall not be combined with an application for bringing on record the legal representative of a deceased plaintiff or defendant. The application shall be by separate petitions.

(5) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf or, where there is no guardian, upon notice to the father or other natural guardian of the minor or, where there is no father or other natural guardian, to the person in whose

care the minor is, and after hearing any objection which may be urg on behalf of any person served with notice under this sub-rule T notice required by this sub-rule shall be served six clear days before t day named in the notice for the hearing of the application and may be form No 11 set forth in appendix II hereto.

4.—*For Or XXXII, r 4, substitute the following rule.—*

4. (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit·

Provided that the interest of that person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than the guardian shall act as the next friend of the minor or be appointed as guardian for the suit unless the court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be

(3) No person shall without his consent be appointed guardian for the suit Whenever an application is made proposing the name of a person as guardian for the suit, a notice in form No. 11-A set forth in appendix II hereto shall be served on the proposed guardian, unless the applicant himself be the proposed guardian or the proposed guardian consents

(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be the guardian, and may direct that the costs to be incurred by that officer in the performance of his duties as guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of the costs as justice and the circumstances of the case may require

(5) When a guardian for the suit of a minor defendant is appointed, and it is made to appear to the Court that the guardian is not in possession of any, or sufficient funds for the conduct of the suit on behalf of the defendant, and that the defendant will be prejudiced in his defence thereby, the Court may, from time to time, order the plaintiff to advance moneys to the guardian for the purpose of his defence and all moneys so advanced shall form part to the costs of the plaintiff in the suit The order shall direct that the guardian, as and when directed, shall file in Court an account of the moneys so received by him.

7.—*Add the following in Or XXXII, r. 7:—*

Rule —(1-A). Where an application is made to the Court for leave to enter into an agreement or compromise or for withdrawal of a suit in pursuance of a compromise or for taking any other action on behalf of a minor or other person under disability and such minor or other person under disability is represented by counsel or pleader, the counsel or pleader shall file in Court with the application a certificate to the effect that the agreement or compromise or action proposed is in his opinion for the

benefit of the minor or other person under disability. A decree or order for the compromise of a suit, appeal or matter, to which a minor or other person under disability is a party, shall recite the sanction of the Court thereto and shall set out the terms of the compromise, as in the following Form which shall be numbered as Form No 24 in Appendix D to this Schedule

14-A.—*In Or. XXXII, after r 14, add the following as rule 14-A*:—

14-A. The appointment or discharge of a next friend or guardian for the suit of a minor in a matter pending before the High Court in its appellate jurisdiction, except in case under appeal to the King in Council, shall be deemed to be a quasi-judicial act within the meaning of section 128 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications presented out of time shall be posted before a judge for disposal.

17.—*Add as rule 17 of Or XXXII*:—

In suits relating to the person or property of a minor or other person under the superintendence of the Court of Wards the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the date of summons and the date for appearance

ORDER XLI.

1.—(1) *Add the following sentence to sub-rule* (1) *of r.* 1:—

The copy of the judgment shall be a printed copy in every case in which the High Court has prescribed that the judgment shall be printed when a copy is applied for the purpose of appeal.

Add the following as a proviso to Or XLI, r. 1 (1):—

Provided that, in appeals from decrees or orders under any special or local Act to which the provisions of Parts II and III of the Limitation Act, IX of 1908, do not apply and in which certified copies of such decrees or orders have not been granted within the time prescribed for preferring an appeal, the Appellate Court may admit the memorandum of appeal subject to the production of the copy of the decree or order appealed from within such time as may be fixed by the Court.

(2) *Add the following sentence to sub-rule* (2) *of r.* 1.—

The memorandum shall also contain a statement of the valuation of the appeal for the purposes of the Court Fees Act.

(3) When an appeal is presented after the period of limitation prescribed therefor it shall be accompanied by a petition supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period, and the Court shall not proceed to deal with the appeal in any way (otherwise than by dismissing it either under rule 11 of this Order or on the ground that it is not satisfied as to the sufficiency of the reasons for extending the period of limitation) until notice has been given to the respondent and his objections, if any, to the Court acting under the provisions of section 5 of Act of 1908 have been heard.

9.—*Substitute the following for r.* 9 (2)·—

Registers in accordance with Forms Nos. 22, 23, 24 and 25 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of suits specified therein

[NOTE —*For the new Forms Nos* 22, 23, 24 *and* 25, *see Appendix H below*]

18.—*In Or XLI r* 18, *after the words* " cost of serving the notice" *insert the word* " or if the notice is returned unserved, to deposit within any subsequent period fixed the sum required to defray the cost of any further attempt to serve the notice."

31.—*Substitute the following for r* 31 —

31 The judgment of the Appellate Court shall be in writing and shall state—

(a) the points for determination,

(b) the decision thereon,

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;

and shall bear the date on which it is pronounced and shall be signed by the Judge or the Judges concurring therein; provided that, where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall after such revision as may be deemed necessary, be signed by the Judge

ORDER XLI-A (*new*).

Appeals to the High Court from original decrees of Subordinate Courts.

1. The rules contained in Order XLI shall apply to appeals in the High Court of Judicature at Madras with the modifications contained in this order.

2. (1) The memorandum of appeal shall be accompanied by the prescribed fees for service of notice of appeal and the receipt of the accountant of the Court for the sum prescribed by the rules of Court

(2) Notwithstanding anything contained in rule 22 of order XLI the period prescribed for entry of appearance by the respondent and filing by him of Memorandum of Cross Objections, if any, shall, unless otherwise ordered, be thirty days from the service of notice upon him

3. (1) If the respondent intends to appear and defend the appeal he shall within the period specified in the notice of appeal enter an appearance by filing in Court a memorandum of appearance.

(2) If a respondent fails to enter an appearance within the time and in the manner provided by the sub-rule above, he shall not be allowed to translate or print any part of the record.

Provided that a respondent may apply by petition for further time, and the Court may thereupon make such order as it thinks fit. The application shall be supported by evidence to be given on affidavit as to the reason for the applicant's default, and notice thereof shall be given to the appellant and all parties who have entered an appearance. Unless otherwise ordered the applicant shall pay the costs of all parties appearing upon the application.

4. (1) The memorandum of appeal and the memorandum of appearance shall state an address for service within the City of Madras at which service of any notice, order or process may be made on the party filing such memorandum

(2) If a party appears in person, the address for service may be within the local limits of the jurisdiction of the Court from whose decree the appeal is preferred

Provided that if such party subsequently appears by a pleader he shall state in the vakalat an address for service within the City of Madras, and shall give notice thereof to each party who has appeared

(3) If a party appears by a pleader, his address for service shall be that of his pleader, and all notices to the party shall be served on his pleader at that address.

5. The Court may direct that service of a notice of appeal or other notice or process shall be made by sending the same in a registered cover prepaid for acknowledgment and addressed to the address for service of the party to be served which has been filed by him in the lower Court Provided that, after a party has given notice of an address for service in accordance with Rule 4, service of any notice or process shall be made at such address

6. All notices and process, other than a notice of appeal, shall be sufficiently served if left by a party or his pleader, or by a person employed by the pleader, or by an officer of the Court, between the hours of 11 a m and 5 p m at the address for service of the party to be served.

7. Notices which may be served by a party or his pleader under Rule 6, or which are sent from the office of the Registrar may, unless the Court otherwise directs, be sent by registered post; and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof and the posting thereof shall be a sufficient service.

8. If there are several respondents, and all do not appear by the same pleader, they shall give notice of appearance to such of the other respondents as appear separately.

9. A list of all cases in which notice is to be issued to the respondent shall be affixed to the Court notice board after the case has been registered.

10. (1) If upon a case being called on for hearing by the Court, it appears that the record has not been translated and printed in accordance with the rules of Court, the Court may hear the appeal or dismiss it, or may adjourn the hearing and direct the party in default to pay cos or may make such order as it thinks fit.

(2) If the Court proceeds to hear the appeal, it may refuse to or refer to any part of the record which is not included in the pri papers.

11. When costs are awarded, unless the Court otherwise orders, costs of a party appearing upon any application before the Registra the Court, shall be Rs. 15, and the costs of appearing when the ap is in the daily cause list for final hearing and is adjourned shall be Rs At the request of any party, the Registrar shall cause the order to drawn up and the said costs to be inserted therein

Memorandum of Objections.

12. (1) If the acknowlegment mentioned in Rule 22 (3) of Or XLI is not filed, the respondent shall together with the memorandum objections file so many copies thereof as there are parties affected therel

(2) The prescribed fees for service shall be presented together w the memorandum to the Registrar.

13. If any party or the pleader of any party to whom a memorandu of objections has been tendered has refused or neglected for three da from the date of tender to give the acknowledgment mentioned in Ru 22 (3) of Order XLI, the respondent may file an affidavit stating the fac and the Registrar may dispense with service of the copies mentioned Rule 12 (1)

14. Rule 31 of Order XLI shall not apply to the High Court judgment is given orally a short-hand note thereof shall be taken by a officer of the Court and a transcript made by him shall be signed or initia led by the Judge or by the Judges concurring therein after making suc corrections as may be considered necessary

ORDER XLI-B (*new*)

1. The rules of Order XLI-A shall apply, so far as may be, to appeal to the High Court of Madras under clause 15 of the Letters Patent o the said Court.

Provided that it shall not be necessary to file copies of the judgment and decree appealed from

2. Notice of the appeal shall be given in manner prescribed by Order XLI-A Rule 6, or if the party to be served has appeared in person, in manner prescribed by Rule 5 of the said order

ORDER XLII (*new*)

Appeals from appellate decrees.

1. The rules of Order XLI and Order XLI-A shall apply, so far as may be, to appeals to the High Court of Judicature at Madras from appellate decrees with the modifications contained in this Order.

2. (1) The memorandum of appeal shall be printed or type-written and shall be accompanied by the following papers:—

A copy thereof; one certified copy and one plain printed or type-written copy of the decrees of Court of first instance and of the Appellate Court; and four printed copies of each of the judgments of the said Courts, one copy of each judgment being a certified copy.

(2) If any ground of appeal is based upon the construction of a document, a printed or type-written copy of such document shall be presented with the memorandum of appeal.

Provided that if such document is not in the English language and the appellant appears by a pleader, an English translation of the document certified by the pleader, to be a correct translation shall be presented.

(3) If the appellant fails to comply with this rule, the appeal may be dismissed.

ORDER XLIII

2.—*Substitute the following for r 2.—*

2 The rules of Order XLI and of Order XLI-A shall apply, so far as may be, to appeals from the orders specified in Rule 1 and other orders of any Civil Court from which an appeal to the High Court is allowed under any provision of law.

Provided that in the case of appeals against interlocutory orders made prior to decree, the Court which passed the order appealed from shall not send the records of the case unless an order has been made for stay of further proceedings in that Court

3.—*Add the following as r 3 of Or XLIII —*

3. A memorandum of appeal from an appellate order shall be accompanied by a printed or typed copy of the memorandum or application and of any papers filed therewith.

APPENDIX B TO SCHEDULE I

Form No. 1.—*Insert the following note in red ink in Form No. 1, namely:—*

Also take notice that in default of your filing an address for service before the day before mentioned you are liable to have your defence struck out.

Form No. 13-A.—*Insert the following as form No 13-A after form No. 13 in Appendix B of Schedule I:—*

No. 13-A.

Certificate of attendance to an officer of Government summoned as a witness in a suit to which the Government is a party

(ORDER XVI, r 4-A.)

(CAUSE TITLE.)

This is to certify that (name) (designation) being a Government servant was sumoned to give evidence in his official capacity on behalf of the plaintiff/defendant in the above suit/matter and was in attendance in this court from the day of to the day of 19 (inclusive) and that a sum of Rupees has been paid into Court by the plaintiff/defendant towards his travelling and subsistence allowance for days according to article 1133 of the Civil Service Regulations and that the said amount has been/will be remitted to the Government treasury at to be credited to Government under the head "XVI-A—Miscellaneous Fees and Fines"

Dated the day of 19 .

Presiding Judge or Chief Ministerial Officer.

Appendix D to Schedule I.

Form No 10-A.—*Insert in Appendix D the following as Form No. 10-A*:—

FORM No 10-A.

FINAL DECREE FOR SALE [ORDER 34, RULE 5 (2), OR ORDER 34, RULE 8 (4)]

(Title)

Upon reading the preliminary decree passed in the above suit and the application of the plaintiff/defendant dated and upon hearing Mr for plaintiff and Mr. for defendant and it appearing that the payment directed by the said decree has not been made

It is hereby decreed as follows —

(1) that the mortgaged property or a sufficient part thereof be sold and the proceeds of the sale (after defraying thereout the expenses of the sale) be applied in payment of what is declared due to plaintiff/defendant in the aforesaid preliminary decree together with subsequent interest and subsequent costs and that the balance, if any, be paid to the defendant/plaintiff or other person entitled to receive it; (2) that if the net proceeds of the sale is insufficient to pay such amount and such subsequent interest and costs in full the plaintiff/defendant be at liberty to apply for a personal decree for the amount of the balance; and (3) that the defendant/plaintiff do also pay plaintiff/defendant Rs for the costs of this application

(Here enter description of mortgaged property in English or in the language of the Court.)

NOTE.—(1) In the case of a decree under Order 34, rule 5 (2), score out the words plaintiff and defendant below the lines; in the case of a decree under Order 34, rule 8 (4), score out the same words occurring above the lines.

(2) Direction No. (2) should be struck out if the personal liability has not been adjudicated in the suit or has been declared not to exist

Form No 10-B.—*Insert in Appendix D the following as Form No. 10-B*:—

FORM No 10-B

FINAL DECREE FOR REDEMPTION [ORDER 34, RULE 3(1), ORDER 34, RULE 5 (1) AND ORDER 34, RULE 8 (1)]

(Title)

Upon reading the preliminary decree in the above suit on and the application of the $\frac{\text{defendant}}{\text{plaintiff}}$ I A No ,dated and after hearing Mr pleader for the

and Mr pleader for the

and it appearing that the payment directed by the aforesaid decree has been made —

It is hereby decreed as follows —

That the $\frac{\text{plaintiff}}{\text{defendant}}$ do deliver up to the $\frac{\text{defendant}}{\text{plaintiff}}$ or to such person as he appoints all documents in his possession or power relating to the mortgaged property and do also retransfer the property to the $\frac{\text{defendant}}{\text{plaintiff}}$ free from the mortgage and from all incumbrances created by the $\frac{\text{plaintiff}}{\text{defendant}}$ or any person claiming under him (or by those under whom he claims) and do also put the $\frac{\text{defendant}}{\text{plaintiff}}$ in possession of the property

SCHEDULE.

Description of the mortgaged property.

The costs of the $\frac{\text{defendant}}{\text{plaintiff}}$ in this proceeding:—

Particulars.	Amount

NOTE.—(1) In the case of a decree under Order 34, rule 8 (1), score out the words plaintiff and defendant above the lines; in the case of decree under Order 34, rule 3 (1) and rule 5 (1), score out the words plaintiff and defendant below the lines

(2) The words "or by those under whom he claims" will be inserted only if the mortgagee derives title from an original mortgagee.

Form No. 24.—*Add the following as Form No. 24 in Appendix D.*—

FORM No. 24.

[DECREE SANCTIONING A COMPROMISE OF A SUIT ON BEHALF OF A MINOR OR LUNATIC.]

(*Title.*)

This suit coming on this day for final disposal in the presence of, etc., and C. D. the defendant, a minor by E. F., his guardian *ad litem*, applying that this suit may be compromised in the terms of an agreement in writing, dated the day of and made between A. B., the plaintiff of the one part, and the said C. D. by the said guardian *ad litem* of the other part, (or, on the terms hereafter set forth) and, it appearing to this Court that the said compromise is fit and proper and for the benefit of the said minor, this Court doth sanction the said compromise on behalf of the said minor, and with the consent of all parties hereto: It is ordered as follows.—

(*Set out the terms of the compromise.*)

Appendix E to Schedule I.

Form No. 15.—*For the word* " Dated " *substitute the words* " Given under my hand and the seal of the Court, this day of ".

Form No. 15-A.—*Add the following as Form No. 15-A in Appendix E.*—

FORM No. 15-A

BOND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF PERSON INTERESTED AND SURETIES

(Order XXI, rule 43.)

In the Court of————————at——————

Civil Suit No of

A. B. of——————————

against

C. D. of——————————

Know all men by these presents that we, I. J. of—————— etc., and K. L. of——————etc., and M.N. of——————etc., are jointly and severally bound to the Judge of the Court of—————— in Rupees——————————to be paid to the said Judge, for which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this——————————day of——————————19———

AND WHEREAS the moveable property specified in the schedule hereunto annexed has been attached under a warrant from the said Court, dated the——————day of——————19————, in execution of a decree in favour of——————in suit No—————— of——————19——————on the file of——————and the said property has been left in the charge of the said I.J.

Now the condition of this obligation is that, if the above bounden I.J. shall duly account for and produce when required before the said Court all and every the property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void: otherwise it shall remain in full force

I.J.

K.L.

M.N

Signed and delivered by the above bounden——————in the presence of——————

Form No. 17.—*Add* the following as a 'Note' to Form No. 29—(Proclamation of Sale)—of Appendix E to Schedule I of the Code of Civil Procedure, 1908:—

"*Note.*—The title-deeds relating to the property have not been filed in Court, and the purchaser will take the property subject to the risk of there being mortgages by deposit of title-deeds, or mortgages not disclosed in the encumbrance certificate"

Appendix F to Schedule I.

Form No. 9.—*For Form No 9 of Appendix F, substitute*—

FORM No 9

APPOINTMENT OF A RECEIVER

(Order XL, r 1)

(Title)

WHEREAS it appears to the Court that in the above suit it is just and convenient to appoint a receiver of the properties specified below or whereas the properties specified below have been attached in execution of a decree passed in the above suit on the day of 19 in favour of

It is hereby ordered that AB be appointed (subject to his giving security to the satisfaction of the Court) the receiver of the said property and of the rents, issues and profits thereof under Order XL of the Code of Civil Procedure, 1908, with all powers under the provisions of that order, except that he shall not without leave of the Court (1) grant leases for a term exceeding three years or (2) institute suits in any Court (except suits for rent) or (3) institute appeals in any Court (except from a decree in a rent suit) where the value of the appeal is over Rs. 1,000 or (4) expend on the repairs of any property in any period of two

years more than half of the net annual rental of the property to be repaired, such rental being calculated at the amount at which the property to be repaired would be let when in a fair state of repair, provided that such amount, shall not exceed Rs 1,000.

And it is further ordered that the $\frac{\text{Parties}}{\text{Defendant}}$ to the above suit and all person claiming under them do deliver up quiet possession of the properties, moveable and immoveable, specified below together with all leases, agreements for lease, kabuleats, account books, papers memoranda and writings relating thereto to the said receiver. And it is further ordered that the receiver do take possession of the said property, moveable and immoveable, and collect the rents, issues and profits of the said immoveable property, and that the tenants and occupiers do attorn and pay their rents in arrear and growing rents to the said receiver And it is further ordered that the said receiver shall have power to bring and defend suits in his own name and shall also have power to use the names of the plaintiffs and defendants where necessary. And it is further ordered that the receipt or receipts of the said receiver shall be a sufficient discharge for all such sum or sums of money or property as shall be paid or delivered to him as such receiver.

And it is further ordered that the said receiver do out of the first monies to be received by him pay the debts due from the said and shall be entitled to retain in his hands the sum of Rs. for current expenses, but subject thereto shall pay his net receipts, as soon as the same come to his hands, into Court to the credit of this suit He shall once in every months file his accounts and vouchers in Court, the first account to be filed on the day of and to be passed on the day of . He shall be entitled to commission at the rate of Rs. per cent, on the net amounts collected by him or to the sum of Rs. per month (or as the case may be) as his remuneration (or he shall act without any remuneration)

And it is further ordered (where an additional office establishment is required) that the said receiver shall be allowed to charge to the State in addition to his own office establishment the following further establishment :—

(Here enter specification of property)

Given under my hand and the seal of the Court, this day of 19 .

Appendix G to Sehdule I.

Form No. 6.—*Insert the following note in red ink in Form No. 6, namely* —

" Also take notice that if an address for service is not filed before the aforesaid date, this appeal is liable to be heard and decided as if you had not made an appearance "

Form No. 6-A.—*In Appendix G, insert the following as Form No. 6-A:—*

FORM No. 6-A (Order XLI-A, rule 2).

NOTICE TO RESPONDENT.

(*Cause title.*)

Appeal from the of the Court of date the day of

To

Respondents.

Take notice that an appeal from the above decree(*order*) has been presented by the abovenamed appellants and registered in this Court, and that if you intend to defend the same you must enter an appearance in this Court and give notice thereof to the appellant or his pleader within 30 days after service of this notice on you.

If no appearance is entered on your behalf by yourself, your pleader or some one by law authorized to act for you in this appeal, it will be heard and decided in your absence

The address for service of the appellants is that of his pleader Mr. A. B. of (*insert address*) *Madras*

(*If the appellant appears in person, insert his address for service.*)

Given under my hand and the seal of the Court, this day of 19 .

Registrar.

[Interlocutory application No of 19 has been made by appellant, and execution has been stayed (*or other order made*) by order dated the day of 19]

Form No. 6-B.—*In Appendix G, insert the following as Form No. 6-B:—*

FORM No. 6-B (Order XLI-A, rule 3)

MEMORANDUM OF APPEARANCE

(*Cause title*)

Take notice that the Respondent intends to appear and defend the above appeal, and that his address for service of all notices and process is (*insert address*) .

The said respondent requires a list of the papers which the appellant proposes to translate and print

Dated the day of 19 .

(Signed) C. D.,

Vakil for Respondent

To the Registrar, High Court of Judicature, Madras.

APPENDIX G.

No. 9

Omit from Form 9 in Appendix G to the First Schedule to the Code of Civil Procedure the entire portion beginning with the words "Memorandum of Appeal" and ending with the words "the following reasons namely"

CODE OF CIVIL PROCEDURE, 1908

APPENDIX G

No 12-A.

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL

Order XLV, r 7, C C P.

(In cases where the subject-matter of the appeal is of sufficient value and the findings of the courts are not concurrent.)

Read petition presented under Or XLV, r. 3 of the Code of Civil Procedure, praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the decree/final order of this Court in suit No of 192 .

The petition coming on for hearing upon persuing the petition and the grounds of appeal to His Majesty in Council and the other papers material to the application and upon hearing the arguments of for the petitioner and of for the respondent (if he appears) this court doth certify that the amount/value of the subject-matter of the suit in the court of first instance is Rs 10,000/upwards of Rs. 10,000 and the amount/value of the subject-matter in dispute on appeal to His Majesty in Council is also of the value of Rs. 10,000/upwards of Rs 10,000 or that the decree/final order appealed from involves directly/indirectly some claim or question to/respecting property of the value of Rs 10,000/upwards of Rs 10,000 and that the decree/final order appealed from does not affirm the decision of the lower court.

APPENDIX G

No. 12-B.

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL.

Order. XLV, r 7, C. C. P.

(In cases where the subject-matter is of sufficient value and the findings of the courts are concurrent)

Read petition presented under Or. XLV, r. 3 of the Code of Civil Procedure, praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the decree/final order of this court in suit No of 192 .

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of   for the petitioner and of   for the respondent (if he appears) this court doth certify that the $\frac{\text{amount}}{\text{value}}$ of the subject-matter of the suit in the court of first instance is $\frac{\text{Rs. 10,000}}{\text{upwards of Rs. 10,000}}$ and the $\frac{\text{amount}}{\text{value}}$ of the subject-matter in dispute on appeal to His Majesty in Council is also of the value of $\frac{\text{Rs 10,000}}{\text{upwards of Rs 10,000}}$ or that the $\frac{\text{decree}}{\text{final order}}$ appealed against involves $\frac{\text{directly}}{\text{indirectly}}$ some claim or question $\frac{\text{to}}{\text{respecting}}$ property of the value of $\frac{\text{Rs. 10,000}}{\text{upwards of Rs 10,000}}$ and that the affirming $\frac{\text{decree}}{\text{final order}}$ appealed from involves the following substantial question (s) of law, *viz* —

(1)

(2)

No. 12-C.

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL

Order XLV, r 7, C C P.

(In cases where the subject-matter in dispute is either not of sufficient value *or is* incapable of money valuation.)

Read petition presented under Or XLV, r 3 of the Code of Civil Procedure, praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the $\frac{\text{decree}}{\text{final order}}$ of this court in suit No   of 192

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of   for the petitioner and of   for the respondent (if he appears) this court doth certify that the $\frac{\text{amount}}{\text{value}}$ of the subject-matter of the suit both in the court of first instance and in this court is $\frac{\text{below Rs 10,000 in value}}{\text{incapable of money valuation}}$ this court in the exercise of the discretion vested in it is satisfied that the case is a fit one for appeal to His Majesty in Council for the reasons set forth below, *viz* —

(1)

(2)

Appendix H to Schedule I.

Form No. 11.—*Substitute the following for Form No 11 of Appendix H:*—

FORM No. 11.

NOTICE TO GUARDIAN APPOINTED OR DECLARED, OR TO FATHER OR OTHER

NATURAL GUARDIAN, OR TO THE PERSON IN CHARGE OF THE MINOR

[Order XXXII, rule 3 (5).]

(Title)

To

Guardian appointed or declared, or father or other natural guardian, or person in charge of the minor

Whereas an application has been presented on the part of the in the above suit for the appointment of a guardian for the suit for the said minor you are hereby required to take notice, that, unless within days from the service upon you of this notice an application is made to this Court for the appointment of you or of some friend of the said minor to act as $\frac{\text{his}}{\text{her}}$ guardian for the purposes of the said suit, the Court will proceed to appoint some other person to act as guardian of the said minor for the purposes of the said

Given under my hand and the seal of the Court this day of 19 .

Form No. 11-A.—*In Appendix H, insert the following Form as Form No 11-A* —

FORM No. 11-A.

NOTICE TO PROPOSED GUARDIAN OF A MINOR $\frac{\text{DEFENDANT}}{\text{RESPONDENT}}$

[Order XXXIII, r. 4 (3)]

To

(Name, description and place of residence of proposed guardian.)

Take notice that *X* $\frac{\text{plaintiff}}{\text{appellant}}$ in has presented a petition to the Court praying that you be appointed guardian *ad litem* to the minor $\frac{\text{defendant (s)}}{\text{respondent (s)}}$ and that the same will be heard on the day of 192

2 The affidavit of *X* has been filed in support of this application

3 If you are willing to act as guardian for the said $\frac{\text{defendant (s)}}{\text{respondent (s)}}$ you are requested to sign (or affix your mark to) the declaration on the back of this notice

4 In the event of your failure to signify your express consent in the manner indicated above, take further notice that the Court may proceed under Order XXXII, r 4, Code of Civil Procedure, to appoint some

ther suitable person or one of its officers as guardian *ad litem* of the minor $\frac{\text{defendant (s)}}{\text{respondent (s)}}$ aforesaid.

Dated the day of 192 .

(Signed)

(*To be printed on the reverse*)

I hereby acknowledge receipt of a duplicate of this notice and consent to act as guardian of the minor $\frac{\text{defendant (s)}}{\text{respondent (s)}}$ therein mentioned

Witnesses (Signed) Y Z

1.

2

Form No. 14.—*For Form No 14 of Appendix H, substitute* —

FORM No. 14.

REGISTER OF ORDINARY SUIT INSTITUTED

Court—

Year—

Instructions

If the suit has been received by transfer, or instituted under Order XXXVII Schedule I, C C P, a note should be made to that effect at the head of the page

2. If a suit is remanded under rule 23, Order XLI, or restored to file under rule 9 or rule 13 Order IX, Schedule I, C C P, note under item 2, the date of restoration to file.

3 Under the head "*Particulars of claim*" enter particulars required by *clauses* (*g*) *and* (*h*) of rule 1, Order VII, Schedule I, C C P, and also the *value* of the suit as required by clause (i) of that Order and with special reference to Judicial Statements Nos VII and VIII and H.C Circulars Nos. 1054 of 1870 and 2253 of 1894 Entries under heads 3, 4 and 5 should be full for embodiment in the decree, as required by rule 6, Order XX, Schedule I, C C P

4. Note carefully the new heads 8 and 10 and fresh additions to heads 9 and 12

5. The certified copies of Judgment and Decree in Second Appeal sent to the lower Appellate Court should be forwarded by it to the Court of First Instance which will return them to the former Court after recording the necessary entries under head 9 of this Register

6 A note should be made of all parties brought on or struck off the record under Order I or XXII, Schedule I, C C P, and also of any withdrawal of the claim or a portion of the claim against any of the defendants.

7 Any amendments or alterations made during the progress of the suit in the value or particulars of the claim or as to the date or place of cause of action should appear under head 5

1 *Ordinary Suit No.* *of* 19 .

2. Date of { Presentation
Filing

3. Plaintiff—Name, description and place of abode

4 Defendant—Name, description and place of abode.

5 Particulars of claim—*Claim* for
Cause of action arose at

6 Date of *Defendant's first appearance*

Valid for { Plaintiff
Defendant

7 Date of Judgment and result.

8 Number of application (for review or re-hearing) with result and date

Fresh Judgment, if any, with date.

9. First Appeal No of 19 Result with date
Second Appeal No of 19 Result with date

10 Note of any orders passed under rule 11, Order XX, rule 2, etc, Order XXI, Schedule I, C.C P

11 *Execution* —

No.	Date of application	Order and date	Against whom.	For what, and amount, if for money	Amount of costs.		
					Rs	a	p

12 *Return of Execution—*

Amount paid into Court.			Persons arrested	Minute of other return than payment or arrest and the date of every return, including entry of order in appeal with date.
Rs	As	Ps		

Form No. 15.—*Add the following as Form No. 15 in App. H:—*

FORM No 15

REGISTER OF SMALL CAUSE SUITS INSTITUTED

ourt—

ear—

Instructions

If the suit has been received by transfer or remanded or restored to e, a note should be made to that effect at the head of the page

2 Under the head "5 *Particulars of claim,*" enter particulars reired by *clause* (*g*) and (*h*) of Rule 1, Order VIII, Schedule 1, C C.P., d also the *value* of the suit as required by clause (1) of that order. tries under heads 3, 4 and 5 should be full, for embodiment in decrees, required by Rule 6, Order XX, Schedule I, C.C P

3. A note should be made of all parties brought on or struck off the cord under Order I or XXII, Schedule I,C.C P

4. Any amendments or alterations made during the progress of the it in the value or particulars of the claim or as to the date or place of use of action should appear under head 5

1. *Small Cause Suit No* *of* 19

2 Date of { Presentation / Filing.

3 PLAINTIFF—Name, description and place of abode.

4 DEFENDANT—Name, description and place of abode

5 PARTICULARS OF CLAIM—*Claim for*

Cause of action arose at on

6 *Date for Defendant's first appearance.*

Vakil for { Plaintiff. / Defendant

7 JUDGMENT, date and result

8 Number of application for review (or re-hearing) with result and date

Fresh Judgment, if any, with date

9 Revision Case No of 19 with result and date

10 Note proceedings, if any, taken under Rule 11, Order XX, Rule 2, etc., Order XXI, Schedule I, C P

11 *Execution —*

No	Date of application	Order and date	Against whom	For what, and amount, if for money.	Amount of costs		
					Rs	A	P

12. *Return of Execution—*

Amount paid into Court			Person arrested.	Minute of other return than payment or arrest, and date of every return.
R.	A	P.		

Form No. 16.—*Add the following as Form No. 16 in App. H*—

Court—
Year—

FORM No. 16.

Register of Suits Disposed of

Instructions.

1. Separate register must be kept for ordinary and small cause suits

2. If the presiding officer of the Court is invested with extended small cause powers, the remarks column should show whether the value of the suit is between Rs 50 and Rs. 100 or between Rs 100 and Rs. 200.

3 The date to be entered in column 3 will always be the latest date. In the case of suits restored to file, the date of original institution should be entered

4 When a suit is, after contest, compromised or withdrawn a note of the fact should be made in the column of remarks It should also be stated whether the decree is appealable, and if so, to what Court.

Serial number	Number of the suit disposed of	Date of institution or of receipt of order of transfer	Date of disposal	Transferred to another Court	Disposed of — Without contest — Without trial	Disposed of — Without contest — Compromised	Disposed of — Without contest — Decreed on cofession	Disposed of — Without contest — Ex parte — Decreed	Disposed of — Without contest — Ex parte — Dismissed	Disposed of — With contest — Decreed on reference to arbitration — In whole or part for plaintiff.	Disposed of — With contest — Decreed on reference to arbitration — For defendant	Disposed of — With contest — Decreed on oath — For plaintiff	Disposed of — With contest — Decreed on oath — For defendant	Disposed of — With contest — Decreed after trial — In whole or part for plaintiff	Disposed of — With contest — Decreed after trial — For defendant	Actual number of days intervening between institution and disposal — Uncontested (columns 7 to 10).	Actual number of days intervening between institution and disposal — Contested (columns 11 to 16)	Amount decreed	Remarks
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	
				7	9	10	11	12	13	14	15	16	17	18	19	23	25	30	Corresponding columns of Statement No IX, Part I (a)

Form No. 17.—*Add the following as Form No. 17 in App. H:—*

FORM No. 17.

REGISTER OF CIVIL MISCELLANEOUS CASES RECEIVED

(ON THE SIDE)

Court—

Year—

Instructions

1 In this register must be entered all cases ordered by H. C Circular No. 557 of 1888 to be shown as miscellaneous applications for purposes of Judicial Statement No IX, Part 2, as well as cases of contempt of Court (*vide* H C Circular No. 2928 of 1892)

2 In the matter of references under the Land Acquisition Act, enter in column 3 the number and date of letter of reference, in column 4 the designation of the officer making the reference, in column 5 the name of the claimant, and in column 6 whether the reference is under section 18, 29 or 30 of the Act.

3 In the matter of references under section 16 of Madras Regulation III of 1802, enter in column 3 the number and date of letter of reference, in column 4 the designation of the officer making the reference and the name of the deceased, in column 5 the name of the claimant, if any, in column 6 the words "Section 16, Madras Regulation III of 1802," and in the last column the numer and date of reference, if any, made to Government and its result.

Number of miscellaneous cases.	Date of presentation	Number of connected case, if any	Name of petitioner, if any, and of his vakil	Name of defendant and of his vakil	Purport of case and section of law.	Final order with date	Number of appeal with result and date
1	2	3	4	5	6	7	8

Form No. 18.—*Add the following as Form No. 18 in App. H*:—

FORM No. 18

REGISTER OF MISCELLANEOUS CASES DISPOSED OF.

Court—

Year—

Instructions.

1. This register will show all miscellaneous cases of every kind, whether instituted on the application of parties or of the Court's own motion, including cases of contempt of Court (H. C. Circulars Nos. 557 of 1888 and 2928 of 1892).

2. The date to be entered in column 3 will always be the latest date In the case of petitions restored to file, the date of original institutions should be entered, and the date of restoration noted in the column of remarks.

Serial No.	Number of miscellaneous case disposed of.	Date of institution, or of receipt of the order of transfer.	Date of disposal.	Transferred or registered as suit	Disposed of												Actual number of days intervening between institution and disposal		Remarks
					Without contest.					With contest									
								Ex parte		Order on reference to arbitration		On oath		After trial.					
					Without trial.	Compromised.	Ordered on confession.	Ordered	Dismissed	In whole or in part for petitioner	For respondent	In whole or in part for petitioner.	For respondent	In whole or in part for petitioner	For respondent	Party committed for contempt of Court	Uncontested (columns 7 to 10).	Contested (columns 11 to 16)	
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	
				7	9	10	11	12	13	14	15	16	17	18	19	Remarks.	23	25	Corresponding columns to Statement No IX, Part II (a).

Form No. 19.—*Add the following as Form No 19 in App H:—*

FORM No 19

REGISTER OF EXECUTION PETITIONS RECEIVED (ON THE SIDE).

Court—
Year—

Instructions

Applications for transmission of decree for execution beyond the jurisdiction of the Courts passing them should not be entered in this Register, but must be entered in the Register of Miscellaneous Cases Received (Form No 17)

Number of Execution Petition	Date of presentation	Number of connected suit and of each previous application	Name of decree holder and of his pleader	Name of judgment debtor and of his pleader	Items of decree or order to be executed with date of any proceedings from which time runs for this application	Mode of assistance, and section of Code, or law prescribing it	Order, with reasons, for closing of proceedings under this application and date.	Number of appeal with result and date
1	2	3	4	5	6	7	8	9

Form No. 20.—*Add the following as Form No. 20 in App H.—*

FORM No 20

REGISTER OF DECREES OF OTHER COURTS RECEIVED FOR EXECUTION UNDER SECTIONS 38 AND 39, C. C P.

Court—
Year—

Date of receipt	Serial number	Name of the decreeing Court	Number of suit on the file of that Court	Number of connected execution or miscellaneous, applications, if any, presented in this Court.	Lower Court to which sent for execution	Nature and date of communication to the decreeing Court (vide Section 41, C. C P).	Amount of postage, if any, received.			REMARKS
1	2	3	4	5	6	7	8			9
							Rs.	a.	p.	

Form No. 21.—*Add the following as Form No. 21 in App H.—*

FORM No. 21

REGISTER OF EXECUTION PETITIONS DISPOSED OF.

Court—
Year—

Instructions

1. The date to be entered in column 4 will always be the latest date ie case of petitions restored to file, the date of original institution should be entered, and the date of restoration noted in the column of remarks.

2. Note in the remarks column the number of judgment-debtors imprisoned in each case, the value of decree under which judgment-debtor was imprisoned and date when sent to jail and date of release, for the purposes of columns 34 to 37 of Statement No XI

							Application on which proceedings were finally closed.			Amount		How the	
							Satisfaction obtained					Judgment debtor	
Serial Number	Number of the execution petition disposed of	Number of connected case	Date of institution or of receipt of the order of transfer.	Date when proceedings were finally closed.	Withdrawn, rejected or not prosecuted	Transferred	In full	In part	Execution wholly infructuous.	Involved in execution applications disposed of.	Realized.	Imprisoned	Arrested but released
1	2	3	4	5	6	7	8	9	10	11	12	13	14
					6	7	8	9	10	15	16	17	18
										Rs	Rs.		

decree was executed											
Moveable property		Immoveable property			Possession given of						Remarks
Sold.	Attached but released (Rule 55 or 60, Order XXI).	Sold	Attached but released (Rule 55 or 60, Order XXI)	Otherwise dealt with section 72, or Rule 83, Order XXI, Schedule I or Schedule III	Moveables (Rule 31, Order XXI)	Immovables (Rules 35 and 36, Order XXI)	Specific performance enforced	Partition effected (Section 54, C.C.P.)	Execution otherwise effected	Actual number of days intervening between institution and disposal	(If the petition is only for part satisfaction of the decree, note the fact)
15	16	17	18	19	20	21	22	23	24	25	
19	20	21	22	23	24	25	26	27	28	13	Corresponding columns to Statement No XI, Part I

Form No. 22.—*Add the following as Form No 22 in App H* :—

FORM No 22

REGISTER OF APPEALS RECEIVED

Court—

Year—

Instructions.

Appeals from orders which have the force of decrees should be shown in this register and not in the Register of Miscellaneous Appeals Received (Form No. 24) in which appeals from other orders should be entered—*vide* H C Circular No 3100 dated 22nd December 1893, and section 2 (2) and Rule 5, Order XXXVI, Schedule I, C.C.P

2 Under item "5 Particulars of suit and decree appealed from" enter also nature and value of appeal, with special reference to the information required by annual statement No X, Parts 3 and 4 and H C Circulars Nos 1054 of 1870 and 2253 of 1894. In cases of appeals against orders having the force of decrees substitute the word "*Order*" for "*Decree*" and add after date the words "*passed under* C.C.P. *on M P. No of* 19 "

3 If the appeal has been received by transfer, a note should be made to that effect at the head of the page

4 If an appeal is remanded under Rule 23, Order XLI, Schedule I, C C P, note under head 2 the date of restoration to file

5 A note should be made of all parties brought on or struck off the record under Order I or XXII, Schedule I, C C.P

1 *Appeal No* *of* 19

2 Date of { Presentation / Filing

3 Appellant—Name, description and place of abode

4 Respondent—Name, description and place of abode.

5 Particulars of suit and decree appealed against. *Decree of the Court of* dated 19 *in Original Suit No* *of* 19

Value of relief

Particulars of relief	*Claimed.*	*Decreed.*	*Appealed against.*
	RS A P	RS A P	RS. A P

6 Hearing, if any, under Rule 11, Order XLI, Schedule I, C C P., and result with date

7 *Date for respondent's first appearance.*

Vakil for { Appellant / Respondent

8 Judgment, result and date.

9. Objections, under Rule 22, Order XLI, Schedule I, C C P., if any, filed by whom and value

10 Number of Application for review (re-hearing) with result and date.

11 Second Appeal No. of 19 . Result with date.

Form No. 23.—*Add the following as Form No. 23 in App. H:—*

FORM No. 23.

REGISTER OF APPEALS DISPOSED OF.

Court— *Year*—

Instructions

1. There must be three separate registers of appeals disposed of, *viz.*, (1) for money or moveables (2) under the Madras Estates Land Act, 1908, and (3) for title and other appeals.

2. The date to be entered in column 2 will always be the latest date. In the case of appeals restored to file, the date of original institutions should be entered.

						Disposed of.													
							Without contest				With contest					Actual number of days intervening between institution and decree			
												After trial.							
Serial number.	Number of the appeal disposed of	Date of institution or of the receipt of the order of transfer.	Date of disposal	Transferred to another Court.	Dismissed under Rule 11, Order XLI	Dismissed for default or otherwise not prosecuted	Decree confirmed	Decree modified	Decree reversed	Remanded	On oath, or by arbitration or compromise	Decree confirmed	Decree modified	Decree reversed	Remanded	Uncontested (columns 8 to 11)	Contested (columns 12 to 16).	Objection under rule 22, Order XLI	REMARKS (If appeals are decided on oath or by arbitration or compromise, note whether the decree confirmed, modified or appealed against was reversed.)
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	
				8	10	11	12	13	14	15	16	17	18	19	20	24	26	31	Corresponding columns of Statement No. X, Part I (a).

Form No. 24.—*Add the following as Form No 21 in App H* —

FORM No 21.

REGISTER OF MISCELLANEOUS APPEALS RECEIVED

Court—

Year—

Instructions.

Appeals from orders which have the force of decrees should not be shown in this register Appeals from other appealable orders only should find place in this register

2 If necessary, give value of appeal under head

3 A note should be made of all parties brought on or struck off the record under Order for XXII, Schedule I, C.C.P.

1 *Miscellaneous Appeal No*

2 Date of { of 19

3 APPELLANT—Name, description and place of abode

4 RESPONDENT—Name, description and place of abode

5 PARTICULARS OF ORDER APPEALED AGAINST—*Order of the Court of* *dated* 19 passed on *M P. No.* *of* 19 , *in Original Suit No.* of 19 .

Appeal under of

6 Hearing, if any, under Rule 11, Order XLI, Schedule I, C.C.P, and result with date

7 *Date for Respondent's first appearance.*

Vakil for {Appellant
Respondent

8 JUDGMENT—Result and date.

9. Objections under Rule 22, Order XLI, Schedule I, C C P, if any, filed by whom

10. Number of applications for review (or re-hearing) with result and date.

Fresh Judgment, if any, with date.

Form No. 25.—*Add the following as Form No. 25 in App. H*:—

FORM No. 25.

REGISTER OF MISCELLANEOUS APPEALS DISPOSED OF.

Court— *Year*—

Instructions

The date to be entered in column 2 will always be the latest date. In the case of appeals restored to file, the date of original institution should be entered

Serial number	Number of the miscellaneous appeal disposed of	Date of institution or of the receipt of the order of transfer.	Date of disposal	Transferred to another Court.	Disposed of: Dismissed under Rule 11, Order XLI	Disposed of: Dismissed for default or otherwise not prosecuted	Disposed of: Without contest: Order confirmed	Disposed of: Without contest: Order modified.	Disposed of: Without contest: Order reversed	Disposed of: Without contest: Remanded.	Disposed of: With contest: On oath, by arbitration or compromise	Disposed of: With contest: After trial: Order confirmed	Disposed of: With contest: After trial: Order modified	Disposed of: With contest: After trial: Order reversed.	Disposed of: With contest: After trial: Remanded.	Actual number of days intervening between institution and disposal: Uncontested (Columns 8 to 11)	Actual number of days intervening between institution and disposal: Contested (columns 12 to 16)	Objections under Rule 22, Order XLI.	Remarks
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	
				7	9	10	11	12	13	14	15	16	17	18	19	23	25	20	Corresponding columns to Statement No X, Part II (a).

APPENDIX VII

Rules made by the Chief Court of the Punjab and the High Court if Lahore under s. 123.

ORDER II.

8.—*After rule 7 of Order II, insert* —

8 (1) Where an objection, duly taken, has been allowed by the Court, the plaintiff shall be permitted to select the cause of action with which he will proceed and shall within a time to be fixed by the Court, amend the plaint by striking out the remaining causes of action.

(2) When the plaintiff has selected the cause of action with which he will proceed, the Court shall pass an order giving him time within which to submit amended plaints for the remaining causes of action and for making up the Court-fees that may be necessary. Should the plaintiff not comply with the Court's order, the Court shall proceed as provided in rule 18 of Order VI and as required by the provisions of the Court Fees Act

ORDER V.

10.—*To rule 10, Order V, the following proviso shall be added.*—

Provided that in any case if the plaintiff so wishes, the Court may attempt to serve the summons in the first instance by registered post instead of in the mode of service laid down in this rule: and provided always that should the defendant not appear in answer to the summons so issued, the Court shall have service effected in accordance with the provisions of this Order

ORDER VII.

2.—In the second paragraph of rule 2 of Order VII after the words " and the defendant " *insert* " or for moveables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate " after the words " the amount " *insert* " or value "

ORDER IX.

9 (1)—*To rule 9 (1) the following proviso shall be added*:—

Provided that the plaintiff shall not be precluded from bringing another suit for redemption of a mortgage, although a former suit may have been dismissed for default

ORDER XVI.

2.—*Add the following as an Exception to rule 2 (1)* —

Exception—When applying for a summons for any of its own Officers, Government will be exempt from the operation of clause (1)

3. *For Rule 3, substitute:—*

3. (1) The sum so paid into Court shall, except in the case of a Government servant, be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

(2) When the person summoned is a Government servant, the sum so paid into Court shall be credited to Government

Exception (1).—In cases in which Government servants have to give evidence at a Court situate not more than five miles from their head-quarters, actual travelling expenses incurred by them may, when the Court considers it necessary, be paid to them.

Exception (2) —A Government servant, whose salary does not exceed Rs. 10 per mensem, may receive his expenses from the Court

4 After the word "summoned," where it occurs in rule 4 (1), insert:—

or, when such person is a Government servant, to be paid into Court.

ORDER XVII.

1(3).—*To rule 1 add the following as sub-rule (3) —*

(3) Where sufficient cause is not shown for the grant of an adjournment under sub-rule (1) the Court shall proceed with the suit forthwith.

ORDER XXI

29-A.—*After rule 29 of Order XXI, the following rule shall be* inserted:—

29-A When a suit under rule 63 of this Order is pending the Court in which such suit is filed may, if it considers that execution of the former decree should be stayed, intimate the fact to the executing Court, which shall thereupon stay execution until the suit is decided

75.—In r 75 after the word "stored" shall be added the words "or can be sold to greater advantage in an unripe state, such as green wheat or gram."

ORDER XXX.

1.—*To rule 1 of Order XXX the following explanation shall be added:—*

Explanation.—"This rule applies to a joint Hindu family trading partnership."

ORDER XXXII.

1.—*To rule 1 the following paragraph shall be added —*

Such person may be ordered to pay any costs in the suit as if he were the plaintiff.

3.—*Omit* the words "to the minor and" in the last paragraph of Rule 3 and *add* the following as a *proviso:*

Provided that the Court may, if it sees fit, issue notice to the minor also.

ORDER XLI.

35.—*Add the following as a proviso to rule* 35 (4):—

Provided also in the case of the High Court, that in the absence of a Judge who passed a decree, or one or more of the Judges who passed a decree, either the Registrar or the Deputy Registrar of the Court shall sign the decree on behalf of such absent Judge or Judges, but that neither the Registrar nor the Deputy Registrar shall sign such decree on behalf of a Judge who dissented from the judgment of the Court.

ORDER XLII.

2.—*Add the following as rule* 2 —

2 In addition to the copies specified in Order XLI, rule 1, the Memorandum of appeal shall be accompanied by a copy of the judgment of the Court of first instance

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APPENDIX B.

FORM No 11

Order V, rule 18, Schedule 1, App. B, Form No. 11.—For the 3rd and 4th parts of (3) in the form read —

(3) The said——————————and his house in which he ordinarily resides being $\frac{\text{personally known to me}}{\text{pointed out to me by}}$.

I went to said house in——————————and there on the day of——————19 , at——————————o'clock in the $\frac{\text{fore}}{\text{after}}$ noon. I did not find the said——————.

I enquired from $\begin{Bmatrix} (a) \text{———————} \\ (b) \text{———————} \end{Bmatrix}$ neighbours.

I was told that——————————————had gone to ——————and would not be back till——————

Signature of Process Server.

APPENDIX VIII

Rules made by the High Court of Patna under s. 122.

ORDER III.

1. Notwithstanding anything contained in Order III, rule 4 (3) of e first Schedule of the Code of Civil Procedure, 1908, no advocate all be entitled to make or do any appearance, application or act for y person unless he presents an appointment in writing, duly signed by ch person or his recognised agent or by some other agent duly authorised power of attorney to act in this behalf; or unless he is instructed by attorney or pleader duly authorised to act on behalf of such person.

ORDER XII.

Substitute the following for rule 6 in Order XII—

6. Where admissions of fact have been made, either on the pleadings or otherwise, the Court may, at any stage of a suit, on the application of any party, or, of its own motion, without waiting for the determination of any other question between the parties, make such order or give such judgment, as it may think just

ORDER XIII.

Add the following as sub-rule (A) in rule 9, Order XIII—

9 (1-A). Where a document is produced by a person who is not a party in the proceeding, the Court may require the party on whose behalf the document is produced, to substitute a certified copy for the original as hereinbefore provided

ORDER XVI.

2. (1)—*Add the following proviso to Or XVI, r 2 (1)—*

Provided that the Secretary of State shall not be required to pay any expenses into Court under this rule when he is the party applying for the summons, and the person to be summoned is an officer serving under Government, who is summoned to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal in his public capacity

(3).—*Add the following proviso to rule 3 —*

Provided that when the person summoned is an officer of Government who has been summoned to give evidence in a case to which Govern-

ment is a party, of fact, which have come to his knowledge, or of matters with which he has had to deal, in his public capacity, then

(i) if the officer's salary does not exceed Rs. 10 a month, the Court shall at the time of the service of the summons make payment to him of his expenses as determined by rule 2 and recover the amount from the Treasury

(ii) if the officer's salary exceed Rs. 10 a month and the Court is situated not more than 5 miles from his headquarters, the Court may, at its discretion, on his appearance, pay him the actual travelling expenses incurred·

(iii) if the officer's salary exceeds Rs. 10 a month and the Court is situated more than 5 miles from his headquarters no payment shall be made to him by the Court. In such cases any expenses paid into Court under Rule 2 shall be credited to Government.

ORDER XLI.

Add the following as rule 14-A in Order XLI—

14 (A). The appellate Court may, in its discretion, dispense with the service of notice hereinbefore required on a respondent, or on the legal representative of a deceased respondent, in a case where such respondent did not appear, either at any stage of the proceedings in the Court whose decree is appealed from or in any proceedings subsequent to the decree of that Court and no relief is claimed against such opposite party or respondent or his legal representative either in the original case or appeal.

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